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

FROM: John M. Andersen  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memo randum for the Antidumping Duty  
Administrative Review of Magnesium Metal from the Russian  
Federation for the Period of Review April 1, 2007, through March 31, 2008

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on magnesium metal from the Russian Federation for the period April 1, 2007, through March 31, 2008. We recommend that you approve the position we have developed in the Discussion of the Issue section of this memorandum.

Background

On April 6, 2009, the Department of Commerce (the Department) published its preliminary results of the administrative review of the antidumping duty order on magnesium metal from the Russian Federation. See Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind in Part, 74 FR 15435 (April 6, 2009) (Preliminary Results). The review covers two manufacturers/exporters, PSC VSMPO-AVISMA Corporation (AVISMA) and Solikamsk Magnesium Works (SMW).

On June 20, 2008, SMW submitted a letter indicating that it made no sales to the United States during the period of review (POR). We confirmed SMW’s claim of no shipments by reviewing customs documentation. See Memorandum from International Trade Compliance Analyst to the File dated March 24, 2009. We received no comments on SMW’s submission and preliminarily rescinded the administrative review with respect to SMW. We did not receive comments on SMW’s submission after issuance of the Preliminary Results. Because we find that SMW had no shipments of subject merchandise during the POR, we are rescinding the administrative review with respect to SMW pursuant to 19 CFR 351.213(d)(3).
We invited interested parties to comment on the Preliminary Results. At the request of certain parties we held a public hearing on June 10, 2009.

Discussion of the Issue

Selection of an Adverse Facts-Available Rate

Comment: AVISMA argues that the Department departed from its longstanding practice in administrative reviews of selecting an adverse facts-available (AFA) rate based on the highest calculated weighted-average margin in the investigation and prior administrative reviews. According to AVISMA, the Department has rarely based the AFA rate on the highest transaction-specific rate and even in those cases where this methodology was implemented its application has been limited almost exclusively to investigations or as partial AFA. AVISMA asserts that the application of the highest transaction-specific margin as the AFA rate in an administrative review is an exceptional occurrence for which the Department has provided no explanation.

AVISMA asserts that, pursuant to section 776(a)(2)(A) and (C) of the Tariff Act of 1930, as amended (the Act), the Department may rely on information derived from the petition, a final determination in the less-than-fair-value investigation, any previous administrative review, or any other information placed on the record. Citing the decision by the Court of Appeals for the Federal Circuit (CAFC) in F. Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (CAFC 2000) (F. Lii de Cecco), AVISMA argues that the Department must not impose punitive, aberrational, or uncorroborated margins.

AVISMA asserts that the Department’s reliance on Rhone Poulenc Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990) (Rhone Poulenc), is troubling because that case makes no mention of the application of the highest prior transaction-specific margin either in holding or in dicta. AVISMA asserts that Rhone Poulenc was decided before implementation of the Uruguay Round Agreements Act (URAA), which amended the Act to adopt the current “facts otherwise available” and “adverse inferences” standards of section 776 of the Act.

According to AVISMA, Rhone Poulenc supports the application of the AFA rate of 21.71 percent from the less-than-fair-value investigation for AVISMA. Specifically, AVISMA argues, the CAFC upheld the highest calculated weighted-average margin for the respondent in the less-than-fair-value investigation as “best information” available for current margins which, according to AVISMA, in this case, would be equivalent to applying the highest margin rate, the 21.71 percent for AVISMA from the less-than-fair-value investigation, as AFA for AVISMA in the instant review.

AVISMA argues that the Department’s citation of Notice of Final Determination of Sales at Less Than Fair Value, {sic} and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India, 71 FR 45012 (August 8, 2006) (Lined Paper), as support for selecting the highest transaction-specific margin as the AFA rate for AVISMA is also inapposite.

1 On May 19, 2009, the petitioner, U.S. Magnesium Corporation LLC, filed its rebuttal brief. We rejected the petitioner’s rebuttal brief because it contained a citation to a letter that is no longer on the record of the instant review. See Memorandum to Laurie Parkhill dated July 20, 2009, and Letter from Laurie Parkhill to the petitioner dated July 21, 2009. On July 23, 2009, the petitioner re-filed its rebuttal brief.
AVISMA asserts that, although the Department used a transaction-specific rate as opposed to a weighted-average calculated rate in *Lined Paper*, the rate selected in *Lined Paper* was not the highest transaction-specific rate and, therefore, according to AVISMA, *Lined Paper* is not on point.

