

July 26, 2010

MEMORANDUM TO: Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

FROM: Edward C. Yang /s/  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in  
the Less-Than-Fair-Value Investigation of Certain Magnesia  
Bricks from Mexico

### **Summary**

We have analyzed the case and rebuttal briefs submitted by the petitioner, Resco Products Inc., and the respondent, RHI-Refmex S.A. de C.V. (Refmex), in this investigation. As a result of our analysis, we have made changes in the margin calculation for the final determination. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from the interested parties.

*Comment 1: Exclusion of Functional Magnesia Carbon Brick Products from the Scope*

*Comment 2: CEP Offset*

*Comment 3: Adjustments to COP Data*

*Comment 4: Treatment of Full Line Service Contract Transactions*

*Comment 5: Movement Expenses*

*Comment 6: Home Market Price Adjustments*

*Comment 7: Adjustments to U.S. Sales Prices*

*Comment 8: Indirect Selling Expenses Incurred in Mexico*

### **Background**

On March 11, 2010, the Department of Commerce (Department) published in the Federal Register the preliminary determination of sales at less-than-fair-value (LTFV) in the antidumping duty investigation of certain magnesia carbon bricks (bricks) from Mexico. See

Certain Magnesia Carbon Bricks from Mexico: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 FR 11517 (March 11, 2010) (Preliminary Determination). On April 9, 2010, the Department issued a post-preliminary determination analysis in which it applied a quarterly cost methodology to calculate Refmex' cost of production (COP). The period of investigation (POI) is July 1, 2008, through June 30, 2009. For a detailed discussion of the events which have occurred in this investigation since the Preliminary Determination, see the "Background" section of the Federal Register notice which this memorandum accompanies. We provided the petitioner and Refmex with an opportunity to comment on our Preliminary Determination, post-preliminary determination, and verification findings.

Based on our analysis of the comments received and findings at verification, we have changed the weighted-average margin applicable to Refmex and all other producers and/or exporters.

### **Margin Calculations**

We calculated constructed export price (CEP) and normal value (NV) for the respondent using the same methodology described in the Preliminary Determination, except as follows:

1. We applied the same revisions to the preliminary determination methodology that we discussed in our post-preliminary determination analysis. See Memorandum entitled "Cost of Production and Constructed Value Calculation Adjustments for the Post-Preliminary Analysis – RHI-Refmex S.A. de C.V.," dated April 7, 2010; and Memorandum entitled "Post-Preliminary Determination Analysis Utilizing Quarterly Cost Methodology for Refmex," dated April 9, 2010.
2. We relied on the sales and COP databases Refmex submitted on June 9, 2010, which incorporated data revisions and corrections identified prior to or during verification.
3. We made additional revisions to the Mexican and U.S. sales databases based on our verification findings, as discussed in the memorandum entitled "Refmex Final Determination Margin Calculation," dated July 26, 2010 (Final Determination Memo).
4. We made adjustments to the reported COP data, as discussed below at Comment 3, and in the memorandum entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – RHI-Refmex S.A. de C.V.," dated July 26, 2010 (Final COP Calculation Memo).
5. We recalculated home market indirect selling expenses, home market technical service expenses, U.S. indirect selling expenses incurred in Mexico, and U.S. technical service expenses in order to eliminate intercompany profit, or "markup," as noted in Comment 3 below and explained further in the Final Determination Memo. We also recalculated home market indirect selling expenses and U.S. indirect selling expenses incurred in Mexico to reallocate certain administrative expenses. See Comment 8 below. In addition, we recalculated home market indirect selling expenses to exclude certain expatriot personnel expenses based on our verification findings. See Final Determination Memo.
6. We recalculated home market and U.S. freight expenses, based on verification information, to account for Refmex' reliance on gross weight, rather than net weight, in

its allocation of freight expenses. We also adjusted international movement expenses incurred on U.S. sales, based on verification information, to account for the difference between the standard costs used in Refmex' expense allocation, and the actual expenses observed at verification. See Comment 5 below and Final Determination Memo.

## **Discussion of the Issues**

### **Comment 1:** Exclusion of Functional Magnesia Carbon Brick Products from the Scope

In the Preliminary Determination, the Department excluded certain magnesia carbon refractory products that were not shaped into bricks (e.g., tapholes) from its margin analysis because it considered them to be non-subject merchandise. See Memorandum to the File entitled "Refmex Preliminary Determination Margin Calculation," dated March 3, 2010. In its questionnaire responses, Refmex asserted that these products are outside the scope of the investigation and agreed with the Department's treatment of them in the Preliminary Determination. However, Refmex argues that, in order to provide certainty with regard to the scope of the investigation, the Department should expressly hold that resin-bonded magnesia carbon functional refractory products, as opposed to magnesia carbon brick products, are not within the scope of this investigation.

