

*US Magnesium LLC v. United States*  
**Court No. 12-00006; slip op. 13-9 (CIT 2013)**  
**Pure Magnesium from the People's Republic of China**  
**Final Results of Redetermination Pursuant to Court Remand**

**SUMMARY**

The Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”), issued on January 22, 2013, in *US Magnesium LLC v. United States*, Court No. 12-00006, slip op. 13-9 (CIT 2013) (“remand order”). The Court’s opinion and remand order was issued following a challenge by US Magnesium LLC (“USM” or “Petitioner”) to *Pure Magnesium from the People’s Republic of China: Final Results of the 2009-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 76945 (December 9, 2011) (“*Final Results*”), and accompanying Issues and Decision Memorandum (“IDM”).

The Court remanded the *Final Results* to the Department: (1) to consider whether previously rejected factual information contained *prima facie* evidence of fraud by the respondent Tianjin Magnesium International Co., Ltd. (“TMI”) in accordance with the factors outlined in *Home Products*,<sup>1</sup> and (2) to explain its rationale for selecting Infobanc data based on substantial evidence on the record or, alternatively, to select a new surrogate value for truck freight. Additionally, the Department requested a voluntary remand to reconsider: (1) the selection of Hindalco Industries Limited’s (“Hindalco”) financial statements for calculating

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<sup>1</sup> See *Home Prods. Int’l v. United States*, 633 F.3d 1369 (Fed. Cir. 2011).

surrogate financial ratios, and (2) USM's claim that the Department made errors when calculating the surrogate value for labor.

After considering the Court's remand order, the Department opened the administrative record to accept and consider whether the previously rejected factual information indicated *prima facie* evidence of fraud. In weighing this evidence in the draft remand results, the Department concluded that this factual information did not demonstrate *prima facie* evidence of fraud by TMI.<sup>2</sup> The Department also determined that the Infobanc data do not constitute the best information available to value truck freight and, instead, selected the World Bank data for this redetermination. After examining USM's claims with regard to Hindalco's financial statements and the labor rate calculation, the Department selected Sudal Industries Limited ("Sudal"), Gujarat Foil Limited ("Gujarat"), and Boruka Aluminum Limited's ("Bhoruka") financial statements to value the financial ratios. Lastly, the Department agreed that it made certain errors in its labor rate calculation and corrected these errors. Consequently, in the draft remand results, TMI's margin changed from zero percent to 0.53 percent.

The Department released the draft remand results to the parties for comment. USM submitted comments regarding (1) its claim that the new factual information demonstrates *prima facie* fraud and (2) the Department's selection of the financial statements of Sudal, Gujarat, and Bhoruka. It did not comment on the Department's reliance on World Bank data to value truck freight and the Department's correction of the labor rate calculation. TMI did not submit comments on the draft remand results.

As explained below, in the final remand the Department continues to find that the new factual information does not demonstrate *prima facie* fraud by TMI. The Department also

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<sup>2</sup> See the Department's Draft Results of Redetermination Pursuant to Court Remand Pure Magnesium from the People's Republic of China *Tianjin Magnesium International Co., Ltd., v. United States* Court No. 12-00006; slip op. 13-09 (CIT 2013) ("draft remand results").

reconsidered its decision to rely on the financial statements of Sudal, Gujarat, and Bhoruka, and instead relies on the financial statements of MALCO. The Department has not made any changes from the draft remand results regarding the truck freight surrogate value selection and the correction to the labor rate calculation. As a result, TMI's margin for these final remand results is 51.26 percent.

## **BACKGROUND**

On December 9, 2011, the Department published the *Final Results* covering the period of review ("POR") from May 1, 2009, through April 30, 2010.

### *Untimely Factual Information*

In the underlying review, TMI reported that its supplier [ ] rented the retorts<sup>3</sup> used in the production of pure magnesium during the POR.<sup>4</sup> The Department classified retorts as an indirect material in the *Preliminary Results*.<sup>5</sup> After the deadline to submit new factual information, USM filed a submission, claiming that newly discovered information indicated that [ ] produced, rather than rented, retorts, during the POR. USM argued that this information, along with two corroborative documents, contradicted TMI's response. Although USM acknowledged that the deadline to submit new factual information had expired, it asked the Department to consider the information for the *Final Results*. TMI filed a submission objecting to USM's untimely new factual information,<sup>6</sup> to which USM filed a rebuttal.<sup>7</sup> The Department rejected USM's new factual

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<sup>3</sup> Retorts are cylindrical metal tubes in which dolomite and other materials are heated as part of the manufacturing process of pure magnesium.

