

***Final Results of Redetermination Pursuant to Court Remand
Magnesia Carbon Bricks from the People's Republic of China and Mexico
Fedmet Resources Corporation v. United States
Court No. 12-00215 (February 23, 2015)***

I. Summary

The U.S. Department of Commerce (“the Department” or “Commerce”) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or “Court”) in *Fedmet Resources Corporation v. United States*, Court No. 12-00215 (February 23, 2015) (“Remand Order”). That order directed the Department to take action in accordance with the decision of the United States Court of Appeals for the Federal Circuit (“CAFC”) in *Fedmet Resources v. United States*, 755 F.3d 912 (CAFC 2014) (“*Fedmet*”).

On March 6, 2015, the Department released its draft results of redetermination pursuant to court remand (Draft Remand Results) to interested parties, in which the Department determined that Fedmet Resources Corporation’s (Fedmet) Bastion® magnesia alumina carbon bricks (“MACBs”) are outside the scope of the *Orders* on certain magnesia carbon bricks (“MCBs”).¹ Resco Products, Inc. (the petitioner), Magnesita Refractories Company, and Harbison Walker International, Inc. (formerly ANH Refractories Company) (collectively, Domestic Producers), as well as Fedmet filed comments on March 6, 2015.² No other interested party filed comments.

¹ See *Certain Magnesia Carbon Bricks from the People's Republic of China: Countervailing Duty Order*, 75 FR 57442 (September 21, 2010); *Certain Magnesia Carbon Bricks from Mexico and the People's Republic of China: Antidumping Duty Orders*, 75 FR 57257 (September 20, 2010) (“*Orders*”).

² See generally Domestic Producers’ Comments, dated March 6, 2015; Fedmet’s Comments, dated March 6, 2015.

As set forth below, in accordance with the CAFC's decision in *Fedmet* and the CIT's Remand Order, the Department determines that Fedmet's Bastion® MACBs³ are not subject to the *Orders* on MCBs from Mexico and the People's Republic of China ("PRC"). The CAFC's decision in *Fedmet* stated that Commerce's determination that the scope of the *Orders* extended to Fedmet's Bastion® MACBs is unsupported by substantial evidence, and held that "Fedmet's Bastion® MAC bricks are outside the scope of the countervailing and antidumping orders at issue in this case."⁴ As such, pursuant to the CAFC's decision in *Fedmet* and the CIT's Remand Order, the Department has made no changes to the Draft Remand Results and continues to determine that it may not impose antidumping and countervailing duties on Fedmet's Bastion® MACBs for these Final Remand Results.⁵

II. Background

In May 2011, Fedmet filed its Scope Request for its Bastion® MACBs, which contain "approximately 8 to 15 percent aluminum oxide (chemical formula Al_2O_3), more commonly known as alumina, 3 to 15 percent carbon, 75 to 90 percent magnesia, as well as smaller amounts of silicon dioxide, calcium oxide, iron oxide, {and} titanium dioxide."⁶ On July 2, 2012, the Department issued its final scope ruling on Fedmet's Bastion® MACBs.⁷ Because the Department found the scope language ambiguous as to whether MCBs could contain added

³ Fedmet's Bastion® MACBs "contain approximately 75 to 90 percent magnesia, 8 to 15 percent alumina (*i.e.*, aluminum oxide), 3 to 15 percent carbon, and smaller amounts of silicon dioxide, calcium oxide, iron oxide and titanium dioxide." See Letter from Fedmet Resource Corporation, to Secretary of Commerce, regarding Antidumping and Countervailing Duty Orders on Certain Magnesia Carbon Bricks from the People's Republic of China; Request for Scope Ruling (May 3, 2011) at 2; see also Letter from Fedmet Resource Corporation, to Secretary of Commerce, regarding Antidumping Duty Order on Certain Magnesia Carbon Bricks; Request for Scope Ruling (May 20, 2011), at 1 and Attachment including the original PRC scope request (collectively, "Scope Request").

⁴ See *Fedmet*, 755 F.3d at 922.

⁵ See *Wheatland Tube Co. v. United States*, 161 F. 3d 1365, 1371 (CAFC 1998).

⁶ See Scope Request at 2.