Refmex explains that the resin-bonded magnesia carbon functional refractory products at issue are tapholes, surround blocks, sleeves, and sets, and, as Refmex contends in a supplemental questionnaire response,<sup>1</sup> are outside the scope of the investigation. In particular, Refmex states the scope of the investigation includes the specific term "bricks" (i.e. solid, compressed blocks that are generally rectangular in shape), rather than broader terms such as "components," "shapes," "products," or "parts," because the Department intended to limit the scope of the proceeding to "bricks," as opposed to other types of products containing magnesia carbon. Refmex continues that the bricks covered by the investigation are solid, generally rectangular in shape (with modest variations from strict rectangularity appropriate to conform to curved walls), and are fitted together to build refractory linings for electric arc furnaces, basic oxygen furnaces, and steel ladles. Refmex adds that these products are produced in large volumes and are used for lining large surface areas that are essentially flat and smooth. In contrast, the other magnesia carbon products that Refmex states are outside the scope of the investigation have significantly more complex, non-brick shapes for use in forming or surrounding tapholes, and therefore are produced in much smaller quantities and are used for more specialized applications.

Refmex adds that, although the Department did not formally state that the magnesia carbon shapes in question were outside the scope of the investigation within the "Scope Comments" section of the Preliminary Determination, Refmex claims that the Department effectively acknowledged that position by excluding the reported non-brick magnesia carbon product sales from the preliminary determination margin calculation. Finally, Refmex notes that the petitioner

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<sup>1</sup> See Refmex' January 28, 2010, section B and C supplemental questionnaire response (SQRBC) at pages 4 – 6.

has not objected to Refmex' assertions throughout this investigation that resin-bonded magnesia carbon functional refractory products are not subject merchandise.

While the petitioner acknowledges that it has no objection to the exclusion from this investigation of the non-brick magnesia carbon bricks Refmex describes, it contends that such criteria as "more complex" shapes, or different end uses and customer perceptions, are not appropriate, objective criteria for revising the scope language to reflect bricks of a particular shape or dimension. The petitioner expresses its concern that the scope language not be weakened to facilitate circumvention through minor dimensional alterations or fraud (e.g., incorrect or misleading labeling of subject merchandise as "complex" or destined for a different end use). Accordingly, the petitioner asserts that the Department should not alter the scope to exclude any products based on their end use, characterization as "non-brick" shape, or customer perceptions. Instead, the petitioner believes that the Department has correctly left such scope matters to be analyzed by U.S. Customs and Border Protection, and any questions can be resolved through formal scope determinations provided for under the statute and the regulations.

#### Department's Position:

We continue to consider the magnesia carbon refractory products that were not shaped into bricks, as described by Refmex, to be non-subject merchandise because, as Refmex notes, they do not meet the physical description of the merchandise covered under the scope. Further, the petitioner has not objected to this interpretation, nor proposed that such merchandise be captured in the Department's margin analysis. We are not, however, amending the scope of the investigation to include a specific exclusion for such products because the current description of the scope of investigation adequately limits the scope to bricks. Although we agree with Refmex that the scope refers to generally rectangular-shaped products, we also agree with the petitioner that an exclusion on the basis of shape may lead to potential circumvention under an antidumping duty order. Thus, at this time, we are not revising the scope description of the merchandise under investigation.

#### Comment 2: CEP Offset

The petitioner challenges the Department's granting of a constructed export price (CEP) offset adjustment to Refmex' home market sales in the Preliminary Determination, in accordance with section 773(a)(7)(B) of the Tariff Act of 1930, as amended (the Act), because it believes the differences in levels of trade (LOTs) that Refmex claims between the home market sales and the CEP sales are overstated and not credible. According to the petitioner, the number and intensity of the differences in selling functions performed at the home market and CEP levels of trade, as reported in Refmex' questionnaire response, include various activities that should be combined, so that the resulting listing of selling functions is condensed. Under the petitioner's analysis, Refmex may have more intense activity in three areas with respect to home market sales – "forecasting", "technical services" and "marketing," while Refmex's activity in five other areas – "packing", "inventory", "order-taking", "rebate processing", and "freight arrangement" is about the same for both home market and CEP sales.

The petitioner asserts, however, that Refmex must perform at least some “forecasting” and “technical service” activities for its sales to its affiliates, Veitsch-Radex America, Inc., located in Burlington, Ontario, Canada (VRC), and Veitsch-Radex America, Inc., located in the United States (VRA), because it believes that Refmex would be involved in analyzing general product demand conditions, and production-related technical problems would likely be handled at the factory rather than at the U.S. sales office. The petitioner concludes that the only reasonable distinction in the selling functions performed by Refmex between the home and U.S. markets is marketing, which, they acknowledged might be more intensive with respect to selling to home market customers than selling to VRC.<sup>2</sup> Even then, the petitioner continues, the Department’s home market sales verification report indicates that Refmex relies on some Mexico-based resources to sell to its affiliate. Therefore, based on the petitioner’s analysis of the selling functions, there are no significant differences between Refmex’ selling activities in support of home market sales and its selling activities in support of sales to VRC, and thus no CEP offset should be granted.

