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December 26, 2013

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: Melissa G. Skinner
Director, Office III
Antidumping and Countervailing Duty Operations

CASE: Pure Magnesium from the People's Republic of China

SUBJECT: Issues and Decision Memorandum for the Final Results of the 2011–2012 Administrative Review

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SUMMARY

The Department of Commerce ("Department") has analyzed the comments submitted by both US Magnesium LLC ("Petitioner") and the respondent, Tianjin Magnesium Metal Co., Ltd. ("TMM" or "MMC"),[1] for the 2011–2012 administrative review of the antidumping duty *Order*[2] on pure magnesium from the People's Republic of China ("PRC"). Following the *Preliminary Results*

[1] Prior to the *Preliminary Results* (*see Pure Magnesium from the People's Republic of China: Preliminary Results of 2011–2012 Antidumping Duty Administrative Review*, 78 FR 34646 (June 10, 2013) ("*Preliminary Results*") and accompanying memorandum, entitled "Decision Memorandum for Preliminary Results of 2011–2012 Antidumping Duty Administrative Review: Pure Magnesium from the People's Republic of China, dated May 31, 2013 ("PDM")), TMM bracketed the identity of its affiliate, Tianjin Magnesium International Co., Ltd. ("TMI"), a respondent in prior reviews of this proceeding. In the *Preliminary Results*, the Department determined it was appropriate to collapse TMM and TMI into a single entity. *See* the May 31, 2013, memorandum to Christian Marsh entitled, "2011–2012 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China: Preliminary Affiliation and Collapsing Memorandum" ("Collapsing Memo"). Subsequent to the *Preliminary Results*, the Department requested that TMM publicly identify the name of its affiliate. *See* Letter from the Department to TMM entitled, "2011–2012 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China: Treatment of Certain Business Proprietary Information," dated June 6, 2013. On June 11, 2013, TMM complied with the Department's request to publicly disclose the identity of TMI as the affiliate in question. *See* Letter from TMM to the Department entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Response of Tianjin Magnesium Metal Co., Ltd. ("MMC") to the Department Letters of June 6, 2013 and June 10, 2013." Thus, the sole respondent in this review is the collapsed entity Tianjin Magnesium Metal Co., Ltd. and Tianjin Magnesium International Co., Ltd. ("TMM/TMI"), also referred to simply as "TMM" or by the respondent as "MMC."

[2] *See Notice of Antidumping Duty Orders: Pure Magnesium From the People's Republic of China, the Russian Federation and Ukraine*; *Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium From the Russian Federation*, 60 FR 25691 (May 12, 1995) ("*Order*").

and the analysis of the comments received, we have made changes to the margin calculations for these final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On June 10, 2013, the Department published its *Preliminary Results* of this administrative review. On July 15, 2013, both Petitioner and TMM submitted additional surrogate value ("SV") information,[3] as well as rebuttal SV information on July 25, 2013.[4] Both parties submitted case briefs on August 8, 2013.[5] Petitioner submitted its rebuttal brief on August 15, 2013.[6] TMM submitted its rebuttal brief on the same day; however, because this document contained new factual information, it was rejected from the record and properly resubmitted with the new factual information redacted on September 25, 2013.[7]

On August 26, 2013, the Department fully extended the time limit for completion of the final results of this administrative review.[8] In accordance with the timely request from both parties, the Department conducted a hearing on November 13, 2013.[9]

As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013.[10] Therefore, all

[3] *See* Letter from Petitioner entitled, "Pure Magnesium from the People's Republic of China: US Magnesium's Post–Preliminary Results Submission Concerning Valuation Of The Factors Of Production," dated July 15, 2013 ("Petitioner's Post–Prelim SV Submission") and Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Public Surrogate Value Information for the Final Results," dated July 15, 2013 ("TMM's Post–Prelim SV Submission").

[4] *See* Letter from Petitioner entitled, "Pure Magnesium from the People's Republic of China: US Magnesium's Post–Preliminary Results Rebuttal Factual Information Submission Concerning Valuation Of the Factors Of Production," dated July 25, 2013 ("Petitioner's Post–Prelim Rebuttal SV Submission") and Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Rebuttal Surrogate Value Information for the Final Results," dated July 25, 2013 ("TMM's Post–Prelim Rebuttal SV Submission").

[5] *See* Letter from Petitioner entitled, "Pure Magnesium from the People's Republic of China / Case Brief of US Magnesium," dated August 8, 2013 ("Petitioner's Case Brief") and Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Brief in Chief of Tianjin Magnesium Metal Co., Ltd.," dated August 8, 2013 ("TMM's Case Brief").

[6] *See* Letter from Petitioner entitled, "Pure Magnesium from the People's Republic of China / Rebuttal Brief of US Magnesium," dated August 15, 2013 ("Petitioner's Rebuttal Brief").

[7] *See* Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Resubmission of Rebuttal Brief of Tianjin Magnesium Metal Co., Ltd.," dated September 25, 2013 ("TMM's Rebuttal Brief").

[8] *See* Memorandum to Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, through Melissa Skinner, Director, Office 8, Antidumping and Countervailing Duty Operations, from Brendan Quinn, International Trade Compliance Analyst, Office 8, Antidumping and Countervailing Duty Operations, entitled, "2011–2012 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated August 26, 2013.

[9] *See* the Hearing Transcript, filed onto the record by Lisa Dennis Court Reporting on November 18, 2013.

[10] *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, entitled, "Deadlines Affected by the Shutdown of the Federal Government," dated October 18, 2013.

deadlines in this segment of the proceeding have been extended by 16 days. The revised deadline for the final results of this review is now December 26, 2013.

Below is the complete list of the issues for which we received comments and rebuttal comments from interested parties:

Comment 1: Surrogate Country
Comment 2: Surrogate Value for Input Magnesium Scrap
Comment 3: Surrogate Financial Statements
Comment 4: Whether Alleged Translation Errors and Omissions Warrant an Adverse Inference
Comment 5: Whether the Department Should Collapse TMM and TMI and therefore Assign a Single AD Rate to the Collapsed Entity
Comment 6: Whether to Identify the Collapsed Affiliate in Customs Instructions
Comment 7: Updating the PRC–Wide Rate

SCOPE OF THE ORDER

Merchandise covered by the order is pure magnesium regardless of chemistry, form or size, unless expressly excluded from the scope of the order. Pure magnesium is a metal or alloy containing by weight primarily the element magnesium and produced by decomposing raw materials into magnesium metal. Pure primary magnesium is used primarily as a chemical in the aluminum alloying, desulfurization, and chemical reduction industries. In addition, pure magnesium is used as an input in producing magnesium alloy. Pure magnesium encompasses products (including, but not limited to, butt ends, stubs, crowns and crystals) with the following primary magnesium contents:

> (1) Products that contain at least 99.95% primary magnesium, by weight (generally referred to as "ultra pure" magnesium);
> (2) Products that contain less than 99.95% but not less than 99.8% primary magnesium, by weight (generally referred to as "pure" magnesium); and
> (3) Products that contain 50% or greater, but less than 99.8% primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium (generally referred to as "off–specification pure" magnesium).

"Off–specification pure" magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8% by weight. It generally does not contain, individually or in combination, 1.5% or more, by weight, of the following alloying elements: aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths.
Excluded from the scope of the order are alloy primary magnesium (that meets specifications for alloy magnesium), primary magnesium anodes, granular primary magnesium (including turnings, chips and powder) having a maximum physical dimension (i.e., length or diameter) of one inch or less, secondary magnesium (which has pure primary magnesium content of less than 50% by weight), and remelted magnesium whose pure primary magnesium content is less than 50% by weight.

Pure magnesium products covered by the order are currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 8104.11.00, 8104.19.00, 8104.20.00, 8104.30.00, 8104.90.00, 3824.90.11, 3824.90.19 and 9817.00.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

DISCUSSION OF THE ISSUES

Comment 1: Surrogate Country

TMM's Arguments

- The Department should not continue to find the Philippines to be the primary surrogate country.
  - The Philippines does not provide a reliable surrogate value for the magnesium scrap primary input. (*See* Issue 2)
  - The Philippines is not a significant magnesium producer, nor is it a significant producer of comparable products, such as aluminum.
  - The two Philippine companies used to calculate surrogate financial ratios for the *Preliminary Results* do not produce comparable merchandise. (*See* Issue 3)
- Ukraine should instead be selected as the primary surrogate because it satisfies all six of the Department's surrogate country criteria.
  - Ukraine is within the per capita gross national income ("GNI") band of economic comparability to the PRC.
  - United States Geological Survey ("USGS") data shows that Ukraine is a producer of magnesium products. None of six the countries indicated on the Office of Policy's surrogate country list[11] are indigenous magnesium producers.
  - Sufficient Ukrainian surrogate value data and financial statements exist on the record.
- In the alternative, the Department should select India as the primary surrogate.

Petitioner's Rebuttal

- TMM does not support its claim that the Philippines is not a significant producer.
  - The Department's standard analysis confirmed it as a significant producer.
  - The Department does not judge the comparative significance of production, thus, TMM's argument that Philippine exports are only a small percentage of the exports from all potential surrogates is irrelevant.
  - TMM's use of a USGS quote stating that there is no Philippine production of magnesium is misleading, since – while the article does state that the Philippines is not a producer of primary magnesium – the quote goes on to state that it is a small producer of secondary magnesium.

[11] *See* Letter from the Department to Interested Parties, entitled, "2011–2012 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China: Request for Comments on the Selection of a Surrogate Country and Surrogate Values," dated November 7, 2012, containing the Department's internal memorandum from Eugene Degnan to Carole Showers, entitled, "Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Pure Magnesium ("PM") from the People's Republic of China ("China")," dated November 2, 2012 ("Surrogate Country List and Request for Comment").