AVISMA contends that *Lined Paper* is distinguishable from this case because the transaction-specific margin selected in *Lined Paper* as AFA was in an investigation, not in an administrative review. In addition, according to AVISMA, the reason the Department used a transaction-specific rate was because the rates in the petition of that case could not be corroborated. Moreover, AVISMA asserts, the Department selected the second-highest transaction-specific margin, not the highest transaction-specific margin, because the highest transaction-specific margin was found to be aberrational. AVISMA argues that the Department’s *Preliminary Results* lacks support in law or agency precedent for the application of the highest transaction-specific margin as AFA for AVISMA.

Citing *Lined Paper*, AVISMA argues that, in the few instances where the Department resorted to transaction-specific margins, the Department took particular attention to examine in detail the selected AFA rate and confirmed that they were non-aberrational and otherwise usable. AVISMA argues that the Department has not pursued any examination of the selected AFA rate in this case.

AVISMA asserts that the highest calculated rate in any segment of this proceeding is the rate of 21.71 percent calculated for AVISMA in the less-than-fair-value investigation. AVISMA contends that this rate was selected by the Department as the AFA rate in the 2006/07 administrative review for SMW and can serve as an AFA rate for AVISMA in this administrative review as well. According to AVISMA, selecting an AFA rate based on the highest calculated rate in a proceeding is the default position in antidumping duty administrative reviews. AVISMA argues that neither the statute nor the Department’s regulations disqualify the highest calculated rate for a respondent in any segment of the case simply because the rate was originally calculated for the same respondent.

AVISMA contends that the 21.71 percent rate is corroborated by AVISMA’s transaction-specific margins in the 2006/07 administrative review. AVISMA argues that, because this rate is significantly higher than the 15.77 percent rate calculated for AVISMA in the 2006/07 administrative review, it is sufficiently adverse and provides an incentive for AVISMA to cooperate in future segments of the proceeding.

AVISMA asserts that the only difference between the 2006/07 and the 2007/08 administrative reviews is the fact that in the 2007/08 administrative review AVISMA is receiving the AFA rate, not SMW, and that AVISMA withdrew its information and participation from the instant review, as opposed to not participating at all in the review process. According to AVISMA, it is being punished with a margin twice as high as that given to SMW although there is no legal basis for treating these two situations differently. AVISMA contends that, while the reasons for resorting to AFA may be different, once the Department decides to apply AFA the legal standard for selecting the AFA rate is the same.
Citing section 776 of the Act, AVISMA asserts that, when applying a rate based on AFA using secondary information, the Department must corroborate the AFA rate applied with information from independent sources that are reasonably at its disposal. According to AVISMA, the statute defines secondary information as information other than that obtained in the course of the review. Citing the Statement of Administrative Action (SAA), AVISMA argues that secondary information is information derived from any previous review under section 751 of the Act. AVISMA contends that the rate of 43.58 percent the Department used in this case as AFA was derived from the 2006/07 administrative review, and it is therefore, by definition, secondary information. Thus, according to AVISMA, the corroboration provision of the statute applies.

AVISMA contends that the AFA rate selected by the Department must be corroborated and the Department must determine that the information has probative value. AVISMA argues that the Department did not corroborate the 43.58 percent rate and did not show that this rate is reliable or has probative value. Citing Ferro Union, Inc., v. United States, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (CIT 1999) (Ferro Union), AVISMA argues that the Court of International Trade (CIT) has cautioned against the indiscriminate selection of the highest rate on the record as an AFA rate.

Citing F. Lii de Cecco, AVISMA argues that the CAFC explained that, in corroborating secondary information used as facts available under section 776 of the Act, the Department must do more than assume any prior calculated margin for the industry is reliable and relevant and accordingly must assure itself that the margin it applies is relevant, not outdated, or lacking a rational relationship to the party. AVISMA argues that the CAFC stated further that the Department cannot assume the highest previous margin simply because it is the one most prejudicial to the respondent. AVISMA asserts that the AFA rate the Department selected does not pass the legal test.

AVISMA argues that in contrast to the comprehensive analysis the Department provided in the 2006/07 administrative review, the Department in the instant review did not provide any legal or factual analysis showing that the selected AFA rate is relevant for AVISMA. AVISMA asserts that the sole fact that the AFA rate is based on AVISMA’s data from a previous administrative review is not sufficient to corroborate the AFA rate.

Citing Ferro Union, AVISMA asserts that the CIT was critical of the Department’s practice to consider weighted-average calculated margins to be reliable simply because they were calculated in a prior administrative review. AVISMA argues that the SAA also refers to weighted-average margins calculated in an administrative review, not transaction-specific margins. According to AVISMA, if a calculated, published, weighted-average margin from a prior review cannot automatically be presumed reliable, as the SAA and the CIT both state, a transaction-specific margin cannot be presumed to be reliable. AVISMA asserts that it is improper for the Department to assume that a transaction-specific margin based on secondary information is corroborated without further analysis. AVISMA asserts that corroboration means

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AVISMA argues that under the CIT’s holding in *Ferro Union*, even if the Department had selected an AFA rate of 21.71 percent to apply to AVISMA for the Preliminary Results, it could not simply use that rate because it was the highest and was a rate obtained by AVISMA. According to AVISMA, the 21.71 weighted-average rate would still need to be corroborated by the Department even if it was derived from AVISMA’s information.