Refmex responds that the petitioner’s analysis is flawed and that the Department correctly granted Refmex a CEP offset adjustment in the preliminary because the home market LOT is more advanced than the CEP LOT. Refmex asserts that it reported, and the Department verified, that it undertakes a significantly larger number of selling activities in support of its home market sales in comparison with its sales to VRC. Refmex argues that the petitioner’s view of Refmex’ selling activities is counter to the facts Refmex reported and the Department verified. Refmex notes that its questionnaire response reporting of its selling activities was in accordance with the Department’s standard list of selling activities, but notwithstanding this fact, even under the petitioner’s compressed selling activities chart, there are significantly fewer Refmex activities in support of CEP sales than for home market sales. Therefore, the Department should affirm its Preliminary Determination finding and calculate a CEP offset in its final determination.

Department’s Position:

We agree with Refmex. Refmex reported the number and intensity of its selling functions according to the Department’s questionnaire instructions. That is, it was the Department, not Refmex, that identified the specific selling functions for a respondent to report in the questionnaire responses. Regardless of how the selling activities are classified, after analyzing Refmex’ questionnaire responses, we determined in the Preliminary Determination, 75 FR at 11520 that:

... the only selling functions that Refmex performed for all CEP sales were packing, inventory maintenance (i.e., in Mexico prior to shipment to the U.S. customer or to U.S. warehouses for resale by Refmex affiliates to unaffiliated U.S. customers), and order input/processing. ... We examined the reported selling activities {to home market customers} and found that Refmex performed the following selling functions for both sales channels in the home market: sales forecasting, strategic/economic planning, engineering services, sales promotion, packing,

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<sup>2</sup> The sales transactions between Mexico and the United States are made formally between Refmex and VRC.

inventory maintenance, order input/processing, direct sales personnel, sales/marketing support, market research, technical assistance, granting of rebates, after-sales services, and freight and delivery arrangements. Furthermore, we found that Refmex performed most of these selling functions at the same relative level of intensity for all customers in the comparison market. ... In comparing the home market LOT to the CEP LOT, we found that the selling activities performed by Refmex for its CEP sales, as described above, were significantly fewer than the selling activities that it performed for its home market sales. Therefore, Refmex provided many more selling functions for its home market sales than it provided for its CEP sales, thus making the home market LOT more advanced than the CEP LOT.

Subsequent to the Preliminary Determination, we conducted two sales verifications which included discussions with management, sales, and technical service personnel at VRC, VRA, and Refmex, as well as examination of a variety of sales and selling expense source documents. Our findings confirmed that Refmex' sales to home market customers involve the full range of selling activities, while Refmex provides only a limited amount of selling activities for its sales to VRC. We also confirmed that most of the selling activities that Refmex performs for home market sales are performed by VRC and VRA for CEP sales. Thus, we concluded at both the CEP and home market sales verifications that there were no inconsistencies with the questionnaire responses. See Memorandum entitled "Verification of the CEP Sales Response of RHI-Refmex S.A. de C.V.," dated May 12, 2010 (CEPVR) at page 4, and Memorandum entitled "Verification of the Home Market Sales Response of RHI-Refmex S.A. de C.V.," dated June 1, 2010 (HMVR) at page 5. Accordingly, we continue to find that Refmex' home market sales are at a more advanced LOT than its CEP sales and, thus, we have continued to apply a CEP offset adjustment in the final determination margin calculations.

Comment 3: Adjustments to COP Data

The petitioner contends that the Department should make adjustments to Refmex' COP data to account for incorrect or inappropriate reporting identified in the COP verification report.<sup>3</sup> According to the petitioner, the Department found at verification that Refmex' reporting of certain costs was inconsistent with the generally accepted accounting principles (GAAP) of Mexico, so that Refmex understated the COP incurred by its affiliate, Producción RHI Mexico, S. de R.L. de C.V. (Promex), which is the producer of the subject merchandise.<sup>4</sup> This error should be corrected in the final determination margin calculations by increasing the reported cost of manufacture (COM), as indicated in the CVR.

With respect to the reporting of general and administrative (G&A) expenses, the petitioner asserts that the Department discovered at verification that offsets for income from affiliates were

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<sup>3</sup> See Memorandum entitled "Verification of the Cost Response of RHI-Refmex S.A. de C.V. in the Antidumping Duty Investigation of Certain Magnesia Carbon Bricks from Mexico," dated May 10, 2010 (CVR).

<sup>4</sup> We have treated Promex and Refmex as a single entity for cost reporting purposes because both companies are affiliated in that they are wholly-owned subsidiaries of RHI AG, and Promex sells all of its production to Refmex. See, e.g., CVR at page 5. Because Promex is the producer of the subject merchandise, the costs reported to the Department by Refmex include those costs incurred by Promex.

overstated. Accordingly, the petitioner contends that the Department should increase the amount in the numerator used to calculate the G&A expense ratio, as indicated in the CVR.

The petitioner also alleges that the Department discovered that Refmex' financial expenses were understated due to: (a) improper offsets for alleged short-term interest income; and (b) an overstated denominator (i.e., inclusive of packing expenses) used to calculate the financial expense ratio. According to the petitioner, the Department should correct for these errors by increasing the reported financial expense numerator and decreasing the financial expense denominator, as indicated in the CVR.