⁷ See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Barbara E. Tillman, Director, AD/CVD Operations, Office 6, regarding "Certain Magnesia Carbon Bricks From the People's Republic of China and Mexico: Final Scope Ruling - Fedmet Resources Corporation ("Final Scope Ruling").

alumina, it reviewed the descriptions of MCBs and MACBs in the (k)(1) sources, determining that they were not dispositive.⁸ In particular, although the petition, petitioner’s questionnaire responses, and the International Trade Commission’s (“ITC”) final injury report identified “MACBs” as a type of brick distinct from the domestic like product, none provided the chemical composition and technical specifications of any product labeled as “MACB.”⁹ In addition, no evidence suggested that a brick with a chemical composition similar to Fedmet’s, which contains in-scope levels of magnesia and carbon, would fall outside the scope of the *Orders*.¹⁰ During the Department’s inquiry, all parties agreed that the industry lacks an accepted standard for the label “MACB,” casting further doubt upon the probative value of the label.¹¹ The record also revealed that the ITC included MCBs with added alumina in its pricing analysis, demonstrating that the ITC considered merchandise similar to Fedmet’s MACBs in its injury determination.¹² After considering the (k)(2) criteria, the Department found that Fedmet’s MACBs fell within the scope of the *Orders*.¹³

Fedmet challenged the Department’s Final Scope Ruling before the CIT. On May 30, 2013, the CIT sustained the Department’s analysis of the descriptions in the (k)(1) sources and of the (k)(2) criteria.¹⁴ Fedmet appealed the CIT’s judgment to the CAFC. On June 20, 2014, in a divided decision, the CAFC reversed the CIT.¹⁵ The CAFC held that the references to “MACBs” in the (k)(1) sources resolved the inquiry, finding that these sources (1) contained multiple representations by petitioner “disclaiming coverage of all {MACBs} in general,” and (2) confirmed the Department’s and the ITC’s “understanding” that the scope did not extend to

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 11.

¹⁴ See *Fedmet Res. Corp. v. United States*, 911 F. Supp. 2d 1348 (Ct. Int’l Trade 2013).

¹⁵ See *Fedmet*, 755 F.3d at 923.

MACBs.¹⁶ The CAFC also faulted the CIT for using extrinsic sources to define labels, such as “MACB,” in the (k)(1) sources.¹⁷

On October 3, 2014, the Department petitioned the CAFC for a panel rehearing, and Domestic Producers petitioned for rehearing *en banc*. The CAFC denied both petitions on January 28, 2015. On February 23, 2015, the CIT issued an order for the Department to take action on remand in accordance with the CAFC’s decision in *Fedmet*.¹⁸

III. Legal Framework

When a request for a scope ruling is filed, the Department examines the scope language of the order at issue and the description of the product contained in the scope ruling request.¹⁹ Pursuant to the Department’s regulations, the Department may also examine other information, including the description of the merchandise contained in the petition, the records from the Department’s less-than-fair-value investigation, the ITC’s injury investigation, and prior scope determinations made for the same class or kind of merchandise.²⁰ If the Department determines that these sources are sufficient to decide the matter, it will issue a final scope ruling as to whether the merchandise is covered by the scope of an order.

Conversely, where the descriptions of the merchandise are not dispositive, the Department will analyze the factors set forth at 19 CFR 351.225(k)(2). These factors are: (i) the physical characteristics of the merchandise; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed. The determination as to which

¹⁶ *Id.* at 920-921.

¹⁷ *Id.* at 917.

¹⁸ See Remand Order.

¹⁹ See *Walgreen Co. v. United States*, 620 F. 3d 1350, 1357 (CAFC 2010).

²⁰ See 19 CFR 351.225(k)(1).

analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

IV. Scope of the Order

The merchandise covered by the order includes certain chemically-bonded (resin or pitch), magnesia carbon bricks with a magnesia component of at least 70 percent magnesia (“MgO”) by weight, regardless of the source of raw materials for the MgO, with carbon levels ranging from trace amounts to 30 percent by weight, regardless of enhancements (for example, magnesia carbon bricks can be enhanced with coating, grinding, tar impregnation or coking, high temperature heat treatments, anti-slip treatments or metal casing) and regardless of whether or not antioxidants are present (for example, antioxidants can be added to the mix from trace amounts to 15 percent by weight as various metals, metal alloys, and metal carbides). Certain magnesia carbon bricks that are the subject of this order are currently classifiable under subheadings 6810.11.0000, 6810.91.0000, 6810.99.0080, 6902.10.1000, 6902.10.5000, 6815.91.0000, 6815.99.2000 and 6815.99.4000 of the Harmonized Tariff Schedule of the United States (“HTSUS”).²¹

While HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive.