<sup>4</sup> See TMI's letter, "Pure Magnesium from the People's Republic of China; A-570-832; Response to First Supplemental Questionnaire by Tianjin Magnesium International, Co., Ltd.," dated February 15, 2011 ("TMI's First DSQR"), at 9.

<sup>5</sup> See *Pure Magnesium from the People's Republic of China: Preliminary Results of the 2009-2010 Antidumping Duty Administrative Review*, 76 FR 33194 (June 8, 2011) ("*Preliminary Results*").

<sup>6</sup> See TMI's letter, "Pure Magnesium from the People's Republic of China; A-570-832; Objection to Petitioner's September 1, 2011 Factual Letter by Tianjin Magnesium International, Ltd.," dated September 6, 2011.

information submission on the grounds that it was untimely filed and that some of the documents were available prior to the deadline for submission of new factual information. In the *Final Results*, the Department continued to classify retorts as an indirect material.

#### Truck Freight

In the *Final Results*, the Department acknowledged that it was unclear whether the Infobanc data on the record included all costs associated with activities relating to truck freight. However, recognizing certain deficiencies in the data proposed by USM, the Department found Infobanc data to be the best information available because the data are “contemporaneous, country-wide, and identify the relevant time period, distances, and weights.”<sup>8</sup> Thus, the Department calculated inland truck freight using Infobanc data.

#### Remand Instructions

Subsequently, USM filed this action to challenge certain determinations reached in the *Final Results*. On January 22, 2013, the Court held that the Department abused its discretion because “it failed to address whether USM’s submission indicated *prima facie* evidence of fraud USM raised while the record was still open.”<sup>9</sup> The Court instructed that, on remand, although the Department is not required to accept USM’s submissions of untimely new factual information, the Department must provide a sufficient explanation addressing the allegations. Further, in determining whether to reopen the record, the Court directed the Department to consider the factors described in *Home Products*, including “the interests in finality, the extent of the inaccuracies in the . . . administrative review, whether fraud existed in the . . . administrative

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<sup>7</sup> See USM’s letter, “Pure Magnesium from the People’s Republic of China: US Magnesium’s Reply to TMI’s Letter of September 6, 2011, Concerning Newly Discovered Information Regarding Retorts,” dated September 8, 2011.

<sup>8</sup> See *Final Results*, and accompanying IDM at Comment 8.

<sup>9</sup> See Remand Order, at 8 (citations omitted).

review, the strength of the evidence of fraud, the level of materiality, and other appropriate factors.”<sup>10</sup>

With respect to the surrogate value for truck freight, the Court found that the Department “erred in failing to support its selection of Infobanc rates with substantial evidence and in ignoring contradictory evidence on the record.”<sup>11</sup> The Court instructed the Department to provide a reasonable explanation of its selection of Infobanc rates based on substantial evidence from the record.<sup>12</sup>

Lastly, the Department requested a voluntary remand to consider USM’s allegations with respect to Hindalco’s financial statements and the labor rate calculation, and the Court granted the request.

#### Remand Review

On February 28, 2013, in accordance with the Court’s order, the Department decided to open the record, and directed USM to place on the record the previously rejected documents with respect to the issue of [ ]’s alleged retort production. On March 1, 2013, USM resubmitted to the record the rejected factual information document as well as TMI’s September 6, 2011, submission objecting to USM’s new factual information, and USM’s September 8,

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<sup>10</sup> *Id.*, at 12 (citations omitted).

<sup>11</sup> *Id.*, at 16.

<sup>12</sup> *Id.*

2011, rebuttal to TMI's objection.<sup>13</sup> On March 8, 2013, TMI submitted rebuttal comments.<sup>14</sup> USM filed rebuttal comments to TMI's March 8, 2013, comments on March 15, 2013.<sup>15</sup>

On April 24, 2013, the Department released the draft remand results and provided USM and TMI an opportunity to provide comments on the draft remand results.<sup>16</sup> On April 23, 2013, USM filed with the Department a request for a 13-day extension to submit its comments on the draft remand results, and the Department granted the extension. On May 13, 2013, USM timely submitted its comments to the Department.<sup>17</sup> TMI did not file any comments.