Refmex responds that, with respect to the petitioner's characterization of the reported COM as being inconsistent with GAAP, the petitioner has misrepresented the Department's verification findings. Refmex reiterates the explanation it provided at verification that the monthly financial accounting data it relied upon to derive the aggregate COM for the POI were taken from monthly financial accounting records kept in the normal course of business by Refmex. These records are also used to report Refmex' financial results to its parent company, RHI AG, which prepares its consolidated financial reports in accordance with International Financial Reporting Standards (IFRS). Refmex stresses that the Department verified that Refmex' COM data reconciled fully to the official IFRS-based financial reports prepared by Refmex and incorporated by RHI AG in its audited consolidated financial statement. Refmex states that it relied on the IFRS-based monthly financial reports to derive Promex' COM for the POI because, as the Department noted in the CVR at page 2, the Mexican GAAP financial statements are prepared only on an annual basis, and it is not feasible to determine the differences between Mexican GAAP and IFRS for each month of the POI.

Refmex acknowledges that the Department observed that certain minor differences exist between the IFRS financial accounts and the Mexican GAAP financial accounts, both of which are maintained by Refmex in the normal course of business. However, in light of the fact that Refmex did not maintain the COM data for the POI on a Mexican GAAP basis in its normal course of business, Refmex contends that the Department should accept its reported COM which is based on IFRS, and thus is consistent with internationally accepted accounting standards. Refmex adds that, if the Department were to make an adjustment to the COM along the lines suggested in the CVR and supported by the petitioner, the data underlying the adjustment would cover only six of the twelve months of the POI. This adjustment would lead to a result that, by definition, would no longer be consistent with either Mexican GAAP or IFRS. Accordingly, Refmex maintains that it is preferable to base the POI COM on the reported data, which have been verified to be consistent with IFRS, rather than to apply a partial-period adjustment that cannot be defined as more accurate or better supported by generally accepted accounting standards.

Refmex does not object to the adjustment to the G&A expense factor adjustment suggested at page 2 of the CVR and supported by the petitioner. However, Refmex objects to the petitioner's proposal to adjust the reported financial expenses ratio because Refmex contends that the adjustment is unnecessary and requires an unwarranted adverse inference. According to

Refmex, the petitioner's allegation of "improper offsets" is not based on any "improper" methodology or incorrect information used by Refmex, but rather on the Department's observation at verification that Refmex could not provide supporting documentation for the consolidated short-term interest income offset that was included in the numerator of the financial expense factor.

While Refmex acknowledges that its financial accounting records do not allow it to provide a detailed, account-by-account summary of the specific interest-bearing short-term financial instruments underlying the reported offset, it adds that the short-term interest income claimed is supported by the financial records maintained in the normal course of business by RHI AG. Refmex states that it reported the necessary information from the RHI AG consolidated financial statement at the most detailed level that it was able to, thus an adverse inference is unwarranted because Refmex has cooperated to the best of its ability and has put forth its maximum effort to provide the Department with the best information reasonably available to Refmex in response to the Department's inquiries. Refmex concludes that disallowing the short-term financial income offset it reported would require unwarranted adverse inferences against Refmex and result in unfairly penalizing Refmex for the manner in which its corporate group keeps its books and records in the normal course of business. Accordingly, Refmex holds that the Department should accept Refmex' claimed short-term interest income offset.

Department's Position:

We agree with the petitioner that Refmex' reported costs should be adjusted to reflect Mexican GAAP. The Department is directed by section 773(f)(1)(A) of the Act to calculate costs based on the records of the exporter or producer if such records are kept in accordance with the GAAP of the exporting country and reasonably reflect the cost associated with the production and sale of the merchandise. In this case, we have established that Promex' audited financial statements are prepared in accordance with Mexican GAAP. See CVR at page 2.

Conversely, in the normal course of business, Promex calculates costs on a monthly basis in accordance with IFRS as mandated by its parent company, RHI AG. The IFRS-based information is forwarded to RHI AG for consolidation into RHI AG's quarterly and annual IFRS consolidated financial statements. Refmex relied on Promex' monthly IFRS cost information to determine the costs reported to the Department. See CVR at pages 5 and 6.

We agree with Refmex that quantifying the differences between Mexican GAAP and IFRS costs for each month of the POI is complicated by the lack of monthly Mexican GAAP cost information. We disagree that the lack of such information precludes the Department from calculating Promex' costs in the manner normally envisioned by the statute. Further, we disagree that the accounting principles mandated by Refmex' and Promex' corporate parent preempt the statute's directive to normally calculate costs based on the home country GAAP. Section 773(f)(1)(A) of the Act specifies that we depart from a company's home country GAAP when that home country GAAP does not reasonably reflect the costs associated with production of the merchandise. No such finding was made in this investigation.