  - o The Philippines is a significant aluminum producer, long considered comparable to magnesium production for the purposes of this case. TMM's claims to the contrary are simply false.
- TMM's argument that the Department should instead select Ukraine is counter to clear Department policy preventing untimely surrogate country argument.
  - o Ukraine was not identified on the Office of Policy's list of potential surrogates.
  - o Ukraine was not proposed as a potential surrogate until the briefing stage of the instant review, and Ukrainian SV information was not submitted until after the *Preliminary Results*; thus, the information and argument supporting Ukraine was submitted over eight months after the initial deadline for comment on surrogate country selection.
  - o TMM did not request that the record be reopened for further consideration of the surrogate country subsequent to the initial deadline for comment, nor did TMM request the consideration of Ukraine in the alternative at any time prior to the briefing stage of the review.
  - o Consistent with determinations in the recent *Garlic/PRC 09–10* (June 11, 2012) and *Fish Fillets/Vietnam 11–12* (July 2, 2013)[12] proceedings, TMM's request to use Ukraine as the primary surrogate should be rejected as untimely.
  - o TMM's argument uses a GNI dataset that was not available at the time of surrogate country selection and was not used to determine the Office of Policy's list of potential surrogates.
- Information from the only known Ukrainian importer of magnesium scrap demonstrates that the purity level of magnesium scrap imports ranged between 60–85 percent during the period of review ("POR"), much lower than the purity level of input in question (and, thus, much lower in value). As such, the Ukrainian data that would be used to value the primary input would be unrepresentative on this input (*i.e.*, highly pure die–cast and extrusion scrap).
- Neither Ukrainian financial statement is acceptable for use in determining surrogate ratios, as the one contains a qualified auditor's opinion, and both statements indicate that the comparable production operations of each company represent an insignificant amount of said company's total production.
- TMM failed to submit Ukrainian SVs for three inputs, provided non–contemporaneous information for another three, and proposed an inappropriate labor rate derived from wage data from the non–comparable Ukrainian motor vehicle industry. As such, there is insufficient Ukrainian surrogate data on the record.
- As discussed in the *Preliminary Results*, India is not an appropriate surrogate country.

Department's Position: The Department determines that the Philippines is the appropriate primary surrogate country after considering the facts and arguments on the record of this review. Based upon our examination, TMM has not demonstrated that the selection of the Philippines is inappropriate, or that Ukraine represents a more suitable alternative primary surrogate. In the *Preliminary Results*, the Department found that the Philippines is the appropriate surrogate country based on the fact that: (1) the Philippines is at a level of economic development comparable to that of the PRC; (2) the Philippines is a significant producer of comparable

[12] *Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order*, 77 FR 34346 (June 11, 2012) ("*Garlic/PRC 09–10*") at Comment 1; and *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty New Shipper Reviews; 2011–2012*, 78 FR 39708 (July 2, 2013) ("*Fish Fillets/Vietnam 11–12*") at Comment 1.

merchandise; (3) the Philippines has the best quality data available for valuing magnesium scrap, the most significant input into the subject merchandise; and (4) and the Philippines is the sole country with contemporaneous SV data for all inputs and surrogate financial statements for producers of comparable merchandise.[13] The record continues to support the use of the Philippines as the primary surrogate country.

First, with respect to TMM's argument that the Philippines is not a significant producer of magnesium, we addressed this issue in the PDM, where we articulated the Department's policy that, "if identical merchandise is not produced {by any country identified as a potential surrogate on the Office of Policy's list}, then a country producing comparable merchandise is sufficient in selecting a surrogate country."[14] We further found that "both Petitioner and TMM each state that they were unable to find evidence of indigenous magnesium producers in any of the potential surrogate countries, export data on the record shows that all of the potential surrogate countries identified in the Surrogate Country List have significant exports of comparable merchandise, as defined by the Harmonized Tariff Schedule ("HTS") subheadings listed in the scope of the *Order*."[15] As discussed below, and plainly laid out for the *Preliminary Results*, the Philippines is a significant producer of comparable merchandise, and neither the record evidence nor the analysis supporting this finding have been challenged for the final results.

TMM's case brief recognizes the Department's stated practice of looking to production of comparable merchandise in establishing whether a potential surrogate is a significant producer,[16] yet the remainder of TMM's argument on this issue then focuses on the fact that the Philippines is not a significant producer of identical magnesium, concluding, "in light of the post preliminary results record showing industry–wide recognition that the Philippines is not a primary magnesium producer and the small amount of Philippines exports that, at best, represent only a tiny amount of product processed from imported magnesium, the Department's final determination should change."[17] As such, TMM appears to acknowledge, but ignore, the Department's standard practice. TMM then advances a different standard to which it believes the Department must comply. However, TMM provides no precedent or further argument to support its assertion that the Department must abandon the selected primary surrogate due to the lack of production of identical merchandise. Rather, the stated policy outlined in the *Policy Bulletin*, as supported by case precedent, confirms the suitability of selecting a primary surrogate based on comparable production. Ironically, for the *Preliminary Results*, TMM advocated that Thai and South African values be used to value factors of production ("FOPs"),[18] even though the record does not confirm that either country produced identical magnesium products.

[13] *See* PDM at 12. *See also* Memorandum to the File through Eugene Degnan, Program Manager, AD/CVD Operations, Office 8, from Andrew Medley, International Trade Compliance Analyst, entitled, "2011–2012 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China: Preliminary Results Surrogate Value Memorandum," dated May 31, 2013 ("Preliminary SV Memorandum").

[14] *See* PDM at 10, *citing to* Import Administration Policy Bulletin 04.1: Non–Market Economy Surrogate Country Selection Process (March 1, 2004) ("*Policy Bulletin*").

[15] *See* PDM at 11, *citing to* Preliminary SV Memorandum.

[16] *See* TMM's Case Brief at 5, which cites the *Policy Bulletin*'s statement with respect to the sufficiency of comparable production.

[17] *See* TMM's Case Brief at 6–7.

[18] *See* Letter from TMM, entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Surrogate–Value Information Submission by Tianjin Magnesium Metal Co., Ltd.," dated December 7, 2012

The Department's *Policy Bulletin* states that "in all cases, if identical merchandise is produced, the country qualifies as a producer of comparable merchandise,"[19] and the Department may ultimately prefer a potential surrogate shown to produce identical merchandise over one with production of only comparable merchandise, based on the specifics of a given case. However, the production of identical merchandise is not an exclusive or determinative factor to the surrogate country selection process where production of comparable merchandise is present, given the specific reference to the term "comparable merchandise" in section 773(c)(4)(B) of the Act in determining whether a market economy country is a significant producer for purposes of surrogate country selection. Based upon the language of the provision, the *Policy Bulletin* states that "if considering a producer of identical merchandise leads to data difficulties, the operations team may consider countries that produce a broader category of reasonably comparable merchandise."[20] In determining whether a potential surrogate country qualifies as a significant producer, the Department has a well–established practice of evaluating export data for the HTS categories listed in the scope of the *Order* for the countries identified as economically comparable potential surrogates by the Office of Policy list. The Department followed this practice in the *Preliminary Results* of the instant case, and found the Philippines to be a significant producer of the merchandise listed in the scope of the order.[21] TMM provides no argument against or objection to this methodology, nor does TMM argue that the Department's analysis of the comparability of production for the *Preliminary Results* was erroneous. TMM's only objection appears to be that this analysis does not demonstrate the Philippines to be a significant producer of identical magnesium product; however, an exclusionary standard based strictly on production of identical merchandise is not rooted in any Department precedent or practice, nor is it contrary to section 773(c)(4)(B) of the Act.

While TMM's assertion that the Philippines does not produce identical merchandise is excursive and, ultimately, not supported by the record;[22] we find that TMM's claim that "there is also no

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("TMM's Initial SV Submission"). TMM did not further argue in support of the selection of Thailand or South Africa as the primary surrogate country for the final results.

[19] *See Policy Bulletin* at 2.

[20] *See Policy Bulletin* at 6.

[21] *See* Preliminary SV Memorandum at 3. Moreover, as Petitioner argued and the Department agreed from the purposes of the *Preliminary Results*, the secondary pure–magnesium production process at issue in the instant review is analogous to aluminum extrusion production (which involves a comparable type of smelting process), and that the comparability of aluminum extrusion production to secondary magnesium production is supported by the Department's determinations in *Magnesium Metal from the People's Republic of China*, 75 FR 65450 (October 25, 2010) ("*Magnesium Metal/PRC*") and *Pure Magnesium from the People's Republic of China*, 75 FR 80791 (December 23, 2011) ("*Pure Magnesium/PRC*") at Comment 2. *See* Letter from Petitioner, entitled, "Administrative Review Of The Antidumping Duty Order On Pure Magnesium From The People's Republic of China: Petitioner's Comments On Surrogate Country Selection," dated November 21, 2012 ("Petitioner's SV Comments") and PDM at 20-21 (footnote 97). Petitioner's Post–Prelim SV Submission at Exhibit 3 demonstrates the Philippines to be a significant exporter of aluminum. As such, the record demonstrates that the Philippines is a significant producer of comparable merchandise as listed in the scope of the *Order*, and a significant producer of comparable aluminum merchandise found to be analogous to magnesium production based on past precedent in this case.

[22] As noted by Petitioner, the very sentence from the *Platt's Metals Daily* document cited by TMM as proof that the Philippines is not a producer of identical merchandise (*i.e.*¸ "the Philippines is not known to have any primary magnesium production…") concludes "… and is a small producer of secondary magnesium." *See* TMM's Case Brief at Exhibit 1. Secondary magnesium, as opposed to the primary magnesium products considered in prior

evidence in the record showing that the Philippines is a significant producer of comparable products, such as aluminum,"[23] is not supported by and, in fact, is contradicted by the evidence on the record. The *Preliminary Results*, PDM, and Preliminary SV Memorandum (and Petitioner's submission with respect to aluminum production) each provide sufficient evidence to establish the Philippines as a significant producer of comparable merchandise based upon the Department's standard analysis, as discussed above. TMM provides no evidence to refute this finding and provides no further references, citations, or argument on this issue. Thus, the Department's preliminary finding remains unchallenged for the final results, and we continue to find the Philippines to be a significant producer of comparable merchandise.

TMM further claims that the Philippines is an inappropriate primary surrogate country because the two Philippine financial statements used to calculate surrogate financial ratios for the *Preliminary Results* are from companies which do not produce comparable merchandise, and the Philippine value used to value the primary input for the *Preliminary Results* does not represent a reasonable surrogate value.[24] With respect to TMM's first point, we have evaluated the Philippine financial statements used for the *Preliminary Results* and agree that one of the two statements should not be used in the calculation of surrogate financial ratios.[25] However, we disagree with TMM that the other statement used in the *Preliminary Results* represents production of non–comparable merchandise and continue to find that the SOH Technologies Corp. statement is an appropriate source from which to calculate surrogate financial ratios.[26] Moreover, upon evaluation of several Philippine financial statements submitted by TMM subsequent to the *Preliminary Results* (for use in the alternative, should the Department continue to select the Philippines as the primary surrogate) we have also found that the New Anchor Foundry Shop Co. ("New Anchor") financial statement is appropriate for use in the surrogate financial ratio calculation as New Anchor is demonstrated to be a producer of comparable merchandise.[27] As such, contrary to TMM's assertion, the Philippines continues to provide two usable, comparable, financial statements from which to derive surrogate financial ratios.[28] Comment 3, below, provides a full discussion and evaluation of the surrogate financial ratio issues.