Below is the Department's analysis of the issues, followed by a summary of USM's comments on the draft remand results regarding the issues of the new factual information and financial statements, and the Department's response to those comments.

## **THE DEPARTMENT'S ANALYSIS IN THE DRAFT REMAND RESULTS**

### **Issue 1: Whether the Documents Submitted By USM Demonstrate *Prima Facie* Evidence of Fraud**

#### Outline of Proceedings

Because the discussion below involves multiple parties and their alleged roles during the underlying review, the Department finds it helpful to provide background information on these parties, and to explain the normal steps taken to obtain information from parties during a proceeding.

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<sup>13</sup> See USM's letter, "Pure Magnesium from the People's Republic of China: Re-Submission Of Factual Information Pursuant To The Department's Memorandum Of February 28, 2013," dated March 1, 2013 ("USM's March 1, 2013, Submission").

<sup>14</sup> See TMI's letter, "Pure Magnesium from the People's Republic of China; A-570-832; Rebuttal To Petitioner's March 1, 2011, Factual Submission in the Remand of the 2009-2010 Review by Tianjin Magnesium International Co., Ltd.," dated March 8, 2013 ("TMI's March 8, 2013, Submission").

<sup>15</sup> See USM's letter, "Pure Magnesium From The People's Republic Of China: US Magnesium's Comments Rebutting TMI's Submission Of Factual Information On Remand In *US Magnesium LLC v. United States*, Ct. No. 12-00006, slip op. 13-9 (CIT January 22, 2013)" dated March 15, 2013 ("USM's March 15, 2013, Submission").

<sup>16</sup> See draft remand results.

<sup>17</sup> See USM's submission, "Pure Magnesium From The People's Republic of China: US Magnesium's Comments On *US Magnesium LLC v. United States* Court No. 12-00006; slip op. 13-9 (CIT 2013) Pure Magnesium from the People's Republic of China Draft Results of Redetermination Pursuant to Court Remand," dated May 13, 2013 ("USM's Comments").

By way of background, during the 2007-2008 POR, TMI was the sole respondent/exporter of the subject merchandise, but TMI had two suppliers of the subject merchandise, [ ] and [ ]

[ ].<sup>18</sup> During the 2008-2009 POR, TMI again was the respondent/exporter, but TMI exported the subject merchandise only supplied by [ ].<sup>19</sup> During the POR of the underlying review, 2009-2010, TMI was the respondent/exporter and [ ] was the sole supplier of subject merchandise.<sup>20</sup>

In a supplemental questionnaire response covering the 2009-2010 review, TMI claimed that [ ] rented retorts and provided a copy of a lease agreement between [ ] and a retort supplier as proof.<sup>21</sup> When the Department requested more information on the characteristics of retorts, TMI provided affidavits from [ ] [ ] retort suppliers.<sup>22</sup>

When conducting an antidumping duty review involving a non-market economy (“NME”) country, it is the Department’s practice to send the respondent a general questionnaire to identify the respondent’s supplier(s) of the subject merchandise. If the respondent is merely an exporter and does not self-produce the subject merchandise, the Department requests that the respondent collect the factors of production (“FOP”) information from the supplier(s). The purpose of the exercise is to construct a normal value for the subject merchandise and to compare the normal value with the U.S. sales price. The FOP information includes direct materials,

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<sup>18</sup> See Memorandum to Wendy J. Frankel, Office Director, “Verification of the Sales and Factors Responses of Tianjin Magnesium International, Ltd. In the 2007-2008 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People’s Republic of China,” dated November 4, 2009 (“2007-2008 Verification Report”), at 1.

<sup>19</sup> See the Department’s memorandum to the File, “Verification of the Sales and Factors of Production (“FOP”) of Tianjin Magnesium Industries (“TMI”),” dated June 7, 2010 (“2008-2009 Verification Report”), at 1 and 5.

<sup>20</sup> TMI’s submission, “Pure Magnesium from the People’s Republic of China; A-570-832; Response to Section A by Tianjin Magnesium International, Co., Ltd.,” dated July 30, 2010 (“TMI’s Section A Response”), at 11.

<sup>21</sup> See TMI’s First DSQR, at 9 and Exhibit SD-3.