At verification, we calculated an adjustment ratio of Promex' fiscal year 2008 cost of sales based on Mexican GAAP and its cost of sales based on IFRS. See CVR at page 17. As noted in the CVR at page 2, we based the ratio on the fiscal year 2008 cost of sales because the fiscal year 2009 financial statements had not yet been completed as of the date of our verification. Refmex failed to provide any concrete evidence that the application of such a ratio to the reported costs would result in costs that do not reasonably reflect the costs associated with the production of the merchandise. Further, Refmex did not provide any evidence that the basis on which the ratio is calculated (i.e., fiscal year 2008) is unreasonable. Refmex suggests that the use of the IFRS data is preferable to applying such a ratio to the reported costs because only six months of the POI fall within fiscal year 2008. On the contrary, because the data necessary to calculate a ratio based on the entire POI are not available either on the record of this proceeding or in Promex' normal books and records, we are applying partial facts available to calculate Refmex' reported costs in a manner consistent with Mexican GAAP. See sections 776(a)(1) and 782(d) of the Act. We find that the FY 2008 information is the best information available and thus a reasonable surrogate for the POI. Therefore, for purposes of the final determination, we have adjusted Refmex' reported costs as outlined in the CVR at page 17, so that the costs reflect the GAAP of Mexico as required by the statute. See also Final COP Calculation Memo.

With regard to G&A expenses, we agree with the parties and have adjusted the numerator of Promex' s G&A expense ratio to exclude certain income from Refmex. As noted in the CVR at pages 33-34, Refmex paid Promex for services during fiscal year 2008 (i.e. the fiscal year on which the reported G&A expense ratio was based). Promex included the total revenues received from Refmex, including profit, as an offset to Promex' G&A expenses (i.e. the numerator of the G&A expense factor). Consistent with our practice (see, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia, 72 FR 60636 (October 25, 2007), and accompanying Issues and Decision Memorandum at Comment 2), we have eliminated the intercompany profit between Refmex and Promex from the numerator of Promex' G&A expense ratio. In doing so, we have allowed Promex to offset only those expenses incurred on behalf of Refmex with the revenues received from Refmex excluding profit.

Refmex also reported indirect selling expenses and technical service expenses inclusive of intercompany profit. See SQRBC at pages 15 and 18, CVR at pages 34-35, and HMVR at page 19. Consistent with our adjustment to the G&A expense ratio, we have also recalculated the following expenses to eliminate the intercompany profit, or "markup," where practicable based on information on the record: home market indirect selling expenses, home market technical service expenses, U.S. indirect selling expenses incurred in Mexico, and U.S. technical service expenses. See Final Determination Memo for an explanation of our recalculations.

With respect to the financial expense argument, we agree with the petitioner that Refmex has failed to provide the necessary documentation to support its claimed short-term interest income offset to its financial expenses. In response to the Department's questionnaires regarding the claimed interest income offset, Refmex provided a copy of footnote 31 accompanying RHI AG's financial statement that distinguishes "gains from securities and non-current receivables" from

“other interest and similar income.” See Exhibit D-16 to Refmex’ January 28, 2010, response to section D of the Department’s questionnaire. Refmex merely concludes that, because gains on “non-current” receivables are presented separately in the footnote from interest and similar income, the interest and similar income, by default, result from short-term interest-bearing assets. We find this evidence inconclusive, as non-current receivables are not interest-bearing assets. Thus, the distinction of these receivables as non-current has no bearing on the nature of the assets generating the interest income reflected in a separate line of the footnote. Moreover, item VI.B of the Department’s March 29, 2010, cost verification agenda requires, among other things, a review of documentation supporting the claimed offset that interest income is from short-term sources. Refmex failed to provide any supporting financial documentation to demonstrate that the claimed interest income offset in question was generated from short-term sources, as required by item VI.B. of the COP verification agenda.

Refmex asserts that the exclusion of its claimed offset would result in an adverse inference against Refmex. We disagree that the exclusion of the offset is an adverse inference. As stated in 19 CFR 351.401(b)(1), “[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of the particular adjustment. . .” In previous cases, the Department has stated that the burden of proof to substantiate the legitimacy of a claimed adjustment falls on the respondent party making that claim. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil, 71 FR 7517 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 4.

Therefore, consistent with the Department’s regulations and practice, we have revised the numerator of Refmex’ financial expense ratio to exclude the offset. We have also revised the denominator of Refmex’ financial expense ratio to exclude packing expenses as discussed in the CVR at page 36.

Comment 4: Treatment of Full Line Service Contract Transactions

As discussed in the Preliminary Results, Refmex reported that it ships some subject merchandise in the U.S. and Mexican markets under “Full Line Service” (FLS) contracts. Under these contracts, Refmex or its affiliates consume bricks as part of broader service agreements with their customers. Refmex reported that, in fulfilling these contracts, it does not generate invoices specifying a quantity or price for the bricks shipped, and, thus, does not record sales of these bricks in its accounting system. Rather, customers pay Refmex or its affiliates based on other terms specified in the contracts. Accordingly, Refmex did not include bricks shipped in conjunction with these service contracts in its sales listings.