AVISMA asserts that, when establishing the probative value of transaction-specific margins relied upon for use as partial AFA or as AFA in investigations, the Department has generally considered the totality of the margins on the record rather than focusing on outlier margins, such as the highest transaction-specific margins. Citing *Hyundai Electronics Industries Co., Ltd. v. United States*, 395 F. Supp. 2d 1231, 1235-36 (CIT 2005) (*Hyundai Electronics*), AVISMA argues that the court has affirmed rates that fall within a range of transaction-specific margins that include a large portion of the POR sales. AVISMA argues that the Department did not even consider the range of transaction-specific rates from the previous review but, without analysis, arbitrarily selected the highest transaction-specific rate of 43.58 percent. According to AVISMA, under the court’s analysis in *Hyundai Electronics*, the Department erred by not considering the full range of transaction-specific margins. Thus, according to AVISMA, the Department’s attempt at corroborating the AFA rate of 43.58 percent is legally insufficient and, therefore, it should use the 21.71 percent AFA rate used for SMW in the 2006/07 administrative review. AVISMA argues that, to the extent that the Department relies on a transaction-specific rate for purposes of the final results, it should review the entire range of AVISMA’s transaction-specific rates on the record and base its rate on an indicative sale in a range of sales.

AVISMA argues that the highest transaction-specific margin of 43.58 percent selected by the Department as AFA is aberrational. According to AVISMA, the AFA rate is based on a single sale of an unusually small quantity and an exceptionally high U.S. inland-freight expense. AVISMA contends that the AFA rate is an outlier and not within the range of AVISMA’s transaction-specific margins. AVISMA asserts that the selected AFA rate is 15 percentage points higher than the next highest margin and not corroborated by AVISMA’s commercial practices.

Citing *Lined Paper*, AVISMA argues that the Department in that case rejected the highest transaction-specific margin for use as AFA because it was from a single sale with a quantity lower than the average quantity per sale. AVISMA contends that the sale selected by the Department for use as the source of the AFA rate was atypical for AVISMA as the quantity was much lower than the typical sales it reported in the previous review. AVISMA asserts that the sale in question was a sale of only a half-load of the subject merchandise.

Citing the preliminary results from the 2006/07 review, AVISMA argues that it is the Department’s practice to disregard the highest transaction-specific margin where circumstances indicate that the selected margin is not appropriate as AFA. AVISMA contends that, in this

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case, the sale corresponding to the 43.58 percent margin had unusually high inland-freight costs compared to the other reported U.S. sales. AVISMA asserts also that the sale in question had freight cost twice as high as a sale to the same destination. According to AVISMA, this unusually high freight expense, for an atypically small sale quantity and value, indicates that the sale is aberrational and should not be selected as the source for an AFA rate.

Citing Timken Company v. United States, 240 F. Supp. 2d 1228, 1234 (CIT 2002), AVISMA argues that, in choosing an AFA rate, the Department must appropriately balance the goal of accuracy against the risk of creating a punitive margin. AVISMA claims that the CIT explained that punitive rates are the result of rejection of low-margin information in favor of high-margin information that is demonstrably less probative of current conditions.

Citing F. Lii de Cecco, AVISMA argues that, although the Department has discretion to choose the sources and facts on which it will rely to support an adverse inference, its discretion in these matters is not unbounded. AVISMA contends that the 21.71 percent margin calculated for AVISMA in the original investigation is sufficiently high to be used as an AFA rate and would not reward AVISMA for its failure to cooperate.

AVISMA argues that the Department has already addressed the appropriateness of the 21.71 percent rate as an AFA rate in the previous review and found that it meets the statutory purpose of deterring non-compliance. AVISMA contends that the Department explained in the 2006/07 final results that a rate only three percentage points above the non-AFA rate of 18.65 percent calculated for SMW in the investigation was sufficiently adverse considering SMW’s other rates in the history of the proceeding. Here, according to AVISMA, the 21.71 percent rate is higher than AVISMA’s current cash-deposit rate of 15.77 percent and also higher than the zero cash-deposit rate in effect during most of the POR. AVISMA argues that, consistent with the Department’s reasoning in the 2006/07 review, an AFA rate of 21.71 percent should also be appropriate for AVISMA and would provide ample incentive to cooperate in future administrative reviews.