<sup>22</sup> See TMI’s submission, “Pure Magnesium from the People’s Republic of China; A-570-832; Response of Tianjian Magnesium International, Co., Ltd. To the Second Supplemental Questionnaire,” dated April 13, 2011 (“TMI’s Second SQR”), at Exhibits S2-2, S2-3 and S2-4.

energy, labor, packing materials, and by-products. If the respondent identifies an input as a direct material, or the Department determines that the input is a direct material, the respondent must report the consumption of the input. If the input is self-produced by the supplier or produced/purchased from an affiliate, the respondent must disclose it and then the Department determines whether to have the respondent report its own consumption of the input, or consumption of the inputs used by the respondent or its affiliate to produce the input (*i.e.*, an intermediate input methodology) to calculate the surrogate value. Alternatively, if an input is not a direct material but rather is overhead, then the Department does not require the respondent to provide the consumption of the input, nor does the Department inquire whether the indirect input is self-produced or produced/purchased from the supplier's affiliate.

As early as the 1996-1997 administrative review, the Department determined that retorts were an indirect material input and valued it in its calculation of overhead expenses.<sup>23</sup> In the subsequent reviews of this proceeding, the Department continued to treat retorts as an indirect material input. However, during the underlying 2009-2010 review, USM argued that the Department should reconsider retort classification and collect more information on [ ] consumption of retorts. After considering USM's argument, the Department sent TMI a supplemental questionnaire requesting more information on retorts. In the *Final Results*, based on the information on the record, the Department continued to classify retorts as an indirect material and valued it in its calculation of overhead expenses.

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<sup>23</sup> In that review, the Department stated, "we do not find that the reducing vessel {*i.e.*, retorts} should be considered a direct material rather than an indirect material for purposes of antidumping law... {and} have treated the reducing vessel cost as part of factory overhead." See *Pure Magnesium From the People's Republic of China: Final Results of Antidumping Duty New Shipper Administrative Review*, 63 FR 3085, 3088 (January 21, 1998) ("*Pure Magnesium NSR Final*").



Parties' Arguments Prior to the Draft Remand Results

USM alleges that TMI's certified factual statements that its supplier [ ] rented the numerous reduction vessels (*i.e.*, retorts) it consumed to produce pure magnesium during the POR are false or misleading because later discovered information shows that [ ] produced its own retorts.<sup>24</sup> USM submitted the following documents to support its claim: (1) a Chinese magnesium industry bulletin published on August 26, 2011, (2) a web page of a company that USM claims is [ ], and (3) a Chinese magnesium industry directory published in 2006.

The first piece of evidence, the industry bulletin, reports at page two that:

[

] <sup>25</sup>

The second piece of evidence, the web page, shows a company's trademark titled "[ ]" and the name of the company titled "[ ]".<sup>26</sup> This web page also reports a company description that is nearly identical to that in the Chinese magnesium industry bulletin:

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<sup>24</sup> See USM's March 1, 2013, Submission, at Attachment 1.

<sup>25</sup> See *id.*, Exhibit 1.

<sup>26</sup> See *id.*, Exhibit 2.

<sup>27</sup> See *id.*

The third piece of evidence, a 2006 industry directory, describes that the [ ] is located at [ ]

] <sup>28</sup>

USM concludes that these documents demonstrate that [ ] actually produced its own retorts, rather than rented them as TMI reported. USM claims that evidence of [ ] alter-ego, [ ] production of retorts demands that the Department find that [ ] is also a producer of retorts.

TMI responded that none of the aforementioned documents is specific to its supplier [ ] because all of them concern a different company [ ].<sup>29</sup> TMI also asserted that, as it had previously stated in its response to the Department's supplemental questionnaires, [ ]'s retorts were rented from [ ] separate companies.<sup>30</sup> TMI further stated that while it believed one of these [ ] companies might be related to its supplier [ ], the relationship between the retort supplier and TMI's supplier [ ] should not have any bearing on the Department's determination on the classification of retorts as an indirect material.<sup>31</sup>

In response, USM argued that TMI's failure to disclose accurately [ ]'s internal or affiliated production of retorts constitutes a failure to cooperate in this review and that the Department should assign TMI a margin based on adverse facts available.<sup>32</sup>

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<sup>28</sup> See USM's March 1, 2013, Submission, at Attachment 1, Exhibit 3.