The petitioner maintains that the Department should require Refmex to provide its internal analyses of all cost components of FLS materials and services, and to provide the total values and unit values that were assigned to bricks, as well as the quantities sold, pursuant to such contracts during the POI. The petitioner notes that the Department observed at verification Refmex’ internal value for bricks consumed under FLS contracts. Thus, even if a per-unit value

for the bricks was not recorded in Refmex' or its affiliate's sales accounting records, as per the Department's verification findings, Refmex could easily calculate per-unit values based on the data it maintains in its accounting system.

The petitioner argues that if the Department continues to permit Refmex to exclude reporting of bricks consumed under FLS contracts or similar arrangements, exporters may be able to use these arrangements to evade antidumping duties should an antidumping duty order be issued. Nevertheless, if the Department continues to allow Refmex to withhold transaction-specific information on bricks consumed under FLS contracts, the petitioner contends that, at a minimum, the Department should state that it will require the reporting of per-unit values for bricks sold at a bundled price along with other goods and services in any future administrative review, and that such values would be tested against reasonable benchmarks.

Refmex counters that it did not withhold any information from the Department regarding the costs of bricks consumed under FLS contracts, but nevertheless, the internal cost of these bricks is not relevant. Instead, Refmex emphasizes that, while the Department observed at verification Refmex' internal brick cost data used to compare revenues with costs, the Department found no instance of any cost or value that could be used as a price for bricks shipped to fulfill FLS contracts. See CEPVR at page 12. Refmex continues that, as the Department verified that all of the FLS contract-related information reviewed was entirely consistent with Refmex's descriptions in its questionnaire responses, these transactions were properly excluded from the Department's margin calculations because there is no reasonable or reliable method for determining a price of the bricks consumed under FLS contracts. Refmex adds that the petitioner's concerns regarding any potential evasion of duties through FLS contracts should be addressed in future reviews or circumvention proceedings should such issues actually arise.

#### Department's Position:

We agree with Refmex that its FLS contracts involve complicated transactions in which the subject merchandise is bundled with additional products and services when delivered to the unaffiliated customer. For the final determination, the Department has continued to exclude these transactions from its dumping analysis because of their complex nature and because they constitute a relatively small percentage of bricks shipped to U.S. customers during the POI.

Nevertheless, if an antidumping duty order is issued and an administrative review is subsequently requested, we may reconsider our treatment of these transactions and seek guidance from all interested parties on how to account for these transactions in calculating cash deposit and assessment rates. We note that entries of bricks into the United States that are shipped under FLS contracts will be covered if an antidumping duty order on bricks from Mexico is published, regardless of whether the transactions are part of the margin calculation for this investigation.

#### Comment 5: Movement Expenses

The petitioner notes that at both of the sales verifications, the Department observed that Refmex: (1) did not report actual international movement charges for sales to the U.S. market;<sup>5</sup> and (2) allocated both international and inland freight expenses based on the gross weight of the shipment, instead of the actual net weight of the product.<sup>6</sup> Because Refmex reported the amount Refmex billed its affiliate for international movement expenses, rather than the actual freight expenses Refmex incurred, the petitioner argues that the Department should apply adverse inferences and assign values for international movement expenses to all U.S. sales based on the highest per-unit international movement expense reported for any U.S. sale. To account for the discrepancy between the gross weight and net weight allocation methodologies in calculating freight expenses (both inland and international movement expenses), the petitioner asserts that the Department should also apply adverse inferences and assign to all U.S. sales the highest per-unit freight expense reported for any U.S. sale. Alternatively, the petitioner states that, if the Department does not make the most adverse inference, it should, at a minimum, assume the largest weight discrepancy observed at verification and adjust the freight expenses accordingly for all U.S. sales.

With respect to the petitioner's advocacy of applying adverse facts available (AFA) for inland freight expenses and the other adjustments discussed below in comments 6, 7, and 8, Refmex argues that AFA under section 776(b) of the Act is not warranted in this investigation because the statute and legal precedent permit its use only in limited circumstances where a party has withheld requested information or otherwise "significantly impede{d} an investigation" and also failed to cooperate to the best of its ability with the Department's requests for information. See section 776(a) of the Act and, e.g., Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (CAFC 2003). Refmex asserts that there is no indication that it has failed to cooperate to the best of its ability in this investigation. While Refmex acknowledges that the Department identified certain minor and inadvertent errors during the Department's verification of Refmex' questionnaire response, it maintains that such limited errors capable of simple correction provide no basis for the use of AFA.

With respect to the reporting of international movement expenses, Refmex contends that the methodology it employed in reporting these expenses is reasonable given the records available to Refmex. Refmex objects to the petitioner's charge that it willfully disregarded the Department's instructions in reporting its international movement expenses based on the amounts posted in VRC's records. Refmex states that this methodology was reasonable and that the standard charges upon which the reported expenses were based closely matched the actual expenses. According to Refmex, the Department's verification showed that, based on the sample transactions examined, the average difference between the total standard charges and the total actual charges was minimal. See HMVR at page 17. Thus, Refmex states that, if the Department determines that any adjustment to the reported international movement expenses is appropriate, an adjustment based on AFA is not warranted and instead the Department should make an adjustment based on the average difference between the standard and actual expenses observed among the examined transactions.