AVISMA asserts that the difficult decision of no longer maintaining an active participation in this review was made because of valid business reasons where the company shifted its focus from magnesium to other products. AVISMA contends that the reasons set forth in its January 21, 2009, letter to the Department are corroborated by U.S. import statistics.  

AVISMA requests that for the final results the Department select an AFA rate that is non-aberrational and consistent with its AFA-rate determinations in previous administrative reviews.

In rebuttal, the petitioner contends that AVISMA was highly uncooperative during the instant review and, therefore, the application of an AFA rate by the Department was appropriate. The petitioner asserts that, after requesting the administrative review, AVISMA did not provide a full accounting of the new affiliations resulting from the September 2006 acquisition of a controlling interest in AVISMA by a major shareholder. Thus, according to the petitioner, AVISMA did not provide the Department with complete questionnaire responses.

The petitioner asserts that the Department’s use of the AFA rate of 43.58 percent is consistent with section 776 of the Act and is justified to ensure AVISMA does not receive a more favorable result by not cooperating than if it cooperated fully. The petitioner argues that, contrary to AVISMA’s assertion, the Department’s application of the highest transaction-specific rate of 43.58 percent as the AFA rate is well reasoned and fully consistent with applicable law.

According to the petitioner, AVISMA repeatedly did not disclose information on its direct and indirect affiliations with its major shareholder, its partners, and officers pursuant to section 771(33) of the Act, despite the Department’s repeated instructions to submit this information and AVISMA’s extension requests for every section of the original and supplemental questionnaires. The petitioner asserts that AVISMA’s lack of cooperation left unanswered questions regarding AVISMA’s affiliation with home-market customers during the POR, resulting in the Department’s deadline extension for the Preliminary Results. The petitioner contends that AVISMA’s lack of cooperation followed by its withdrawal from the administrative review late in the process significantly impeded the review after considerable resources from both the Department and the petitioner had been spent.

The petitioner argues that AVISMA’s decision to withdraw its participation in the administrative review just weeks prior to the sales and cost verifications indicates AVISMA had knowledge that its 2007/08 review dumping margins would be less favorable than the AFA rate assigned to SMW in the 2006/07 review. Citing Kompass Food Trading Int’l v. United States, 24 C.I.T. 678, 683 (CIT 2000), the petitioner argues that AVISMA cannot use its own unresponsiveness to attempt to control the administrative process.

According to the petitioner, AVISMA’s lack of cooperation, late withdrawal, and efforts to impede the administrative review all demonstrate that the circumstances surrounding the Department’s decision to apply AFA to SMW in the 2006/07 review are qualitatively different than the circumstances that exist in the instant review. For example, according to the petitioner, SMW withdrew from the administrative process before the Department devoted considerable resources to the administrative review while AVISMA withdrew late in the administrative process where the Department had already devoted considerable resources.

The petitioner argues that applying an AFA rate of 21.71 percent to AVISMA would reward it for not cooperating with the Department because AVISMA knew that its weighted-average dumping margin from the instant review would have significantly exceeded the 21.71 percent rate had the Department been able to calculate a dumping margin using AVISMA’s data. The petitioner cites Mittal Steel Galati S.A. v. United States, 491 F. Supp. 2d 1273, 1277 (CIT 2003) (Mittal Steel), in which the CIT affirmed the Department’s selection of a 75.04 percent rate from twelve years earlier for a respondent following its withdrawal from participating in the administrative review. The petitioner argues that in Mittal Steel the CIT found that the respondent’s conduct in that case led the Department to infer that the respondent’s actual dumping rate was higher than the 48.90 percent rate preliminarily assigned by the Department. Thus, according to the petitioner, the CIT affirmed the Department’s decision to apply a higher AFA rate because the respondent in Mittal Steel withdrew all of its sales and cost information from the record after receiving a 48.90 percent margin in the preliminary results of that review.
The petitioner contends that AVISMA’s claim it withdrew from the proceeding due to the administrative burden is not credible because the majority of AVISMA’s work was complete when it withdrew. According to the petitioner, AVISMA withdrew in hope it would receive the rate of 21.71 percent assigned to SMW in the 2006/07 review.

The petitioner argues that the Department’s decision to apply the AFA rate in question is supported by judicial precedent where the Department may act with great discretion in selecting an AFA rate for an uncooperative respondent. Citing Ta Chen Stainless Steel Pipe, Inc. v United States, 298 F.3d 1330, 1338-1340 (CAFC 2004) (Ta Chen), the petitioner argues that the courts have provided the Department with discretion in selecting an AFA rate so long as the rate is based on actual sales data available, not overly punitive, and induces future cooperation. The petitioner contends that AVISMA was aware of the consequences of non-compliance and the Department’s use of a transaction-specific AFA rate is fair to AVISMA. The petitioner contends that 43.58 percent AFA rate selected for the Preliminary Results is lawful and deters future non-compliance in administrative reviews.