<sup>29</sup> See TMI's March 8, 2013, Submission, at 2.

<sup>30</sup> *Id.*, at 4.

<sup>31</sup> *Id.*, at 5.

<sup>32</sup> See USM's March 15, 2013, Submission, at 9-12 and 20-21.

## The Department's Analysis in the Draft Remand Results

In reconsidering whether the information submitted by USM demonstrates *prima facie* evidence of fraud, we have evaluated three separate aspects of this issue: A) whether fraud existed in this administrative review and, if so, the strength of the evidence of fraud; B) the level of materiality; and C) the extent of inaccuracies in this review.<sup>33</sup> Our findings are the following.

### *A) Whether Fraud Existed in the Underlying Review and the Strength of the Evidence of Fraud*

In examining the evidence put forth by USM, the Department finds that [ ], not [ ], produced retorts at various times. All three of the documents submitted by USM specifically discussed [ ] (*i.e.*, [ ]). Record evidence from prior antidumping duty reviews of pure magnesium indicates that [ ] and [ ] are two separate, albeit affiliated, entities. The record of the instant review demonstrates that [ ] was the sole supplier of the pure magnesium TMI exported to the United States during the POR.<sup>34</sup>

In the two immediately preceding administrative reviews, the Department found that [ ] and [ ] are separate entities. The 2007-2008 Verification Report states that TMI exported pure magnesium produced by two suppliers, [ ] and [ ].<sup>35</sup> Although the two suppliers “shared a common financial, accounting, and sales departments, each located at [ ] headquarters in [ ],” the two were found to be “separate legal entities,” and “kept distinct financial records during the POR.”<sup>36</sup> During the 2007-2008 POR, the [ ]-owned [ ]<sup>37</sup> pure magnesium plant was sold to [ ], and

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<sup>33</sup> See Remand Order at 11-12.

<sup>34</sup> See TMI's Section A Response, at 11.

<sup>35</sup> See 2007-2008 Verification Report, at 1.

<sup>36</sup> *Id.*, at 2, 6.

<sup>37</sup> [ ] is short for [ ] Plant.

the Department verified the relevant documents relating to the ownership transfer (*e.g.*, transfer agreement and payments).<sup>38</sup>

Additionally, the 2008-2009 Verification Report states that [ ] and [ ] “maintain separate identities and operations, although the headquarters of both companies are both located in the building in which {the department officials} conducted verification.”<sup>39</sup> The report also states that during the POR, “[ ] plants (*i.e.*, [ ] and [ ])<sup>40</sup> were both under the control of [ ], in contrast to the prior POR where [ ] controlled [ ] and [ ] controlled [ ] for a portion of the POR, before [ ] purchased [ ].”<sup>41</sup> The report further states that [ ] was the sole supplier of pure magnesium exported by TMI to the US during that POR.<sup>42</sup> During this underlying review, TMI continued to report that [ ] was the sole supplier of pure magnesium it exported to the United States.<sup>43</sup>

Furthermore, the Department disagrees with USM’s claim that the fact that [ ] web page displays an image of the exact same building shown in the document that USM put forth as [ ]’s company brochure<sup>44</sup> constitutes evidence that [ ] is [ ].<sup>45</sup> As discussed above, we acknowledge that [ ] and [ ] share the same corporate headquarters. However, as also mentioned above, the web page clearly states that the information pertains to [ ], not [ ]. Moreover, the marketing material in USM’s February 24, 2011, submission (which USM alleges to be TMI’s supplier’s marketing material)

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<sup>38</sup> See 2007-2008 Verification Report, at 2 and 6.

<sup>39</sup> *Id.*, at 5.

<sup>40</sup> [ ] is short for [ ] Plant.

<sup>41</sup> See 2008-2009 Verification Report, at 5.

<sup>42</sup> *Id.*

<sup>43</sup> See TMI’s Section A Response, at 11.

<sup>44</sup> See USM’s submission, “Pure Magnesium from the People’s Republic of China: Initial Deficiency Comments On TMI’s First Supplemental A-C Questionnaire Response And First Supplemental Section D Questionnaire Response,” dated February 24, 2011 (“USM’s February 24, 2011, Submission”), at page 7 of Exhibit 2.