V. Analysis

In *Fedmet*, the CAFC held that, “where a petitioner is requested to clarify with a high degree of specificity the scope of its petition, its response is highly germane to a subsequent

²¹ In the preliminary determination of the underlying investigation, we included HTSUS heading 6815.99 in our description of the scope of the *Orders*. See, *Certain Magnesia Carbon Bricks from Mexico: Notice of Preliminary Determination of Sales at Less Than Fair Value*, 75 FR 11517 (March 11, 2010). We subsequently determined that all of the HTSUS ten-digit subheadings under heading 6815.99 must be used. Accordingly, the appropriate HTSUS ten-digit subheadings of 6815.99 have been listed. The current scope of the *Orders* can be found online at the Department’s website. See <http://web.ita.doc.gov/ia/CaseM.nsf/136bb350f9b3efba852570d9004ce782/22be70da7d007efe85257df90053cad0?OpenDocument>.

scope determination,” and that “a petitioner has an obligation to be explicit and precise in its definition of the scope of the petition both prior and during the investigation.”²² If a petitioner is asked to clarify the scope of the investigation and there also is potential for overlap between subject and non-subject merchandise, the CAFC held that any overlap is “surrendered by {a petitioner’s} failure to provide a technical definition or ‘cut off point’ when asked to be more specific.”²³ Further, when the Department allegedly relied upon labels, the CAFC held that the Department “cannot later depart from its previous understanding based on its own failure to define non-subject merchandise more precisely than ‘by name.’”²⁴

The CAFC stated that the (k)(1) sources do not detract from statements that MACBs were excluded from the scope of the underlying investigations, and held that the (k)(1) sources are dispositive of the question presented by Fedmet’s scope ruling request. The CAFC noted that the Department erred in proceeding to analyze the (k)(2) factors, and declined to review such analysis.²⁵ The CAFC’s ruling specifically held that the Department’s scope determination is not supported by substantial evidence and that Fedmet’s Bastion® MACBs are not subject to the *Orders*.²⁶

VI. Draft Results of Redetermination

Following the express directive of the CIT’s Remand Order, which instructs the Department to act in accordance with the CAFC’s decision in *Fedmet*, the Department determines on remand that the *Orders* do not cover Fedmet’s Bastion® MACBs based upon the reasoning set forth in the CAFC’s *Fedmet* decision. Our decision is consistent with the CAFC’s decision in *Fedmet* that there is insufficient evidence to conclude that Fedmet’s Bastion®

²² See *Fedmet*, 755 F.3d at 920.

²³ *Id.* at 921.

²⁴ *Id.* at 922.

²⁵ See *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1076 (Fed. Cir. 2001).

²⁶ See *Fedmet*, 755 F.3d at 922-23.

MACBs were included in the scope of the *Orders*. Accordingly, the Department finds that Fedmet’s Bastion® MACBs as defined in its Scope Request as containing “approximately 8 to 15 percent aluminum oxide (chemical formula Al_2O_3), more commonly known as alumina, 3 to 15 percent carbon, 75 to 90 percent magnesia, as well as smaller amounts of silicon dioxide, calcium oxide, iron oxide, {and} titanium dioxide,” are not subject to the *Orders*. Further, as the Department stated in Fedmet’s Final Scope Ruling, the “scope ruling is limited to Fedmet Bastion® MAC bricks, and is not intended to address all bricks designated as MAC bricks, in particular because there is no apparent industry standard for defining a MAC brick based upon the record of this case.”²⁷

VI. Summary and Analysis of Litigant’s Comments on Draft Remand Results

As explained above, Domestic Producers and Fedmet commented on the Department’s Draft Remand Results on March 6, 2015. As explained below, we continue to reach the same conclusions that were explained in the Draft Remand Results. We address each of the interested parties’ comments and provide our analysis in turn.

Issue: Implementation of the Scope Ruling Redetermination

Domestic Producers’ Comments

- The CAFC’s decision in *Fedmet* was limited to Fedmet’s Bastion® MACBs.
- The Department should refine the proposed exclusion concerning Fedmet’s Bastion® MACBs by removing the modifier “approximately,” which is too vague and imprecise.
- The exclusion for Fedmet’s Bastion® MACBs should be limited to the chemical composition percentages provided in Exhibit 1 of Fedmet’s Scope Request, which pertains to Fedmet’s particular Bastion® MACB.

²⁷ See Final Scope Ruling at 11.

- The Department should reopen the record to accept additional information so that it may establish the appropriate testing protocols for administering the scope exclusion for Fedmet’s Bastion® MACBs. Record evidence suggests that some of the testing protocols may convert aluminum in MCBs to alumina. By reopening the record, the Department can gather additional information that is needed to identify an appropriate testing methodology that U.S. Customs and Border Protection (CBP) can use to administer the exclusion for Fedmet’s Bastion® MACBs.

Fedmet’s Comments

- The Department’s Draft Remand Results fully and properly implements the holding of *Fedmet*. This should be adopted without revision or amendment in the final remand results.
- Reopening the record at this late stage would be improper.
- The Department is without authority to now revise the definition in the Scope Request which the CAFC adopted in its *Fedmet* decision.