As to TMM's concerns with respect to the reasonability of the price of the Philippine value used as the surrogate to value the primary input, we agree, and we have re–evaluated the SV used to value magnesium scrap, as appropriate.[29] Nevertheless, we do not find that questions with respect to the viability of a single SV to be sufficient to compel the Department to change its determination with respect to the surrogate country, particularly when the selected primary

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reviews of this proceeding, is the exact product under consideration in the instant review. As such, though the article does not indicate the amount of secondary magnesium produced in the Philippines, the record demonstrates that the Philippines is a producer of identical products, a significant producer of comparable products listed in the scope of the order, and a significant producer of comparable aluminum products. TMM does not dispute any of these facts, yet, confoundingly, still claims that there is no evidence of comparable production.

[23] *See* TMM's Case Brief at 7.

[24] *See id.*, at 8–18 and 21–23.

[25] *See* Comment 3, below.

[26] *See id.*

[27] *See id.*

[28] *See id.* TMM's proposed alternative primary surrogate, Ukraine, provides only one usable statement.

[29] *See* Comment 2, below.

surrogate satisfies all aspects of the surrogate country selection criteria, as discussed above, and no other significant data availability concerns are identified. Instead, the Department has taken the more reasonable approach of evaluating options with respect to the specific SV, as we have done in the instant determination at Comment 2. With respect to the data availability for the remaining surrogate values, we note that the Philippines provides complete contemporaneous information for all other FOPs, and is particularly desirable when compared to TMM's proposed alternative of Ukraine (which is either missing data or offers non–contemporaneous data for six factors and does not provide a comparable surrogate value for labor).

Furthermore, we note that – even disregarding the suitability of the Philippines, discussed above, and the timing issues with respect to TMM's arguments on Ukraine, discussed below – certain data availability factors suggest Ukraine would not represent the best available primary surrogate country. Although the record demonstrates that Ukraine ($3,120 GNI per capita) is within the band of countries considered to be at a level of economic development comparable to the PRC and TMM demonstrates that Ukraine is a producer of identical and comparable merchandise,[30] Ukraine does not provide a full set of data from which to value FOPs . As noted by Petitioner in its rebuttal brief at 37, and confirmed by the Department, TMM's proposed Ukrainian labor rate is for the non-comparable motor vehicle industry and lacks source documents.[31] It is also unclear to which time period the labor rate applies and, thus, the Department would be unable to apply the appropriate inflator or deflator. Conversely, the Philippine wage rate used for the *Preliminary Results* is for the comparable "Manufacture of Basic Metals" from 2008 and has been inflated to be contemporaneous with the POR.[32] Additionally, the Ukrainian electricity SV proposed by TMM is not contemporaneous and is missing source documentation; the truck freight SV is missing source documentation; and the brokerage and handling SV is missing source documentation and covers an uncertain time period.[33] As such, on the whole, we note that the surrogate value information for the Philippines is more specific, more contemporaneous, and more complete than the surrogate value information for Ukraine. Moreover, the selection of Ukraine would result in just one usable financial statement.[34] Thus, though TMM emphasizes the importance of Ukraine as an identical producer, the *Policy Bulletin* instructs the Department that "if considering a producer of identical merchandise leads to data difficulties, the operations team may consider countries that produce a broader category of reasonably comparable merchandise." Indeed, the Philippine data is reasonably comparable and contains no such data difficulties.

With respect to TMM's request that the Department use India in the alternative, the Department addressed this issue for the *Preliminary Results*.[35] Because TMM offers no new evidence or

[30] *See* TMM's Case Brief at 25, *citing to* TMM's Post–Prelim Rebuttal SV Submission at Exhibits 2 and 3. While we accept that Ukraine is a producer of magnesium based on the information provided by TMM, as an experienced respondent, it remains unclear why TMM did not simply provide the Ukrainian export data used in the Department's standard analysis for identical and comparable production.

[31] *See* TMM's Post-Prelim SV Submission at Exhibit SVF-3.

[32] *See* Preliminary SV Memorandum.

[33] *See* TMM's Post-Prelim SV Submission at Exhibit SVF-3. However, Petitioner's claims that TMM did not submit complete Ukrainian data to value magnesium chloride, potassium chloride, and salt are unfounded, as this information is included in TMM's Post-Prelim SV Submission at Exhibit SVF-3(b).

[34] *See* Comment 3, below.

[35] *See* PDM at 11-12.

argument in support of this request, we incorporate by reference the Department's reasoning set forth in the *Preliminary Results*.[36]

Finally, we agree with Petitioner that recent case precedent further supports the Petitioner's arguments against considering Ukraine as the primary surrogate country. Specifically, in *Garlic/PRC 09–10* (June 11, 2012) at Comment 1 (and echoed in *Fish Fillets/Vietnam 11–12* (July 2, 2013)), we found that:

> The Department provided the parties to this proceeding with more than sufficient time to submit any information related to the potential {surrogate countries} for this administrative review. Yet, the Department notes that, at no time during the {surrogate country} comment period in this review, did any party, including {the respondent}, submit any new information or in any way contest the {Office of Policy's list of potential surrogate countries}. In accordance with its regulations and practice, the Department identified potential surrogate countries based on the information available to it at the time. Specifically, the {Office of Policy's list of potential surrogate countries} used the most up–to–date information available at the time to identify the six economically–comparable countries on the list… {I}t is important for the Department to determine the list of potential {surrogate countries} early in the case in order to provide sufficient time for party participation and the necessary analysis. This list represents the best information available to the Department at the time it was issued. Revising the list of {surrogate countries} at a later date would be potentially unfair to the parties and create undue administrative difficulties.

We reiterate the importance of determining the list of potential surrogate countries early in the case in order to provide sufficient time for party participation and necessary analysis. The Department provided parties ample time to comment on any shortcomings with respect to the list of potential surrogates and/or suggest additions to the list of economically comparable countries prior to the *Preliminary Results*. TMM did timely indicate that no one country may be adequate to value FOPs for the instant review and that data from multiple potential surrogates from the Office of Policy list might be used to derive SVs, and further suggested the viability of India as a potential surrogate, although India was not listed (and not within the GNI band of economic comparability).[37] However, TMM did not propose alternatives to the countries included on the existing list or advocate Ukraine as a viable alternative until the briefing stage of this review[38]; well after the established deadline for comment on the surrogate country list. Because the record remained open to the submission of alternate surrogate value information subsequent to the *Preliminary Results*, the submission of Ukrainian FOP data itself was not untimely or inappropriate. However, we agree with Petitioner that the consideration of Ukraine as a potential surrogate country for the first time at the briefing stage of the instant review, is exactly the type of scenario considered in *Garlic/PRC 09–10* (June 11, 2012) and found to "create undue administrative difficulties" and be "potentially unfair to the parties."

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[36] *Id.*

[37] *See* TMM's Initial SV Submission.

[38] TMM provided Ukrainian SV data in its post-preliminary SV submission. However, this information was not accompanied by argument and only in TMM's Case Brief was argument in support of Ukraine as the primary surrogate country first forwarded.

Comment 2: Surrogate Value for Input Magnesium Scrap

TMM's Arguments

- The Philippine import data for magnesium scrap used for the *Preliminary Results* is unreasonable and should not be used to value the primary input for the final results.
  - The Philippine import data (consisting only of sales from the United States), are not corroborated by corresponding U.S export data.
  - The Philippine data consist of just two sales totaling just over two metric tons, a commercially insignificant quantity that is not a reliable basis from which to value the primary input. A recent *PET Film/China* (September 24, 2008)[39] determination supports rejecting data where the SV's quantity of imports is of such an insignificant quantity that it does not reflect the respondent's experience.
  - The average unit value ("AUV") for Philippine magnesium scrap inputs is significantly higher than other scrap price benchmarks on the record as well as prices for finished magnesium products (which should necessarily be valued higher than their scrap byproducts). As such, the Philippine data are aberrational and should not be used to value the primary magnesium scrap input.
- The Department should instead value magnesium scrap inputs using Ukrainian import data for HTS 8104.20 ($1.67 U.S. Dollars ("USD") per kilogram ("Kg")) in concert with a determination to switch to Ukraine as the primary surrogate country (*see* Issue 1).
- Should the Department continue to use the Philippines as the primary surrogate country, the magnesium scrap SV should be based on either:
  - A broad market average price combining the import data for HTS 8104.20 from 8 economically comparable countries, or
  - *Recycler's Exchange* data for magnesium scrap.
- Indian import data for HTS 8104.20 are an acceptable alternative magnesium scrap SV source.

Petitioner's Rebuttal

- Philippine price data for imports of HTS 8104.20 remain the best available information from which to value TMM's scrap inputs.
  - The Department does not rely on export statistics to corroborate import statistics.
  - The AUV for Philippine imports of HTS 8104.20 has remained steady over a 5–year period, and this consistency cannot be considered aberrational.
  - The amount of Philippine imports is commercially significant based on TMM's own comments with respect to the *Bona Fide* sales quantity of the sole POR sale from the *Preliminary Results* and the instant quantities are dissimilar from the situation discussed in the *PET Film/PRC* (September 24, 2008) case cited by TMM.
- The record does not show that the Philippine value is aberrational.
  - TMM does not provide appropriate benchmarks for comparison and instead relies on countries not included on the Office of Policy's list of potential surrogate countries.
  - TMM argues that a scrap SV price higher than average prices for finished primary and secondary Magnesium on the record is contrary to common sense. However, the price data

[39] *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039 (September 24, 2008) ("*PET Film/PRC*") at Comment 1.

on the record demonstrates that Magnesium pricing is not rigid and the quality of Magnesium products within various HTS categories can vary widely.
   - Certain price data on the record supports the Philippine SV's AUV.
- TMM's suggestion to use an average price based on multiple sources in the alternative to the Philippine value is unprecedented and should be rejected. Moreover, all of the data points in this average are from unusable sources or non–economically comparable countries.
- The *Recyclers' Exchange* data provided by TMM contains major flaws, as it does not reflect transaction prices, is not specific to the scrap input in question, and cannot be verified as authentic.

Department's Position: In the *Preliminary Results*, the Department valued the primary input, magnesium scrap, with Philippine price data for imports of HTS 8104.20 ("Magnesium Waste and Scrap") as obtained from Global Trade Atlas ("GTA"), at an AUV of $8.64 USD/Kg. For the final results, we find that the continued use of the Philippine SV would yield an unreasonable result, on the grounds that the record demonstrates the Philippine scrap value is higher than all benchmark magnesium prices for finished secondary magnesium from potential surrogate countries (*i.e.*, the output of production/subject merchandise in the instant case). As the Philippine SV price exceeds all price benchmarks on record for the output of production (and, indeed, all price information on record for <u>any</u> type of magnesium), Philippine price data for imports under HTS 8104.20 do not represent the best available information upon which to value TMM's magnesium scrap input.