The petitioner disagrees with AVISMA’s assertion that the Department relies consistently on the highest weighted-average margin from previous segments rather than any previous highest transaction-specific margin. Citing section 776(b) of the Act, the petitioner argues that the Department has the discretion to rely on “information from the petition, the final determination, previous reviews, or any other information placed on the record.” Citing Branco Peres Citrus, S.A. v. United States, 173 F. Supp. 2d 1363, 1376 (CIT 2001) (Branco Peres), the petitioner argues that the Department’s use of the highest transaction-specific margin as the AFA rate is consistent with Department practice and supported by judicial precedent in situations where the highest weighted-average margin is insufficient to generate cooperation with future segments of a proceeding.

Citing Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10698 (March 9, 2007) (Shrimp from Ecuador), the petitioner argues that the Department has opted to assign an AFA rate based on the highest transaction-specific margin rather than a weighted-average margin in order to induce cooperative behavior from future respondents. Specifically, the petitioner argues that in Shrimp from Ecuador the Department concluded that the weighted-average rates calculated for respondents in previous segments of the proceeding as well as in the instant review of that case were not sufficiently high as to effectuate the purpose of the facts-available rule.

Citing Polyethylene Retail Carrier Bags From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 2511 (January 15, 2009), the petitioner argues that the Department has used the highest transaction-specific margin in partial-AFA situations. According to the petitioner, the Department has also used the highest CONNUM-specific dumping margin as an AFA rate when other available margins were not sufficiently high to induce cooperation.
The petitioner contends that the 43.58 percent AFA rate assigned to AVISMA by the Department should not be reduced as it was derived from AVISMA’s own sales data. The petitioner asserts that the 43.58 percent rate reflects the Department’s sound judgment of the necessary margin to deter non-cooperation and ensures AVISMA will not benefit from its non-cooperation.

The petitioner argues that, contrary to AVISMA’s characterization, Rhone Poulenc remains a seminal decision regarding the Department’s authority to respond to uncooperative respondents, illustrating that the main holding of Rhone Poulenc is adopted in the SAA and has been confirmed under the URAA by the CAFC and the CIT as demonstrated in Ta Chen, 298 F.3d at 1339.

In response to AVISMA’s claims that it should receive its margin from the investigation as the appropriate AFA rate in the instant review, the petitioner contends that the law infers that a respondent’s lack of cooperation results from knowledge that cooperation would result in a higher dumping margin than the highest previously calculated rate. Specifically, according to the petitioner, the dumping margin of 21.71 percent AVISMA seeks would allow it to benefit from its lack of cooperation. Citing the SAA, the petitioner argues that the Department should employ adverse inferences about missing information to ensure a non-cooperative party will not benefit from its own lack of cooperation with a rate more favorable than what it would have received had it cooperated.

Citing Mitsubishi Belting Ltd. v. United States, 21 C.I.T. 247, 249 (CIT 1997), the petitioner argues that the courts assume that, if a respondent possesses information demonstrating it is dumping at a lower rate than a higher prior rate, the respondent would submit this information to the Department. The petitioner contends that AVISMA’s public financial statements indicate that its higher production costs in the instant review would have led to higher margins for AVISMA which, according to the petitioner, is a primary reason AVISMA withdrew from the current administrative review.

The petitioner asserts that AVISMA’s claim that the Department, “according to its practice,” should apply an AFA rate of 21.71 percent for AVISMA is false. The petitioner argues that nothing in the statute, the SAA, or the Department’s practice prohibits the Department from calculating a new, higher AFA rate from a previously set rate and that establishing a higher AFA rate is necessary at times to ensure a party does not benefit from non-cooperation.

The petitioner contends that the 43.58 percent AFA rate is not aberrational. Contrary to AVISMA’s claims, the petitioner argues that the transaction in question is of a significant quantity. Moreover, the petitioner argues, AVISMA did not demonstrate how this sale can be viewed as abnormal strictly due to quantity. Citing Ta Chen, the petitioner argues that an AFA rate taken from a modest number of transactions does not make it unreliable. In addition, the petitioner asserts that, if AVISMA was concerned about the net price difference resulting from the per-pound freight discrepancy between the sale in question compared to other sales,
AVISMA could have set a higher gross price for the transaction to avoid having a higher dumping margin for the sale.

According to the petitioner, if AVISMA viewed the sale on which the Department relied to determine AFA as abnormal, AVISMA would have argued as such during the 2006/07 administrative review but it did not do so.