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<sup>5</sup> See CEPVR at page 17 and HMVR at page 17.

<sup>6</sup> See CEPVR at page 17 and HMVR at pages 13, 14, and 17.

With regard to the allocation of U.S. freight expenses on a gross weight basis rather than a net weight basis, Refmex states that the petitioner has failed to identify any legal or factual basis for applying AFA. Refmex asserts that the petitioner has further failed to account for the complexity of Refmex' distribution channels in the United States and the associated complexity of allocating freight expenses to Refmex' reported U.S. sales through these distribution channels, for which Refmex went to great lengths in its efforts to provide accurate data to the Department.

Refmex also notes that the petitioner ignores the fact that Refmex allocated home market freight expenses in the same manner as it did U.S. freight expenses, and the differences between gross weight and net weight in the home market and U.S. market were roughly equivalent.

Department's Position:

We have adjusted the reported international movement expenses incurred on U.S. sales based on verification findings to account for the variance between the reported standard international movement expenses and the actual expenses observed for the transactions examined at verification. We have also adjusted the inland freight expenses incurred on U.S. and home market sales, based on information developed at verification, to account for the difference in allocating expenses on the basis of the net weight of the merchandise, rather than the gross weight of the shipment. This weight adjustment was also applied to the international movement expenses incurred on U.S. sales.

The Department's normal practice in cases where a respondent relies on a standard cost accounting system is to apply the allocated variance between standard and actual costs. See, e.g., section D of the Department's antidumping duty questionnaire at pages D-10 – D-11. However, the Department has found that, while it may be appropriate to use standard or budgeted costs for purposes of preparing a COP questionnaire response, it is not necessarily appropriate to use standard or budgeted costs in preparing movement and selling expense information for a sales response. See Notice of Final Determination of Sales at Less Than Fair Value:

Carbon and Certain Alloy Steel Wire Rod From Germany, 67 FR 55802 (August 30, 2002) (Rod from Germany) and accompanying Issues and Decision Memorandum at Comment 7. Where a standard cost methodology is applied for sales-related expenses, the Department expects the reported expenses to have a high correlation with the actual expenses incurred. In this instance, unlike in Rod from Germany, the transactions reviewed at verification demonstrated a high correlation between the standard and actual costs, as we noted that the difference between the standard movement expenses used in Refmex' allocation methodology and the actual movement expenses incurred by Refmex was minimal. See HMVR at page 17. Accordingly, there is no basis for the application of AFA to these expenses, as suggested by the petitioner. Rather, we have adjusted the international movement expenses based on the average difference observed at verification. See Final Determination Memo for a further explanation of the movement expense recalculation.

Refmex' reliance on the gross weight of its shipments to allocate its freight expenses understates the freight expense applicable to transporting the subject merchandise by allocating a small fraction of the expense to pallets and other packing material. However, we note that Refmex applied the same expense methodology to both its home market and U.S. sales, so that any distortion deriving from that methodology was applied to sales in both markets in a comparable manner. As with the international movement expenses, we have developed information from the sales verifications to make an appropriate adjustment to these expenses. Accordingly, we have adjusted the reported home market and U.S. freight expenses based on the average difference observed at verification between the gross weight and the net weight of the shipments. See Final Determination Memo for a further explanation of our recalculations.

In addition, we agree with Refmex that AFA should not be applied for these movement expenses or for the other expense items addressed in comments 6, 7, and 8 below. Refmex has cooperated in this investigation. Accordingly, under sections 776(a) and (b) of the Act, the application of AFA is not warranted in making any adjustments for these expenses.

#### Comment 6: Home Market Price Adjustments

According to the petitioner, the Department found sales-debiting adjustments to home market sales at verification that could be designed to impact the dumping analysis. The petitioner notes one example cited in the HMVR where the sale amount posted in the accounting system was higher than the reported price, and then offset by a "debit amount." See HMVR at page 9. The petitioner also points to the HMVR where the Department reported that "post-sale adjustments are typically made by cancelling invoices and re-issuing them...." See id. The petitioner contends that the Department should not simply correct the prices of these individual transactions, but also make an adverse inference for all home market sales and assume that these downward adjustments were applied to more sales than the sample examined at verification. To that end, the petitioner asserts that the Department should apply an upward adjustment to all home market sales prices.

Refmex responds that the petitioner either misunderstands or misrepresents the Department's verification findings with respect to Refmex' posting of sales transactions. According to Refmex, the Department found at verification that Refmex' accounting system automatically books an invoiced value as the sum of a credit and debit accounting transaction to the given customer account, and that these sums were identical to the invoiced sales values for every sale verified by the Department. Refmex further contends that the petitioner's claim that these adjustments could be designed to impact the dumping analysis is nonsensical because the POI covers a period prior to the filing of the antidumping duty petition, a time when Refmex had no knowledge of an antidumping case. Therefore, Refmex concludes that there is no basis to make any adjustments, AFA-based or otherwise, to its home market prices.