When selecting surrogate values with which to value the factors of production used to produce subject merchandise, the Department is directed to use the "best available information" on the record.[40] When selecting SVs for use in a non–market economy ("NME") proceeding, the Department's preference is to use, where possible, a range of publicly available, non–export, tax–exclusive, and product–specific prices for the POR, with each of these factors applied non–hierarchically to the particular case–specific facts and with preference for data from a single surrogate country.[41] Additionally, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case–by–case basis.[42] As there is no hierarchy for applying the above–mentioned principles, the Department must weigh available information with respect to each input value and make a product–specific and case–specific decision as to what the "best" available surrogate value is for each input.[43]

When a party claims that a particular surrogate is not appropriate to value the FOP in question, the Department has determined that the burden is on that party to prove the inadequacy of said

[40] *See* Section 773(c)(1)(B) of the Tariff Act of 1930, as amended (the "Act").

[41] *See, e.g.*, *Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 12651 (March 15, 2005) at Comment 3 and *Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) at Comment 4*; see also* 19 CFR 351.408(c)(2).

[42] *See, e.g.*, *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) ("*Mushrooms/PRC*") at Comment 1.

[43] *See id.*

SV or, alternatively, to show that another value is preferable.[44] In this case, we find that TMM presents a "colorable claim,"[45] that the relatively high AUV of Philippine import data in comparison to benchmark data illustrating the import price for unwrought magnesium (*i.e.*, the finished output product in this proceeding), demonstrates that the use of the Philippine price is unreasonable for use in valuing TMM's magnesium scrap inputs, as discussed below. However, with respect to TMM's contention that the quantity of the Philippine SV in question is commercially insignificant and unsupported by corresponding export data, we have addressed this issue in the *Preliminary Results*,[46] and reiterate that the Department has consistently found that small quantities alone are not inherently distortive[47] and export data are not reliable for the purposes of establishing the legitimacy of import data.[48]

Price of Input Scrap Relative to the Output

TMM notes that use of the Philippine SV leads to an inappropriate result since the input scrap FOP costs more than any benchmark price on record for the output product.[49] Indeed, recent case precedent supports the practice of rejecting and/or capping a scrap SV when it is of a higher price than the SV for the input which created the scrap byproduct in question. In *MLWF/PRC*[50] (October 18, 2011), the Department states:

> For purposes of this final determination, the Department has valued Layo Wood's byproducts using a simple average of the surrogate values for Layo Wood's wood veneer and wood core inputs… As explained in *Steel Nails* and argued by Petitioner, the Department has found in past cases that it may disregard a surrogate value when it is clear that the selection of that surrogate value would yield an unreasonable result. The facts of this case closely match those of *Steel Nails*, in that the AUV of Philippine HTS

[44] See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987 (January 22, 2009) at Comment 6; *Laminated Woven Sacks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 35646 (June 24, 2008) at Comment 2; *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review*, 73 FR 14216 (March 17, 2008) ("*Carrier Bags/PRC*") at Comment 6; and *Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 FR 60980 (October 14, 2004) at Comment 3.

[45] *See, e.g.*, *Mittal Steel Galati S.A. v. United States*, 502 F. Supp. 2d 1295, 1308 (CIT 2007).

[46] *See* PDM at 12. *See also* Preliminary SV Memorandum. TMM provides no further case precedent or record evidence in support of its argument.

[47] *See, e.g.*, *Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results of Administrative Review; 2011-2012*, 78 FR 56209 (September 12, 2013) at Comment 4, *Fish Fillets/Vietnam 11–12* (July 2, 2013) at Comment 4, and *Mushrooms/PRC* (July 17, 2006) at Comment 1.

[48] *See, e.g.*, *Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008) at Comment 9, stating: "we do not normally consider export statistics from the relevant exporting country reliable for purposes of evaluating the legitimacy of the corresponding import values into the importing country. Given differing reporting and inspection requirements and timing considerations, it would be unrealistic to expect export statistics to match perfectly import statistics for any given shipment of merchandise."

[49] *See* TMM's Case Brief at 16-17, *citing Baroque Timber Industries (Zhongshan) Co. v. United States*, Slip Op. 13-96 at 24 (Ct.Int'l Trade 2013).

[50] *See Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (Tuesday, October 18, 2011) ("*MLWF/PRC*") at Comment 24.

> 4401.30 {*i.e.*, the scrap by–product} would be higher than the surrogate values used for Layo Wood's log, veneer and core inputs {*i.e.*, the inputs from which the scrap by–product is produced}. All parties, including the Petitioner, acknowledge that HTS 4401.30 offers the most specific description of Layo Wood's byproducts. While we agree that the HTS description provided by Philippine HTS 4401.30 includes the terms "sawdust" and "scrap," the HTS description is not the only relevant factor for the Department to consider. In this case, as was the case in Steel Nails, we find that the valuation of a scrap byproduct with a surrogate value higher than the substantive inputs into that scrap product would produce an unreasonable result not explained by the record. Consequently, we have valued Layo Wood's byproducts using a simple average of the surrogate values for Layo Wood's wood veneer and wood core inputs.[51]

In the underlying *Steel Nails/PRC* (June 16, 2008)[52] determination, the Department found that:

> In the Final Determination Pursuant To The Remand Order From The U.S. Court Of International Trade In Paslode Division of Illinois Tool Works, Inc. v. United States, Ct. No. 9712–02161 (Jan. 15, 1999), the Department stated that "It is clear that our steel scrap value selection produced an unreasonable result – a value for steel wire rod scrap (0.8390 USD/kg) that exceeded the price for steel wire rod (0.3119 USD/kg) – one that cannot be explained by any notes or data..." We find that in this case, the facts match this situation closely in that one of the suggested HTS categories for the valuation of steel scrap (7204.41.00) has a value greater than the value the Department determined in Comment 10 above. While we acknowledge that HTS category 7204.41.00 includes an explicit reference to "shavings" and that "shavings" were clearly identified as among the types of scrap generated by respondents, the HTS description is is {sic} not the only relevant factor for the Department to consider in valuing steel scrap. As discussed above, reliance on this value will produce an unreasonable result. Therefore, we are using only HTS category 7204.49.00 to value steel scrap.

We note that there are several differences between the above–referenced cases and the facts of the instant proceeding. First, in each prior case, the higher scrap SV in question was used to value a byproduct offset, not an input scrap value as in the instant case. However, because the central premise underlying the prior determinations is that scrap should not be priced in excess of the value of the product from which it is derived, we do not find the instant circumstance to be incongruous with these prior determinations.[53] Second, in *Steel Nails/PRC* (June 16, 2008),

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[51] *Id.* (explanations added). *See also, Fish Fillets/Vietnam 11–12* (July 2, 2013) at comment VI.B, stating that the Department finds it unreasonable that the surrogate value for fish oil byproducts (derived from whole fish) would be higher than their main input (*i.e*., whole fish). Whereas the "unreasonable" SV was still used to value fish oil, because it was input specific, the fish oil SV was capped at the price of the SV for the whole fish input product. *See also* C*ertain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 FR 15039 (March 14, 2012) (*Fish Fillets/Vietnam 10–11*) at Comment II.B.3, where the Department capped broken fillet by-products at the value for whole live fish because broken fillets were not a value-added byproduct.

[52] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008) ("*Steel Nails/PRC*") at Comment 12.

[53] The scrap is made from die castings and extrusions of alloy magnesium. *See*, Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A-570-832; Response of Tianjin Magnesium Metal Co.,

MLWF/PRC (October 18, 2011), and each of the *Fish Fillets/Vietnam* determinations, the impetus for rejecting or capping the byproduct SV was the existence of a lower–value SV for the direct input product on record (generally import data from the same primary surrogate country and sourced from the same GTA database as the byproduct SV). In the instant case, there is no SV for the output product on the record to prompt this comparison and, even if it were necessary, the Philippines did not have any imports of secondary magnesium under HTS 8401.19 (*i.e.*, the appropriate six–digit HTS subcategory for the output subject merchandise) during the POR. Regardless, the primary concern of, *e.g.*, *Steel Nails/PRC* (June 16, 2008), is to prevent the use of a scrap surrogate value when it is clear that the selection of that scrap surrogate value would yield an unreasonable result based on information with respect to the value of the material from which the scrap is derived. In this case, the scrap input in question is initially made of secondary magnesium as specified under HTS subcategory 8104.19 ("Magnesium, Containing Under 99.8% Magnesium By Weight, Unwrought") and is ultimately smelted into, the subject merchandise, ingots of secondary magnesium as also classified under HTS 8104.19. Thus, we agree with TMM that the scrap input value should not exceed the price of finished magnesium ingots; products which should, reasonably, command higher (or, at least, very similar) prices than the scrap from which they are derived based on the specific circumstances of this case. Moreover, since Philippine prices for output magnesium are not available, we find that the use of benchmark data supports the position that the Philippine input scrap SV would produce an unreasonable result.

Comparing the Philippine SV to Benchmark Data

As it is the Department's preference to benchmark to values from countries determined to be potential surrogates,[54] we have evaluated the contemporaneous import prices for secondary magnesium (HTS 8104.19), the subject merchandise in the instant review, from the potential surrogate countries identified on the Office of Policy's list. The analysis demonstrates that the Philippine scrap SV used to value the primary input for the *Preliminary Results* exceeds all of the available benchmark values on record (from Indonesia, South Africa, Thailand, and Colombia[55]) for the secondary magnesium (*i.e.*, the resulting output of production and input

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Ltd. to the Sections C & D Supplemental Questionnaire," dated January 28, 2013 ("TMM's SSCDQR") at 7. As stated in TMM's SSCDQR at 3-4, "When magnesium {of a certain quality} is used to produce die casting parts, during production there will be generated magnesium… scrap {of the same quality}. When producing magnesium extrusions with magnesium {of a certain quality}, magnesium {of the same quality} scrap is produced. If the magnesium scrap is sorted manually, using the sorted out magnesium scrap to recycle, then the product analysis should be close to the specific original magnesium… content." Thus, the scrap input in question both begins (as an input in the production of magnesium die-casts and extrusions) and ends (as an output of secondary magnesium production) its "life" as an ingot or some other basic form of alloy magnesium classified under HTS 8104.19, *i.e.*, raw alloy magnesium.

[54] *See, e.g.*, *Saccharin from the People's Republic of China: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 51800 (September 11, 2007) ("*Saccharin/PRC*") at Comment 2 ("While in the past the Department has used U.S. prices to benchmark surrogate values... the Department's current practice has been to benchmark surrogate values against imports from the list of potential surrogate countries for a given case, if available.")