The petitioner disagrees with AVISMA’s claim that the 43.58 percent AFA margin is too high for this administrative review. The petitioner argues that the AFA rate is not only reasonable but proves to be too low when the 2006/07 review margins are calculated using the data available from AVISMA’s 2007/08 public information. For example, the petitioner contends, there was a seven-percent increase from the 2006/07 review period average exchange rate to the average exchange rate for the 2007/08 review period. The petitioner argues that, had 2007/08 period data been used in the calculations, the 43.58 percent AFA rate would prove to be too low. The petitioner argues further that, because of AVISMA’s production declines in 2007, per-unit costs increased. Using data from AVISMA’s annual financial report, the petitioner argues that its calculations indicate that a decline in volume leads to an increase of 26.41 percent in per-unit costs for 2007. Thus, according to the petitioner, when the 2006/07 review margins are adjusted for an increase in Ruble and cost-of-production values to the factual circumstances of the 2007/08 administrative review, the AFA rate of 43.58 percent is corroborated. The petitioner asserts that, as a result, the AFA rate of 43.58 is not punitive. Rather, the petitioner asserts, adjusting any of the 2006/07 administrative review margins for the factual circumstances of the 2007/08 administrative review demonstrates that the 43.58 percent is a reasonable estimate. Citing Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 66 FR 56272 (November 7, 2001), the petitioner argues that, in other antidumping duty proceedings, the Department has corroborated AFA rates using a respondent’s most recent financial statements following the respondent’s withdrawal from the proceeding.

In the event the Department finds it cannot use the margin of 43.58 percent as an AFA rate, the petitioner argues that the Department should find that applying the petition rate of 54.40 percent is corroborated by the record in the instant review.

Department’s Position: As we stated in the Preliminary Results, section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the administering authority, fails to provide such information by the deadlines for submission of the information and in the form or manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. We find that AVISMA’s actions in terminating its participation in the administrative review and requesting the removal of its business-proprietary information (BPI) from the administrative record constitute a refusal to provide information necessary to conduct the antidumping analysis pursuant to sections 776(a)(2)(A) and (B) of the Act. Moreover, AVISMA’s withdrawal
significantly impeded conduct of the administrative review. See section 776(a)(2)(C) of the Act. Therefore, we continue to find that we must base the margin for AVISMA on facts otherwise available pursuant to sections 776(a)(2)(A), (B), and (C) of the Act.

In applying the facts otherwise available, section 776(b) of the Act provides that, if the administering authority finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority, in reaching the applicable determination under this title the administering authority may use an inference adverse to the interests of that party in selecting from among the facts otherwise available. Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA at 870. Further, “affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.” See Antidumping Duties; Countervailing Duties, Final Rule, 62 FR 27296, 27340 (May 19, 1997).

As we found in the Preliminary Results, AVISMA’s request to return or destroy its BPI constitutes a refusal to participate in the administrative review and demonstrates that AVISMA failed to cooperate by not acting to the best of its ability to comply with our request for information. Therefore, pursuant to section 776(b) of the Act, we continue to find that, in selecting from among the facts otherwise available, an adverse inference is warranted.

Section 776(b) of the Act provides that the Department may use as AFA information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. When selecting an AFA rate from among the possible sources of information, the Department’s practice – consistent with statutory intent – has been to ensure that the margin is sufficiently adverse to induce respondents to provide the Department with complete and accurate information in a timely manner. See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65084 (November 7, 2006).

As we explained in the Preliminary Results, as total AFA we assigned to imports of subject merchandise produced and/or exported by AVISMA the rate of 43.58 percent which is the highest transaction-specific rate we calculated for AVISMA in the 2006/07 administrative review of the order. For the final results, we continue to find that this rate is sufficiently adverse to serve the purposes of section 776 of the Act and is appropriate, considering that this AFA rate is the highest calculated transaction-specific rate determined for AVISMA in this proceeding.

We disagree with AVISMA’s assertion that the 21.71 percent rate calculated in the less-than-fair-value investigation is sufficiently adverse and provides an incentive for AVISMA to cooperate in future segments of the proceeding. AVISMA’s cash-deposit rate for the period April 1, 2007, through September 10, 2007, was 21.71 percent. Further, AVISMA’s cash-deposit rate for the period September 11, 2007, through March 31, 2008, was zero percent. Thus, for five of the twelve months of the 2007/08 POR, AVISMA’s cash-deposit rate was 21.71 percent and, for seven of twelve months of the 2007/08 POR, AVISMA’s cash-deposit rate was zero. By definition, cash-deposit rates are applicable to subject merchandise that enters into the United States from the effective date forward and serve as payment of estimated duties owed on
subject merchandise imported into the United States on a prospective basis. Here, in this proceeding, we had instructed U.S. Customs and Border Protection (CBP) to collect a cash-deposit rate of 21.71 percent for AVISMA’s magnesium metal imports from the effective date of February 24, 2005, through September 10, 2007. Thus, subject merchandise produced or exported by AVISMA during the POR has been subject to a cash-deposit rate of 21.71 percent since the completion of the less-than-fair-value investigation up through the first five months of the 2007/08 POR.