#### Department's Position:

We agree with Refmex. As we noted in the HMVR at page 9, "{t}he sum of these two entries

{examined} is equal to the invoice amount, thus this two-part invoice booking does not alter the invoice value recorded as sales revenue. ... Refmex could not explain the basis for this booking methodology ... {h}owever, we observed that this booking methodology had no impact on sales prices or net sales revenue.” We reviewed a significant number of home market sales transactions during verification and found no instance where Refmex’ booking methodology altered the net invoice value. Similarly, we found no discrepancies in Refmex’ cancelation and reissuance of invoices to make price adjustments. Therefore, there is no basis to make any adjustment to Refmex’ reported home market prices as suggested by the petitioner.

#### Comment 7: Adjustments to U.S. Sales Prices

The petitioner points to the CEPVR, where the Department observed an unreported discount on one U.S. sale examined at verification, and an unreported credit on another U.S. sale examined at verification. See CEPVR at pages 12-14. The petitioner contends that, when such errors are found in the limited sample of sales examined at verification, adverse inferences should be applied to the universe of data being verified. Accordingly, the petitioner asserts that the Department should apply commensurate price discount and credits, respectively, to all U.S. sales, or, at a minimum, to all sales to the customer for which each discrepancy was observed.

Refmex responds that the example of a sale with an unreported discount relates to one of the corrections VRC presented at the beginning of the CEP verification. With respect to the sale with an unreported credit adjustment, Refmex notes that it applies only to a single transaction from among the various sales the Department examined at verification. Refmex contends that the petitioner has seized upon a minor error observed during verification to attempt to support a finding that AFA should be applied to a larger universe of Refmex’ sales. Refmex asserts that such a finding is unsupported in the law or Department practice. Citing NSK Ltd. v. United States, 481 F.3d 1355, 1361 (CAFC 2007),<sup>7</sup> Refmex notes that the statutory standard for full cooperation does not require perfection in all data reported, and the Department routinely accepts limited adjustments for issues identified during verifications without applying AFA.

#### Department’s Position:

We agree with Refmex. During our sales verifications, we reviewed numerous sales transactions. As Refmex notes, the sale with the unreported discount was properly identified at the outset of verification. The sale with the unreported billing adjustment applied to a single transaction observed at verification. Among the numerous sales reviewed in detail, as well as the sales reconciliation data examined in detail, we found no evidence of additional omissions of similar adjustments. Accordingly, other than making the necessary sale-specific revisions, there is no basis to make any further adjustments to Refmex’ sales data in this regard.

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<sup>7</sup>“Whether a respondent has lived up to {the cooperation} requirement is assessed by determining ‘whether {the} respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation, .’” quoting Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (CAFC 2003).

Comment 8: Indirect Selling Expenses Incurred in Mexico

The petitioner asserts that, based on the Department's verification findings, Refmex overstated home market indirect selling expenses reported under the INDIRSH variable. The petitioner cites to the HMVR, where the Department noted that INDIRSH included administrative expenses incurred in supporting the selling activities of Refmex employees who deal with sales to VRC. According to the petitioner, INDIRSH should be recalculated to remove these expenses from the numerator used to calculate the INDIRSH ratio.

Refmex replies that, as explained at the home market sales verification, the activities performed by the small number of Refmex sales staff responsible for handling the paperwork associated with Refmex' intercompany export sales are minimal and involve only a fraction of their time, which, in turn, results in an indirect selling expense ratio for Mexican-incurred indirect selling expenses for U.S. sales (DINDIRSU) that is a small fraction of a percentage point.<sup>8</sup> Accordingly, Refmex notes that any administrative expenses attributable to these activities will also be minimal, and any distortion resulting from the omission of the administrative overhead expenses is immaterial to the margin calculation. Refmex adds that, as it reported in its questionnaire responses, the Refmex staff involved with sales to VRC are also involved with sales to all RHI affiliates located anywhere outside of Mexico, so that a reallocation of any administrative expenses incurred in supporting the activities of these employees solely to the VRC sales would incorrectly overstate the administrative expenses associated with Refmex' sales to VRC.

Department's Position:

The administrative expenses at issue, identified at page 19 of the HMVR, relate to such office expenses used by the sales personnel as utilities, office equipment, and office supplies. Personnel expenses form the bulk of the reported INDIRSH expenses and the entirety of the DINDIRSU expenses. In comparison to the personnel expenses, the total cost of utilities, office equipment, office supplies, and other such cost items that support the sales personnel are minimal. The reported DINDIRSU ratio is, as noted above, a small fraction of a percent. Nevertheless, based on the questionnaire response data, we have determined an appropriate amount to reflect the administrative office expenses associated with the selling activities of Refmex employees who deal with sales to VRC, and recalculated both DINDIRSU and INDIRSH by adding this expense amount to the former calculation, and subtracting this expense amount from the latter calculation. See Final Determination Memo for a detailed explanation of these expense recalculations.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination of this

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<sup>8</sup> See page 6 of revised public version of Refmex' rebuttal brief, submitted on June 17, 2010.

investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

Agree ✓

Disagree \_\_\_\_\_

/s/

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

July 26, 2010

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(Date)