[55] *See* Preliminary SV Memorandum at Attachment XI. Costa Rican import data, consisting of a single shipment of one kilogram with a price of $82.00, is not sufficiently robust so as to represent a viable comparative data point.

source of the scrap itself).[56] This fact pattern is further corroborated by the available information on record with respect to import prices of primary magnesium classified under HTS 8104.11 ("Magnesium, Containing 99.8% Or More Magnesium By Weight, Unwrought," *i.e.*, primary magnesium product at issue in prior reviews of the *Order*) from potential surrogates (Indonesia, Thailand, and South Africa);[57] each also significantly lower than the Philippine SV.[58] Thus, every appropriate benchmark on record with respect to the value of the unwrought magnesium output (*i.e.*, subject merchandise) in potential surrogate countries is lower, and significantly lower in most cases, than the Philippine SV for the magnesium scrap price used to value the input used to produce such a product in the *Preliminary Results*. As such, we find that these benchmarks provide a comparison that supports not using the Philippine SV data to value TMM's scrap.

Petitioner argues that the specific scrap input in question (*i.e.*, die–cast and extrusion scrap) is of a relatively high value and must therefore necessarily command a higher value than the typical magnesium scrap comprising the bulk of the imports in a basket magnesium scrap category.[59] Based on the information provided by Petitioner onto the record,[60] along with TMM's description of the quality of the scrap and production process[61], we agree that the record supports a conclusion that the type of die–cast and extrusion scrap used to produce the sale in question would be, in general, of a higher quality (and, thus, value) than typical magnesium scrap comprising most of the price data in a general broad–basket scrap HTS category. However, Petitioner has not demonstrated that marginally more pure alloy scrap from die–castings and extrusions and, more specifically, the particular input in question as sourced in the PRC and described on the record, should be valued with a price in excess of virtually every other magnesium price on record and, thus, has not justified the continued use of the Philippine value. Furthermore, we disagree with Petitioner's characterization of the record as containing prices, such as Bulgarian and Chilean values, which corroborate the Philippine SV in question.[62] In fact, the Chilean data is wholly unusable due to inconsistencies in data reporting and the

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[56] *See* Memorandum to Melissa Skinner, Director, AD/CVD Operations, Office 8, from Andrew Medley, International Trade Compliance Analyst, entitled, "2011–2012 Antidumping Duty Administrative Review of Pure Magnesium from the People's Republic of China: Final Results Surrogate Value Memorandum," dated concurrently with this memorandum ("Final Results SV Memorandum") for the full data analysis and further discussion of the benchmarks used.

[57] Because, as Petitioner argues and TMM demonstrates, the scrap input in question is highly pure secondary/off-spec magnesium (*i.e.*, closer to the 99.8 percent end of the off-spec range than the 50 percent end as specified by the scope), we find that the price information for imports of "primary" 99.8 percent and over magnesium under HTS 8104.11 are also relevant as corroborative information. *See*, *e.g.*, Letter from Petitioner entitled, "Pure Magnesium from the People's Republic of China: US Magnesium's Rebuttal Comments Concerning Valuation of Factors of Production," dated December 21, 2012 ("Petitioner's December 21 Rebuttal Submission") at Exhibit 1.

[58] The price difference between the Philippine SV for scrap and nearly all magnesium benchmarks (primary or secondary) is significant. Indeed, aside for a single value for secondary magnesium imports into Thailand (itself still lower than the Philippine SV), the prices of all other benchmarks for finished magnesium ingot are at least half the Philippine scrap price. *See* Final Results SV Memo for the full data analysis and further discussion of the benchmarks used.

[59] *See* Petitioner's Rebuttal Brief at 33-34.

[60] *See* Petitioner's Post-Prelim Rebuttal SV Submission at Exhibit 2-C and Petitioner's December 21 Rebuttal Submission at Exhibit 1.

[61] *See* TMM's SSCDQR at 2-7.

[62] Petitioner's Rebuttal Brief at 12-13.

Bulgarian price referenced by Petitioner is a non–contemporaneous benchmark, thus, each are inappropriate for comparison.[63] Finally, as we have determined to disregard the Philippine data based on the above finding that the use of this SV would lead to an unreasonable result, arguments with respect to the aberrationality of the Philippine value are moot.

Surrogate Value for Magnesium Scrap Input

As the Philippine data used for the *Preliminary Results* are unusable, the Department must determine the best available remaining data on the record from which to value TMM's magnesium scrap input. TMM suggests that either an average of prices from eight benchmarks cited in its case brief or price information from an online source (*i.e.*, *Recyclers Exchange*) be used to value the scrap input in question. First, we agree with Petitioner that record evidence suggests that the *Recyclers Exchange* data do not represent comparable scrap inputs, and find that the database itself has fundamental data integrity issues (*i.e.*, it is not representative of actual transaction prices and may not have been reported by a functioning company during the POR).[64] Moreover, there is no further information with respect to how the underlying data are compiled in *Recyclers Exchange* and whether they are officially–reported and tax–exclusive; thus, this data source fails critical components of the Department's SV selection criteria and is ultimately inappropriate for use in valuing the scrap inputs in question.[65] Second, TMM provides no support or precedent for its suggestion that the Department derive a surrogate value from an average of multiple data sources and we note that the Department's preference for sourcing data from a single primary surrogate country extends to a preference for data from a single country even when departing from the primary surrogate. Furthermore, only three of the ten prices provided in TMM's suggested "average" SV represent usable, contemporaneous information from economically comparable countries and, thus, this average value itself is inappropriate.[66]

As discussed in the *MLWF/PRC* (October 18, 2011) and each of the *Fish Fillets/Vietnam* cases referenced above, our recent practice in cases where the value of the selected scrap FOP exceeds the value of the corresponding source material is to continue to utilize the scrap value in question as the SV, but to cap this value at the price of the primary product. However, because the instant record lacks a value for finished unwrought magnesium from the Philippines from which an appropriate cap may be determined (*i.e.*, Philippine price data for imports of HTS 8104.19), we are unable to cap the SV in question and must instead look to the other available SV information on the record.

Based on the fact pattern of this particular case, we believe it is appropriate to continue to select a SV for the primary scrap input from prices of POR imports in the input-specific HTS 8104.20 scrap subcategory from import data of a single alternate country. The Department's standard

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[63] *See* Final Results SV Memo. As downloaded from GTA, the Chilean data show $7,832 USD worth of magnesium scrap imported in a single transaction, but report two different quantities for this transaction, 155,969 total kilograms or 582 kilograms net of packing, resulting either a $13.46 or $0.05 AUV and thus providing contradictory price information. The Bulgarian data cited by Petitioner is annual import data for the calendar year 2011, and not contemporaneous to the POR. As demonstrated above, the appropriate, contemporaneous, Bulgarian value is available on record and corroborates a lower magnesium scrap price.

[64] *See* Final Results SV Memo.

[65] *See id.*

[66] *See id.*

practice is to value FOPs using information from the primary surrogate country and, when such information is unavailable or unreliable, utilize information from a secondary surrogate country identified by the Office of Policy in the alternative.[67] In the instant proceeding, however, the record does not provide usable magnesium scrap price information from any potential surrogate country.[68] Nevertheless, TMM cites to HTS 8104.20 import price benchmark data from ten different countries in support of its arguments with respect to the aberrationality of the Philippine value, eight of which TMM finds to be appropriate values to average into a single value and use as the SV.[69] This data includes HTS 8104.20 import prices from two potential surrogates (Thailand and South Africa[70]) and eight other countries (Austria, Bulgaria, the Czech Republic, India, Mexico, Serbia, Ukraine, and the United States). TMM asserts that six of the latter eight countries are economically comparable – presumably all except the United States and Austria – and includes these countries in its suggested alternative SV average (along with the non-contemporaneous and non-market prices from South Africa and Thailand discussed above). However, only three out of these six countries actually rest within the band of countries at a level of economic development comparable to China as established by the Office of Policy's list of potential surrogate countries: Bulgaria, Serbia, and Ukraine.[71]

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[67] *See, e.g., Fish Fillets/Vietnam 10–11* (March 14, 2012) at Comment 2A; *Steel Wire Garment Hangers from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Second Antidumping Duty Administrative Review*, 76 FR 66903, 66905 (October 28, 2011), unchanged in final *Steel Wire Garment Hangers from the People's Republic of China: Final Results and Final Partial Rescission of Second Antidumping Duty Administrative Review*, 77 FR 12553 (March 1, 2012).

[68] The Office of Policy identified Indonesia, South Africa, Thailand, Colombia, Costa Rica, and the Philippines as potential surrogates. *See* Surrogate Country List and Request for Comment. Of these six countries, only the Philippines, Thailand and Costa Rica report imports of HTS 8104.20 during the POR. However, the Costa Rican quantity (3 Kg, with a total value of $4.00 (*i.e.*, a $1.33/kg AUV)) is not sufficiently robust so as to be a viable comparative data point for the purposes of evaluating the Philippine SV. *See* Preliminary SV Memorandum at Attachment XI. Moreover, Thai data consist only of imports from non-market economies. *See* Preliminary SV Memorandum at 4 and Attachment XI. As such, with the Philippine data now considered unusable based on the above determination, no potential surrogate country offers viable prices for imports of HTS 8104.20 from which to derive the relevant SV, nor has information from alternate sources been provided to the record for any of the potential surrogate countries.

[69] *See* TMM's Case Brief at 15-16 and 19-20.

[70] As established in the *Preliminary Results*, the South African data cited by TMM consist only of a single shipment prior to the POR and, therefore, do not provide a usable, contemporaneous, value. *See* Preliminary SV Memorandum at 4. Despite TMM's continued efforts to present this information as valid, along with the non-market Thai import information discussed above, both the Thai and South African price information cited by Petitioner are plainly unusable either for SV or benchmarking purposes.

[71] *See* Surrogate Country List and Request for Comment. The Office of Policy determined the list of potential surrogates using the World Development Indicators database, published by the World Bank on September 27, 2012. Of the potential surrogates identified on the list, the Philippines had the lowest 2011 per capita GNI figure ($2,210 USD) and Costa Rica had the highest GNI ($7,660). It is the Department's long-standing practice to identify countries at the same level of economic development as the PRC on the basis of per capita GNI data and, as a result, to identify the countries with a GNI in the band of between the lowest and highest country identified on the Office of Policy's list to be economically comparable. *See, e.g., Pure Magnesium/PRC* (December 23, 2010) at Comment 4. TMM's arguments rely on a GNI list that was updated since the release of the surrogate country list and, thus, unavailable at the time the Office of Policy established the list of potential surrogates in this case. *See* TMM's Post-Prelim SV Submission at Exhibit SVF-4. Nevertheless, even using TMM's version of the list, Austria, U.S., India, Mexico, and the Czech Republic are outside the established GNI band (indeed, Austria, the U.S., and the Czech Republic each have per capita GNIs several times that of Costa Rica, the highest potential surrogate, regardless of the GNI source list used). Thus, while it is unclear what standard TMM uses to define economic comparability, this standard does not appear to conform to the Department's established practice.