Because AVISMA’s cash-deposit rate was 21.71 percent for entries during a portion of the 2007/08 POR, we find that using the same rate as an AFA rate would not be sufficient so as to encourage participation in future segments of this proceeding. As indicated above, after having a cash-deposit rate of 21.71 percent for a significant portion of the POR, AVISMA still did not act to the best of its ability in this segment of the proceeding. Thus, AVISMA’s actions indicate to the Department that adoption of 21.71 percent as an AFA rate would have no effect in inducing future cooperation on the part of AVISMA. We find that an AFA rate that is identical to the rate AVISMA would have paid on entries for five months of the POR in the absence of any request for review is insufficiently adverse to induce cooperation. As a result, the 21.71 percent rate advocated by AVISMA is not an appropriate AFA rate as it negates the purpose of an adverse inference proffered by section 776(b) of the Act by not providing ample incentive to cooperate in future administrative reviews. See F. Lii de Cecco, 216 F.3d at 1032 (“Commerce is in the best position, based on its expert knowledge of the market and individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin”); see also Ta Chen, 298 F.3d at 1338-1340.

Moreover, when a respondent is uncooperative, such as the case here with AVISMA, we find it appropriate to assume that, if AVISMA could have demonstrated that its dumping margin is lower than the highest prior calculated margin, it would have provided information showing the margin to be less. See Rhone Poulenc, 899 F.2d at 1190. Because the highest prior calculated margin in any segment of the proceeding was 21.71 percent, we find it reasonable to conclude that the actual margin for AVISMA in the instant review is greater than 21.71 percent.

We disagree with AVISMA’s assertion that our citation to Rhone Poulenc in the Preliminary Results is inapposite. Rhone Poulenc is applicable for the principle that the Department must assume that, if an uncooperative respondent could have demonstrated that its dumping margin is lower than the highest prior calculated margin, that respondent would have provided information showing the margin to be less. Thus, given that the highest prior weighted-average margin in any segment of the proceeding was 21.71 percent, Rhone Poulenc supports the Department’s permissible conclusion that AVISMA would have not withdrawn its information from the administrative record and complied with the Department’s requests for information if AVISMA thought its weighted-average margin in this review would have been lower than the 21.71 percent rate. The holding in Rhone Poulenc has been confirmed under the URAA by the CAFC and the CIT. See Ta Chen, 298 F.3d at 1339.

We disagree also with AVISMA’s assertion that the Lined Paper case is not on point in this case. The citation to Lined Paper is to illustrate that, even if the Department has developed a practice of using the highest weighted-average margin determined for any respondent in any
segment of the proceeding, the Department nonetheless has the discretion of using a transaction-specific margin of a company to establish AFA rates where it finds it to be appropriate under section 776(b) of the Act. Thus, contrary to AVISMA’s contention, Lined Paper is relevant to this case because it provides precedent, of which AVISMA is presumed to be aware, for use of a transaction-specific margin as an AFA rate. In conjunction with Shrimp from Ecuador, in which the Department selected the highest transaction-specific margin as an AFA rate in an administrative review, Lined Paper debunks AVISMA’s assertion that the Department has a practice of selecting, without exception, an appropriate AFA rate from previously established rates.

In addition, we disagree with AVISMA’s contention that, by selecting the highest transaction-specific rate on the record of this proceeding as AFA for AVISMA, we made a determination that is punitive or inconsistent with other Departmental determinations regarding the application of total AFA in administrative reviews. As we indicate above, the circumstances in this case warrant the use of a rate other than the 21.71 percent weighted-average rate as AFA. The CIT in Branco Peres affirmed the Department’s use of the highest transaction-specific dumping margin as a respondent’s AFA rate to ensure that the respondent does not obtain a more favorable rate by being uncooperative. Thus, rather than being in any way punitive, our decision to use the highest transaction-specific dumping margin as AFA is consistent with case precedent as indicated by Lined Paper and with the CIT’s decision in Branco Peres.