Department’s Position: All parties agree, and we continue to find, that the CAFC’s decision in *Fedmet* is limited to reversing Commerce’s scope determination that Fedmet’s Bastion® MACBs are subject to the *Orders*. However, as explained below, we disagree with Domestic Producers that the CAFC’s ruling - that Fedmet’s Bastion® MACBs are not subject to the scope of the *Orders* - should be changed.

Regarding how the merchandise subject to this scope inquiry should be defined, the Department has consistently used the definition contained in Fedmet’s Scope Request,²⁸ which is the same definition adopted by the CAFC in *Fedmet*.²⁹ Specifically, Fedmet’s Bastion® MACBs contain “approximately 8 to 15 percent aluminum oxide (chemical formula Al₂O₃),

²⁸ See Scope Request at 2.

²⁹ See *Fedmet*, 755 F.3d at 916.

more commonly known as alumina, 3 to 15 percent carbon, 75 to 90 percent magnesia, as well as smaller amounts of silicon dioxide, calcium oxide, iron oxide, {and} titanium dioxide.”³⁰ We disagree with the Domestic Producers that we should now alter this definition by removing the word “approximately,” or that we should limit the proposed exclusion to the chemical specifications contained in Exhibit 1 of Fedmet’s Scope Request. Throughout the scope inquiry and in litigation, all parties had ample opportunity to challenge this definition, and no argument was made on the record or in litigation for the use of an alternative definition which would conflict with Fedmet’s original Scope Request. The CAFC adopted the definition in its holding, including the term “approximately” and the 8 to 15 percent alumina range.³¹ To determine otherwise at this stage would require Commerce to act inconsistent with *Fedmet* and, thus, to violate the CIT’s Remand Order. The Department declines to do so.

With respect to Domestic Producers’ argument that we reopen the record to identify the appropriate testing protocols for administering the scope exclusion for Fedmet’s Bastion® MACBs, we note the following. As an initial matter, the CIT did not order the Department to reopen the record, and we do not find it appropriate to do so under the limited time frame provided in the Remand Order and the CAFC’s explicit holding in *Fedmet*. Moreover, as they acknowledge in their comments,³² Domestic Producers’ evasion concerns rest on speculation. Such speculation is not substantial evidence,³³ and the Department cannot accept unsubstantiated statements as sufficient proof.³⁴ Finally, in any event, the Department’s responsibility is to

³⁰ See Scope Request at 2; see also *Fedmet*, 755 F.3d at 916.

³¹ See *Fedmet*, 755 F.3d at 922-23.

³² Domestic Producers’ Comments at 5 (“The record, however, does not establish that Fedmet’s assertion is correct with respect to all of these testing methods In fact, the record does not contain any information supporting the efficacy of the testing methodologies mentioned by Fedmet.”).

³³ *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009).

³⁴ *Home Meridian Int’l Inc. v. United States*, 772 F.3d 1289, 1295 (Fed. Cir. 2014).

identify and describe the products that are either subject to or excluded from an order.³⁵


Technical expertise in administering a scope of an order rests with CBP, such that it must determine whether particular entries meet the scope as defined by the Department, using whatever testing methodologies they find appropriate. The Department declines to disturb CBP's field of expertise.

VII. Final Results of Redetermination

We have implemented no changes as discussed above. Following the express directive of the CIT's Remand Order, which instructs the Department to act in accordance with the CAFC's decision in *Fedmet*, the Department continues to determine on remand that the *Orders* do not cover Fedmet's Bastion® MACBs based upon the reasoning set forth in the CAFC's *Fedmet* decision. Our decision is consistent with the CAFC's decision in *Fedmet* that there is insufficient evidence to conclude that Fedmet's Bastion® MACBs were included in the scope of the *Orders*. Accordingly, the Department continues to find that Fedmet's Bastion® MACBs as defined in its Scope Request as containing "approximately 8 to 15 percent aluminum oxide (chemical formula Al_2O_3), more commonly known as alumina, 3 to 15 percent carbon, 75 to 90 percent magnesia, as well as smaller amounts of silicon dioxide, calcium oxide, iron oxide, {and} titanium dioxide," are not subject to the *Orders*. Further, the Department continues to find that this "scope ruling is limited to Fedmet Bastion® MAC bricks, and is not intended to address

³⁵ See, e.g., *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (CAFC 2002).

all bricks designated as MAC bricks, in particular because there is no apparent industry standard for defining a MAC brick based upon the record of this case.”³⁶



Paul Piquado
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for Enforcement and Compliance

24 MARCH 2015
Date

³⁶ See Final Scope Ruling at 11.