Petitioner suggests that the data provided by TMM are not from countries identified as at a level of economic development comparable to China by the Office of Policy and thus represent inappropriate benchmarks from which to evaluate the Philippine data[72] in question and, *ergo*, represent inappropriate information from which to derive an SV in the alternative. Though, as discussed above, many of the benchmark prices included in TMM's suggested multiple-country average SV are inappropriate for use in valuing FOPs based on the Department's standard SV criteria, we disagree with respect to the Bulgarian, Serbian, and Ukrainian price data. While the Department's preference is to value FOPs using information from the primary surrogate country or a secondary surrogate country identified by the Office of Policy when such information is unavailable or unreliable, there is no usable information on record from any potential surrogate country from which to value magnesium scrap inputs. As such, the Department is instructed to weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" surrogate value is for each input,[73] and the Department's practice to choose the best source in spite of apparent imperfections.[74] Moreover, the Office of Policy Memo further explains that the list of countries it provides is a "non-exhaustive" list of potential surrogate countries and states that the Department "may also consider other countries on the case record if the record provides you adequate information to evaluate them."[75] Since acceptable data sources from which to value TMM's magnesium scrap input have not been placed on the record from any of the countries provided in the Office of Policy's Surrogate Country Memorandum, the Department must rely on alternative sources of surrogate data[76] and instead looks to the best available data on the record from economically comparable countries not identified on the Office of Policy's list.[77] Accordingly, contemporaneous and input-specific data exists on the record from three economically comparable countries – Serbia, Ukraine, and Bulgaria – and, given the data limitations specific to

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[72] *See* Petitioner's Rebuttal Brief at 10.

[73] *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002) at Comment 2.

[74] *See Catfish Farmers of America v. United States*, 641 F. Supp. 2d 1362, 1377 (CIT 2009), stating "Where Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable."

[75] *See* Surrogate Country List and Request for Comment.

[76] Section 773(c)(4)(A) of the Act states that the Department shall value FOPs using prices in a country economically comparable to the NME country "to the extent possible." As stated in the *Policy Bulletin*, "Limited data availability sometimes is the reason why the team will "go off" the OP list in search of a viable primary surrogate country." *See* Surrogate Country List and Request for Comment.

[77] This reasoning is further supported by the Department's determination on a surrogate country-related issue in *Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) at Comment 7, stating "Respondents… argue that Bulgaria is not at a level of economic development comparable to the PRC, and that, because Bulgaria was not listed on the Office of Policy surrogate country list, that the Department should not consider it further. Section 773(c)(4)(A) of the Act is silent with respect to how or on what basis the Department may determine that a country is at a level of economic development comparable to the NME country. However, section 351.408(b) of the Department's regulations state that in making this determination the Department will place primary emphasis on per capita GDP as the measure of economic comparability. It is the Department's long-standing practice to identify countries at the same level of economic development as the PRC, on the basis of per capita GNI data…" and *citing to Pure Magnesium/PRC* (December 23, 2010) at Comment 4.

the instant case – we believe they represent the best sources from which to value magnesium scrap inputs in spite of apparent imperfections.[78]

As such, based on the fact pattern of this particular case, we believe it is appropriate to select a SV for the primary scrap input from prices of POR–imports in the input–specific HTS 8104.20 scrap subcategory from one of the three economically comparable countries provided by TMM: Ukraine ($1.68/kg), Bulgaria ($1.21/kg), and Serbia ($2.32/kg). Each dataset represents an appropriate value from which to derive SV information, as they are input specific, within the proper range of corroborated prices for magnesium scrap, from an economically comparable country, publicly available, non–export, tax–exclusive, and obtained from the preferred GTA data–source. Of these data, we find that the Serbian HTS 8104.20 import data provide the most robust dataset and, therefore, represent the best available information to value scrap magnesium.[79] The Serbian value represents a contemporaneous value from an economically comparable country consisting of officially reported and broad–ranging price data for the most specific import category available. Therefore, given the unusual circumstances of the instant proceeding, including the fact that a scrap product is the primary input, the scrap–input–specific HTS 8104.20 import data benchmarks were unavailable for any potential surrogate, and there were no value data on the record for the primary product to use as a cap for the scrap input, we determine that the Serbian data provide the best available information to value scrap magnesium.

Comment 3: Surrogate Financial Statements

TMM's Arguments:

- If Ukraine becomes the primary surrogate country, ratios should be valued using Ukrainian statements.
- The Philippine companies used for the *Preliminary Results* do not produce comparable merchandise:
  - RU Foundry and Machine Shop Corporation's ("RU Foundry") financial statements only discuss operations involving beverages and fruit juice products and do not give any indication of comparable steel or aluminum production.
  - SOH Technologies Corp.'s ("SOH Tech") statement mentions casting, not aluminum production. The only evidence of aluminum production exists in a non–public document provided by Petitioner.
- If the Philippines remains the primary surrogate country, the four additional Philippine financial statements provided by TMM should be used in the alternative.

Petitioner's Arguments:

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[78] Moreover, the similar AUVs for Ukrainian ($1.68/kg), Bulgarian ($1.21/kg), and Serbian ($2.32/kg) price data both corroborate one another and further corroborate the above determination that the significantly higher Philippine value ($8.64/kg) used for the *Preliminary Results* is inappropriate for use for surrogate valuation purposes in the instant case. We note that TMM did not provide price data for imports of magnesium scrap in HTS subcategory 8104.20 for all countries in the GNI band of economic comparability. Of major trading countries that rest within the GNI band, additional GTA import data appear available for Romanian and Moroccan imports of HTS 8104.20, each with a higher AUV than any of the economically comparable/in-band (or non-comparable/out-of-band) countries referenced in TMM's analysis (but similarly lower than the Philippine price). However, because this data does not exist on the record, the Department is unable to evaluate or utilize any such prices for surrogate valuation purposes.

[79] *See* Final Results SV Memo.

- RU Foundry's statements state that it is engaged in casting/foundry operations; this is supported by a website description stating that the company casts various types of metals, including aluminum. TMM's brief ignores this fact and provides no contradictory information.
- The use of email to confirm that SOH's operations involve aluminum casting is supported by all certifications on the record and is an acceptable method of establishing the validity of information. TMM did not previously raise questions as to the validity of the email communication, offers no argument or objection to the information in the email, and provides no contradictory information.
- Three of the four alternative Philippine producers suggested by TMM are not acceptable surrogates, as record evidence suggests, they do not produce comparable merchandise.

Department's Position: Consistent with the recommendation to continue to use the Philippines as the primary surrogate country (*see* Comment 1), we continue to utilize financial statements from Philippine producers of comparable merchandise to calculate surrogate financial ratios for the final results. As discussed in detail below, we have calculated the surrogate financial ratios using the financial statements of SOH Tech and New Anchor Foundry Shop Co. ("New Anchor"), excluding the RU Foundry statement used in the *Preliminary Results* as well as the FVC Philippines, Inc. ("FVC Philippines"), Supercast Foundry and Machinery Corporation ("Supercast"), and Makati Foundry, Inc. ("Makati") provided by TMM. In our calculation of normal value, we used surrogate values for energy, since New Anchor's financial statement breaks out energy expenses.

As a result of the recommendation to continue to use the Philippines as the primary surrogate country (*see* Comment 1), we do not find it appropriate to utilize the Ukrainian financial statements submitted by TMM. Moreover, we agree with Petitioner that Public Joint Stock Company Lugansk Foundry – Mechanical Plant ("Lugansk") does not appear to produce subject or comparable merchandise. Lugansk's financial statements indicate that it produces "cast iron radiators; spare parts for radiators; sewer manholes, roadway inlets; steel and iron casting for the needs of engineering plants; steel and iron castings for the needs of railway enterprises."[80] All of these indicate that Lugansk manufacturers finished products in steel and iron, as compared to TMM's magnesium ingots, which are nonferrous and are used as inputs for other industrial processes. After discarding Lugansk's financial statements, we are left with only Private Joint–Stock Company Vtormet's ("Vtormet") financial statements for Ukraine. Notwithstanding arguments by the Petitioner against Vtormet's statement (*see* Comment 4), it is the Department's preference to average together as many financial statements as possible and to source all surrogates from a single surrogate country where possible. As discussed below, we have two useable financial statements for producers of comparable merchandise from the Philippines and, as discussed in Comment 1, we have selected the Philippines as the primary surrogate country for this review. Moreover, TMM has not challenged the standard the Department used to identify producers of comparable merchandise at the *Preliminary Results* (*i.e.*, consideration of aluminum production as production of comparable merchandise).[81] Therefore, in accordance

[80] *See* TMM's Post–Prelim SV Submission at Exhibit SVF–3(i).

[81] *See* PDM at 9: "…in prior reviews of the *Order* (as well as AD orders on similar magnesium products such as magnesium metal from the PRC), primary aluminum production was found to be analogous and comparable to primary magnesium production where no indigenous magnesium production was found in potential surrogate

with our preference, we have selected two financial statements from a single, primary, surrogate country, the Philippines.

With respect to TMM's assertion that the Philippine statements used for the *Preliminary Results* are not representative of comparable production, we agree with TMM that RU Foundry's statement contains irreconcilable contradictions as to what merchandise RU Foundry actually produces and sells. For the *Preliminary Results*, the Department used RU Foundry's financial statements to calculate surrogate financial ratios because RU Foundry's statements indicated that "the company is engaged in Iron and Steel Casting/Foundry" and because Petitioner placed on the record a description of RU Foundry's line of work, which included production of aluminum, (considered to be a comparable production process to production of magnesium).[82] However, upon further examination, RU Foundry's financial statements indicate that it derives its revenue from "a range of beverage products in the wholesale market" and from "selling fruits, juices and copra products." Moreover, the purchases listed under the "Cost of Goods Manufactured & Sold" section of the statement do not indicate that RU Foundry purchases the required raw materials for metal production. Instead, RU Foundry's "Trade and other receivables" accounts note receivables from companies such as "Eco Agri," "Puro Organic," and "Fresh Start," each of which suggests that RU Foundry's operations resemble the beverage operations indicated and not the metal foundry industry. Accordingly, despite its name and the description placed on the record by Petitioner, RU Foundry's statements contain conflicting information which suggests it does not produce comparable merchandise and, thus, we have not used RU Foundry's financial statement to calculate surrogate financial ratios for the final results.