We disagree with AVISMA’s contention that we are somehow bound to make a similar AFA rate selection in the instant administrative review as we did in the AFA determination for SMW in the 2006/07 administrative review. Each administrative review is unique and stands on its own. In addition, there is nothing in the Department’s regulations, the SAA, or any court decision that indicates that the Department is bound by previous determinations in these circumstances. On the contrary, in United States Steel Corp. v. United States, Slip Op. 2009-74 at 30 (CIT July 20, 2009) (citing Nucor Corp. v. United States, 414 F.3d 1331, 1340 (CAFC 2005)), the CIT ruled that “each agency determination is sui generis, involving a unique combination and interaction of many variables, and therefore a prior administrative determination is not legally binding on other reviews before this court.” Unlike in the 2006/07 review, where SMW withdrew early in the review before the Department expended significant resources, AVISMA withdrew much later in the administrative process after a significant expenditure of agency resources. Therefore, the circumstances in this review are different than in the 2006/07 review and necessitate a different approach.

With respect to corroborating the AFA rate, section 776(c) of the Act provides that, when the Department relies on secondary information as facts available, it must corroborate, to the extent practicable, that information from independent sources that are reasonably at its disposal. The SAA clarifies that “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics, and customs data as well as information obtained from interested parties during the particular proceeding.
To corroborate secondary information, to the extent practicable, the Department must “examine whether the secondary information to be used has probative value.” See 19 CFR 351.308(d). Probative value means that the rate must be both reliable and relevant. See Ferro Union, 44 F. Supp. 2d at 1333. Because AVISMA removed its sales and cost information from the record of the instant review, we have no POR-specific company information on the record of this review to examine for corroboration purposes. Thus, we must corroborate the AFA rate of 43.58 percent to the extent practicable as directed by section 776(c) of the Act and 19 CFR 351.308(d). In this case, because the AFA rate of 43.58 percent is based on AVISMA’s questionnaire responses and accompanying data from the immediately preceding administrative review that are uncontradicted by any record evidence, we find that the rate is reliable and relevant for use in this administrative review and, therefore, it has probative value for use as AFA. As such, we find this rate to be corroborated to the extent practicable consistent with section 776(c) of the Act.

With respect to the petitioner’s corroboration rebuttal comments, we find that we could not rely on the petitioner’s analysis because the petitioner used AVISMA’s financial statement that was broad-based in terms of product cost reported and did not identify magnesium-specific costs. In addition, the petitioner assumed that the same cost-price relationship that existed in the 2006/07 administrative review also existed in the 2007/08 administrative review. Therefore, we do not find the petitioner’s analysis sufficiently reliable for purposes of further corroborating the AFA rate.

We disagree with AVISMA that the AFA rate of 43.58 percent is aberrational. We examined the record for the 2006/07 review and compared the sale with the 43.58 percent margin with other sales in the margin database. In so doing, we found that, when considering various categories of sales characteristics for comparison purposes (i.e., transactions with the lowest quantities, highest movement expenses, lowest gross unit prices, etc.), the sale transaction in question is not unusual or aberrational. Moreover, given that AVISMA has control of how it prices its merchandise to the United States and arranges its shipping of subject merchandise in the United States, it is clear that the sale in question is not unusual or aberrational. The record indicates that having sales transactions with a low quantity alone does not indicate that the sale is unusual or aberrational. In addition, the record indicates that having a sale with a high movement expense alone does not indicate that the sale is unusual. The reason that the sale in question has a margin of 43.58 percent is because AVISMA priced a low-quantity sale with a gross unit price that is one of the lowest sales prices AVISMA reported. After making the appropriate adjustments to the sale for various expenses incurred, the Department’s calculation in that review indicates that the sale was compared to a normal value that had a value that was much higher than the net U.S. price. Thus, the fact that the sales transaction yielding the margin we selected as the AFA rate in this review had a high margin compared to other sales is not due to the sale being unusual or aberrational but due to the fact that AVISMA simply dumped the sale at a higher rate than its other sales in that review.

Accordingly, after considering all these factors together, we find that there is nothing unusual or aberrational about the sale with the 43.58 percent margin. In considering the range of transaction-specific margins in the 2006/07 review calculations for AFA-rate selection purposes, we continue to find reliance on this transaction-specific margin appropriate for effectuating the
purpose of section 776(b) of the Act. Because our consideration of this issue requires analysis of BPI, we have discussed this issue in a separate business-proprietary memorandum. See Analysis Memorandum from Hermes Pinilla, International Trade Compliance Analyst, to the File, dated August 4, 2009.

For these reasons, we find that the AFA rate of 43.58 percent selected in the Preliminary Results did not result from an unusual or aberrational sale, is corroborated, is consistent with Department practice, and is sufficiently adverse to serve the purposes of AFA.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above position. If this recommendation is accepted, we will publish the final results of the review in the Federal Register.

Agree _________  Disagree _________

____________________
Ronald K. Lorentzen
Acting Assistant Secretary for Import Administration

____________________
Date