With respect to TMM's assertion that SOH Tech does not produce comparable merchandise, we disagree. Both SOH Tech's financial statements and the email communication on the record indicate that SOH Tech produces comparable merchandise, and thus we find no reason to reject the financial statement for SOH Tech.[83] Furthermore, TMM did not place any additional information on the record which would call into question SOH Tech's financial statement. SOH Tech's financial statements indicate that the "principal activity of the company are {*sic*} engage in the business of processing metals and other similar article {*sic*} for the electroplating industry steel fabrication, {*sic*} other allied services at wholesale."[84] SOH Tech's financial statements do not contain any information which conflicts with its operations statement. Moreover, Petitioner obtained confirmation directly from an official company representative for SOH Tech confirming that they perform "sand casting of aluminum."[85] The Department's position, in past cases, has been to not rely solely on email from third parties, but to examine the record evidence,

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countries." As discussed above, as Petitioner argued and the Department agreed for the *Preliminary Results*, the secondary pure–magnesium production process at issue in the instant review is analogous to aluminum extrusion production (which involves a comparable type of smelting process), and this comparability is supported by the Department's determinations in *Magnesium Metal/PRC* (October 25, 2010) and *Pure Magnesium/PRC* (December 23, 2011) at Comment 2. *See also* Petitioner's SV Comments and PDM at 20 (footnote 97).

[82] *See* Petitioner's submission titled "Pure Magnesium from the People's Republic of China: US Magnesium's Initial Comments Concerning Valuation of the Factors of Production," dated December 7, 2012 ("Petitioner's Initial SV Comments"), at Exhibit 8.

[83] *See id.* at Exhibit 9.

[84] *Id.*

[85] *See id.* at Exhibit 9–B.

as a whole.[86] Thus, in conjunction with SOH Tech's financial statements, the company description, and the email which Petitioner placed onto the public record, we conclude that SOH Tech is a producer of comparable merchandise.[87]

We agree with Petitioners that, of the four Philippine statements submitted by TMM for consideration for the final results, only one company, New Anchor, produces comparable merchandise and is appropriate for use in calculating financial ratios; the other three manufactures do not produce comparable merchandise.[88] New Anchor's financial statements indicate that it is in "the business of general foundry and in the manufacture of cast iron, brass, aluminum wares,"[89] and thus produces comparable merchandise. Moreover, because New Anchor's statements break out energy for production of merchandise, we have classified New Anchor's energy costs accordingly in our financial ratio calculations and have used the factors of production for energy provided by TMM and the surrogate values placed on the record at the *Preliminary Results* to calculate energy in the buildup to normal value for these final results. Also, because the financial statements of SOH Tech do not separately identify energy related to production, we have included only depreciation in the numerator of the overhead ratio calculation for this company to ensure there is no double–counting of energy costs.

Comment 4: Whether Alleged Translation Errors and Omissions Warrant an Adverse Inference

Petitioner's Arguments

- TMM knowingly submitted and certified to a materially inaccurate English translation of the proposed Ukrainian financial statement for producer Vtormet.
- Specifically, a Ukrainian phrase, "(умовно – позитивний)", that should have been translated to indicate that the auditor's opinion was "qualified" was instead mistranslated to the nonsensical "suspended – positive", and two ensuing paragraphs explaining the reason for the auditor's qualification – *i.e.*, that the auditor did not participate in monitoring the inventory of current and capital assets and liabilities – were altogether omitted from TMM's initial translation of the financial statement.
    - Because the Department does not rely on qualified financial statements, the proper translation of this phrase would have indicated that this financial statement could not be used in calculating surrogate financial ratios.

[86] *See e.g.*, *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 41374 (August 17, 2009) at Comment 14 where the Department similarly determined "that we should not rely solely on the email from a third party" but look at "the record evidence on the whole."

[87] *See* Petitioner's Initial SV Comments.

[88] *See* TMM's Post–Preliminary SV Submission, at Exhibits SVF–2(a), SVF–2(c), and SVF–2(d). *See also*, Petitioner's Post–Prelim Rebuttal SV Submission at Exhibit 4. Based on information in the financial statements and Petitioner's rebuttal surrogate value submission, it appears that three of the four Philippine companies submitted by TMM after the *Preliminary Results* do not produce identical or comparable merchandise (*i.e.*, cast aluminum): 1) FVC Philippines' production is limited to cast iron, ductile iron, stainless steel, bronze, and cast steel; 2) Supercast manufactures water pumps, cast iron fittings, and manholes/gratings; and 3) Makati produces cast iron and plastic PVC pipe.

[89] *See* TMM's Post–Preliminary SV Submission at SVF–2(b).

  - As an experienced respondent with experienced counsel, TMM must be presumed to have known that a qualified opinion would disqualify the statement and such mistranslations and omissions must be considered willful.
- Because these mistranslations and omissions are purposeful:
  - TMM has failed in its duty to ensure the accuracy of certified submissions.
  - Omission of material language from a certified English translation is egregious conduct that significantly impedes this proceeding and, thus, amounts to a failure to cooperate pursuant to section 776(a)(2)(C) of the Act.
  - These actions are representative of a pattern of falsification on behalf of the respondent in this proceeding, and similar actions have previously supported the application of total adverse facts available.
  - Given the history of willful fraud in this case, the Department should again find that this failure to cooperate warrants an adverse inference in accordance with section 776(b) of the Act.

TMM's Rebuttal
- The Ukrainian phrase in question was not mistranslated, since a literal translation of the two Ukrainian words in question, "умовно" and "позитивний," translate to "suspended" and "positive." Because this is exactly how the words were translated into English in the initial submission, the translation cannot be fraudulent.
- Petitioner's argument presumes that Ukrainian phrase "умовно – позитивний" is equivalent to the English term "qualified" in the context of the accounting parlance. Petitioner offers no support for this and, rather than making a substantive case regarding the meaning of the Ukrainian term, chooses to mischaracterize TMM's technically accurate translation in order to pursue an adverse facts available ("AFA") claim.
- With the submission of Petitioner's translation, the Department obtained fully translated document during the ordinary course of the proceeding.
- Unlike in the cases cited by Petitioner, the instant auditor's opinion does not identify any actual flaws with the underlying information in Vtormet's statement. Indeed, the "qualification" was ultimately positive and would not disqualify the statement from use in the Department's calculations. As such, the alleged mistranslation and omission is not material, particularly since there is adequate alternate financial statement information available on the record.
- Earlier in this proceeding, Petitioner submitted a foreign language document the translation of which failed to include material information. As such, Petitioner's allegations are hypocritical and inappropriate. Should the Department pursue Petitioner's claims, it must do the same to Petitioner and its counsel for this earlier transgression.

Department's Position: First, we note that any methodological issues with respect to the general usability of the Ukrainian Vtormet statement are rendered moot by the Department's determination to continue to use the Philippines as the primary surrogate country (*see* Comment 1, above) and to continue to determine surrogate financial ratios using Philippine financial statements (*see* Comment 3, above). The record contains usable statements from producers of comparable merchandise in the primary surrogate country and, therefore, it is not necessary to evaluate the viability of the Vtormet statement for the calculation of surrogate financial ratios for the final results margin calculation. However, as a result of Petitioner's allegations with respect to TMM's failure to cooperate, the Department must evaluate the record with respect to the purported mistranslation and omission of translation for salient material.

TMM translates the Ukrainian phrase in question, "(умовно – позитивний)," as "suspended positive" in the section 5.1 subheading of the auditor's opinion for Vtormet's financial statement.[90] TMM states that "the second of these words позитивний means positive. The first of these words умовно is subject to a number of definitions including 'conditional' 'suspended' 'provisional' and the like," and concludes that "suspended positive" is, thus, a correct literal translation of the Ukrainian words.[91] Petitioner's rebuttal translation translates this phrase as "qualified." The record does not contain information on how the phrase умовно – позитивний is used in various contexts, such as in an accounting document, nor does it contain information to contradict TMM's assertion that it provided an acceptable translation of the words.

The record indicates that two paragraphs are omitted from TMM's initial translation of Section 5 (*i.e.*, the auditor's opinion) of Vtormet's financial statement.[92] TMM offers no explanation with respect to these omissions. Petitioner provides a translation of these paragraphs in its rebuttal translation of the auditor's opinion. Each paragraph, the first immediately preceding the section 5.1 subheading discussed above ("General Audit Opinion –('qualified' or 'suspended positive')") and the other following this subheading, states that the auditor did not participate in monitoring of inventory of current and capital assets and liabilities.[93]

Section 776(a) of the Act and section 351.308(b) of the Department's regulations provides that the Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary 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," the Secretary "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."

In this case, the information has been placed on the record, in the form of Petitioner's translation of the omitted paragraphs and, in any case, we do not consider the information at issue to qualify as "necessary information" given that the Department has selected the Philippines as the appropriate surrogate country. Because the information at issue is not necessary for the determination, and there are no other allegations or information that raise question as to the reliability of any other information provided by TMM in this particular review, we do not find that the party significantly impeded the proceeding based upon the facts in this case. Accordingly, we find no basis to apply facts available, and thus no basis to apply adverse inferences in this case. This determination should not be interpreted to mean, however, that literal translations are acceptable when appropriate accounting terms in English should have been

[90] *See* TMM's Post–Prelim SV Submission at Exhibit SVF–3(j).
[91] *See* TMM's Rebuttal Brief at 5.
[92] *See* TMM's Post–Prelim SV Submission at Exhibit SVF–3(j).
[93] *See* Petitioner's Rebuttal SV Submission at Exhibit 8, Attachment 3. *See also* Petitioner's Case Brief at Attachment 1.

used in the translation, or that parties may choose to omit portions of financial statements when they submit such statements for the Department's determination.

Comment 5: Whether the Department Should Collapse TMM and TMI and therefore Assign a Single AD Rate to the Collapsed Entity

TMM's Arguments:

- The Department erred in its "primary" finding that TMM and TMI used the same producers. Thus, the Department should not sustain the preliminary collapsing determination and should not assign a combination rate to TMM and TMI.

Petitioner's Rebuttal:

- TMM's specific request confuses the facts, since the Department did not preliminarily assign a combination rate (which is reserved for exporters and all of the producers that supplied subject merchandise to a given exporter during the POR). Rather the Department collapsed the two entities and preliminarily determined to assign both companies the same rate.
- TMM's assertion that the Department was incorrect in finding that TMM and TMI use the same producers is, itself, false.
  - TMM's argument focuses only on a portion of a single sentence in the Department's collapsing analysis and notes that the exhibit cited to by the Department does not reference producers. However, this was simply an inadvertent typo on behalf of the Department (the citation to "Exhibit SA–10" should have said "Exhibit SA–7"). Exhibit SA–7 clearly shows that the two companies shared suppliers subsequent to the POR.
  - TMM's argument incorrectly insinuates that the commonality of producers was the primary basis for collapsing. TMM's argument ignores the Department's discussion of affiliation and potential for manipulation of price/production, including level of ownership, interlocking board members/managers, and intertwined operations. Even if TMM's narrow claim that the two companies did not share suppliers had merit, which it does not, this single prong was not the deciding criteria and the result would be unchanged.

Department's Position: We disagree with TMM and sustain our preliminary determination to collapse TMM and its affiliate TMI. TMM's argument on this issue misunderstands the Department's findings from the *Preliminary Results*. TMM argues that the Department's preliminary collapsing finding is predicated on a "primary" finding of commonality of supplier between TMM and TMI, thus, because the Department did not support this finding, the overall collapsing determination cannot be sustained.[94] In fact, the collapsing determination was not predicated on any single finding, whether regarding common suppliers or otherwise. Contrary to TMM's presumptions, the finding with respect to common suppliers is ultimately immaterial to the overall collapsing determination, the remainder of which is supported by the significant amount of analysis that TMM did not address in its case brief. Further, despite TMM's assertions to the contrary, the Department's finding with respect to TMM's shared suppliers is supported by the record.

[94] *See* TMM's Case Brief at 26–27.

First, TMM claims that "the primary basis for the Department's decision to assign a combination rate for MMC and its affiliate was a finding of commonality of suppliers."[95] In making a determination to collapse two affiliated companies, in accordance with 19 CFR 351.401(f), the Department evaluates the potential for manipulation including the level of common ownership; the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and whether operations are intertwined (such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers). The Department's Collapsing Memo focused in particular on the significant level of common ownership, the significant interlocking of management and ownership, and the significantly intertwined operations of the two companies.[96] In making this third finding (*i.e.*, that the operations were significantly intertwined) – in addition to the finding that the two companies shared suppliers – the Department found there to be significant sharing of sales information and overlapping involvement in pricing decisions, significant sharing of facilities and employees, and noted that "the ability of staff to move between the three companies essentially results in the staffing for the three companies operating as a single and fluid enterprise."[97] Thus, each prong of the collapsing analysis, including all of the sub–criteria relevant to the finding that the operations of TMM and TMI are intertwined, supported (and continue to support) the Department's determination to collapse TMM and TMI. At no point did the Department state, suggest, or infer that the finding on one specific sub–criterion of the analysis with respect to intertwined operations (*i.e.*, common suppliers) was the primary, determinative issue for the overall determination to collapse TMM and TMI.

Rather, the Department found that "based on the significant level of common ownership, extensively interlocking boards and management, and significantly intertwined operations of TMM and TMI… the criteria outlined in 19 CFR 351.401(f) have been met and that there is a significant potential for the manipulation of price or production between TMM and TMI."[98] While this finding is supported by the fact that the Department found TMM and TMI had common suppliers, it was not solely reliant on such a finding, particularly since the remainder of the record fully supported the determination to collapse based on all other aspects of the analysis. TMM offers no argument on the other findings upon which the preliminary determination to collapse was based and, is now sustained in these final results.

Regardless of the above finding that the collapsing determination is not solely reliant upon any determination regarding common suppliers, the record supports the initial finding that TMM and TMI indeed share suppliers. TMM states that "the facts also conclusively show that the supplier used by MMC was not the same as the supplier used by MMC's affiliate. We have examined the record and find there is no factual basis on the record to support this claim."[99] Implicit in this statement is that the Department's collapsing determination found that the supplier used by TMM for the single sale during the POR was one of TMI's suppliers and, thus, if the record does not support this finding, the ensuing finding regarding commonality of suppliers is unfounded.

[95] *See id.* at 26.
[96] *See* Collapsing Memo at 6–8.
[97] *See id.* at 7.
[98] *See id.* at 8.
[99] *See* TMM's Case Brief at 27.

However, this misconstrues the Department's findings and fails to take account of the reasoning laid out in the Department's Collapsing Memo. Indeed, with respect to the single sale during the POR, TMM did not share a supplier with TMI. TMM was formed only one month prior to the end of the POR and completed only the one sale, which it sourced from a single supplier not shown to be one of TMI's suppliers.[100] However, because TMM is a nascent company with only one sale during the POR, we found it necessary to look at a larger sample size of TMM's operations and found it relevant that "after the POR, TMM sold products to the same customers as TMI and sourced products from the same producers used by TMI."[101] Thus, the finding that TMM and TMI shared suppliers <u>subsequent to the POR</u> was expressly recognized and explained in the initial collapsing determination in light of the particular facts in this case. As discussed above, we found (and continue to find) this fact relevant, but not solely determinative, to the Department's collapsing determination in this case. TMM does not dispute this finding.

TMM asserts that the record evidence cited by the Department in the Collapsing Memo (*i.e.*, Exhibit SA–10) does not support the conclusion that TMM and TMI share suppliers and instead consists of sales data without any mention of supplier or producer.[102] The complete sentence from the Collapsing Memo in question is: "As further evidence of shared sales and procurement operations between TMM and TMI, we note that, after the POR, TMM sold products to the same customers as TMI and sourced products from the same producers used by TMI" and ends with a footnote citing to Exhibit SA–10 of TMM's SSAQR, an exhibit which lists all of TMM and TMI's sales during and after the POR.[103] As such, TMM is technically correct: Exhibit SA–10 consists of sales data and, therefore, supports only the "TMM sold products to the same customers as TMI" portion of the sentence in question. However, the Department inadvertently left out of this footnote a reference to Exhibit SA–7 of the same submission, which provides information regarding the producers and suppliers of TMM and TMI during and after the POR, <u>and shows definitively that the two companies share common suppliers</u>.[104] Thus, we continue to find that the record supports the commonality of suppliers between TMI and TMM.

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[100] While TMM's producer for the magnesium ingot that comprised the sole sale in the POR did not also produce or supply material for TMI during or after the POR, this producer is co–located within the factory of one of TMI's suppliers. In other words, though legally distinct from one of TMI's suppliers during the POR (also shown to have supplied TMM subsequent to the POR), TMM's supplier leased out a workshop inside the facility of this other supplier in order to produce the single sale. *See* Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Correction to the Response to Sections C and D of Tianjin Magnesium Metal Co., Ltd.," dated September 19, 2012, at Exhibits 2 and 4. *See also,* Letter from TMM entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Response of Tianjin Magnesium Metal Co., Ltd. to the Third Supplemental Questionnaire," dated March 1, 2013 at 12–13. Thus, though TMM's supplier for the sole POR sale is not the same as TMI's supplier of certain merchandise during the POR (and to both TMI and TMM after the POR), there appears to be a close relationship between these two legally distinct entities.

[101] *See* Collapsing Memo at 7. Indeed, Exhibits 7, 9, and 10 of TMM's SSAQR demonstrate that, for certain sales subsequent to the POR, TMM and TMI sold the same products, sourced from the same suppliers, to the same customers. *See* Letter from TMM to the Department entitled, "Pure Magnesium from the People's Republic of China; A–570–832; Response by Tianjin Magnesium Metal Co., Ltd. to the Section A Supplemental Questionnaire," dated December 28, 2012 ("TMM's SSAQR"). In concert with the other findings from the Collapsing Memo, the fact pattern demonstrates that TMM and TMI share common owners and managed by common managers who negotiate sales of the same product sourced from the same suppliers to the same companies. TMM provides no objection to these findings.

[102] *See* TMM's Case Brief at 27.

[103] *See* Collapsing Memo at 7.

[104] *See* TMM's SSAQR at Exhibit SA–7.

While the Department acknowledges this inadvertent omission of a single citation in the Collapsing Memo, we note that this citation is not obscure or difficult to locate on the record. Exhibit SA–7 of TMM's SSAQR plainly exists on the record mere pages prior to the SA–10 Exhibit so scrutinized in TMM's Case Brief, and should have been easily identifiable to TMM in the context of the sentence in question, particularly since it is company–specific information submitted onto the record by TMM itself. Moreover, Exhibit SA–7 is identified in TMM's Case Brief at Exhibit CB–18, where TMM cites to relevant portions of the narrative of the SSAQR. Thus, TMM acknowledges that information supporting the Department's statement exists on the record. TMM has provided no substantive objection to the Department's initial collapsing determination. As such, we find no reason to alter our initial determination and sustain our finding with respect to collapsing TMM and TMI into a single entity for the purpose of the final results.

Finally, Petitioner is correct that our draft instructions did not specify a combination rate, rather, a single rate for the single collapsed entity. As we have determined to continue to treat the companies as a collapsed entity for the final results, our final instructions to CBP will continue to assign TMM/TMI a single rate. Thus, TMM's argument that it is unreasonable to assign TMM and TMI a combination rate is moot, since no such combination rate was indicated in the draft instructions nor contemplated for the final results.

Comment 6: Whether to Identify the Collapsed Affiliate in Customs Instructions

Petitioner's Comments: The Department's draft liquidation instructions, released concurrently with the *Preliminary Results*, did not publicly identify TMI as TMM's collapsed affiliate, instead only referencing "Company A." Because the identity of TMI as the collapsed affiliate has been disclosed as public information subsequent to the *Preliminary Results*, these instructions should be updated to identify the collapsed entity and, accordingly, all references to "Company A" should be replaced with "TMI". Moreover, because TMM and TMI are treated as a single entity for purposes of the antidumping duty order as a result of the collapsing finding, the liquidation and cash deposit instructions should state that the TMM/TMI will be treated as collapsed entities for the duration of this order, unless that determination is reversed.

Department's Position: The will update the cash deposit and liquidation instructions to reflect the public disclosure of the identity of TMI as TMM's collapsed affiliate and the sustained collapsing determination itself, as appropriate.

Comment 7: Updating the PRC–Wide Rate

Petitioner's Comments: If the final results margin calculated for TMM is higher than the current PRC–wide margin of 111.73 percent, the Department should update the PRC–wide rate accordingly.

Department's Position: The PRC-wide entity is not under review in this administrative review, and the Department cannot alter a rate for an entity not under review.[105] Therefore, the Department has not "updated" the PRC–wide margin in this administrative review.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and final dumping margins in the *Federal Register*.

Agree _____ Disagree _____

____
Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

____
Date

[105] *See, e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission in Part*, 76 FR 56732 (September 14, 2011) at 56734 ("Because the PRC-wide entity was not reviewed during this POR, the PRC-wide rate remains… {at} the rate established in the administrative review for the most recent period.").