<sup>45</sup> See USM’s March 1, 2013, Submission, at 8.

describes information about [ ] operations.<sup>46</sup> Thus, it is not surprising that the image of the building from the web page matches the image of the building from the marketing material, given that they both describe [ ]. Nothing in either document states that the information pertains to [ ]. In fact, neither the fax number of [ ] shown in the marketing material nor the address of [ ] in the 2006 Chinese magnesium industry directory matches the fax number or address of [ ] on the record.<sup>47</sup>

Importantly, USM overlooks the fact that the Department previously asked TMI whether its supplier [ ] “has registered, and/or is known under any other names” in a supplemental questionnaire, to which TMI replied negatively.<sup>48</sup> USM’s proffered evidence does not demonstrate that this questionnaire response is not credible.

Therefore, because all three documents specifically refer to [ ], not [ ], and because the Department has previously found [ ] and [ ] to be separate entities, the Department finds that evidence of [ ] retort production does not constitute evidence of fraud with respect to TMI’s claim that [ ] rented the retorts consumed in the production of subject merchandise during the POR.

Additionally, in response to TMI’s rebuttal brief, USM claims that TMI omitted material information during the administrative review that one of [ ] retort suppliers is an affiliated company to [ ] in an “effort to falsely understate its supplier’s production cost.”<sup>49</sup> According to USM, TMI’s failure to disclose the affiliation between [ ] and [ ]’s retort supplier shows that “TMI clearly failed to report ‘particularly important’

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<sup>46</sup> See USM’s February 24, 2011, Submission, at Exhibit 2.

<sup>47</sup> See TMI’s submission, “Pure Magnesium from the People’s Republic of China; A-570-832; Response to First Supplemental Questionnaire by Tianjin Magnesium International, Co., Ltd.,” dated February 3, 2011, (“TMI’s First SQR”), at 26. (“The address of [ ] is [ ]; see also TMI’s Section A Response, at 21 (Fax: [ ]); see also USM’s February 24, 2011, Submission, Exhibit 2, at 7 (Fax: [ ]).”)

<sup>48</sup> See TMI’s First SQR, at 28.

<sup>49</sup> See USM’s March 15, 2013, Submission, at pages 10-14.

information” because Question 3.a. (Corporate Structure and Affiliations) of the Section A questionnaire required respondents to report such important information.<sup>50</sup> However, USM was incorrect because Question 3.a. requests that the respondent provide the corporate structure and affiliations of the exporter of the subject merchandise. In this case, the respondent, TMI, is the exporter, not its supplier [ ].

Furthermore, record evidence does not indicate that TMI and [ ] are affiliated. Hence, the Department does not consider the fact that TMI did not report [ ]’s alleged affiliation with [ ]’s own retort supplier to be evidence of fraud by TMI.

*B) Level of Materiality*

Under the Department’s practice, whether a respondent’s supplier rents or purchases a production input, or whether it leases a production input from an affiliate, does not affect the Department’s analysis as to whether the production input should be classified as an indirect material input and valued as overhead<sup>51</sup> or a direct material input. As discussed in the IDM, the Department evaluates various criteria to distinguish direct or indirect material on a case-by-case basis, and it has broad discretion in determining which criteria are most relevant to a particular case when evaluating the issue.<sup>52</sup> Under the Department’s practice, indirect materials are usually items used in the production process, but are not traceable to a particular product, or items that are added directly to products, but whose cost is so small that the effort of tracing that cost to individual products would be greater than the benefit of accuracy. In this case, the record evidence demonstrates that retorts are part of the necessary production equipment to manufacture

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<sup>50</sup> *Id.*, at 13.

<sup>51</sup> When the Department classifies an input as an indirect material input and values it in overhead, it is the same as if the Department classified it as overhead.

<sup>52</sup> See *Final Results*, and accompanying IDM at Comment 4.

the subject merchandise, however they are not physically incorporated into the final product.<sup>53</sup> USM concedes this fact.<sup>54</sup>

Additionally, we note, that USM did not cite to any case precedent to demonstrate that it is the Department's practice or preference to classify materials based on whether or not they are rented or produced.<sup>55</sup> Because the record demonstrates that whether a material is rented or produced does not affect the Department's analysis in this regard, we find that the documents submitted by USM are immaterial with respect to the issue of retort classification. Regarding USM's claim that TMI's failure to disclose [ ] alleged affiliation with its retort supplier constitutes failure to disclose "particularly important information," the Department disagrees and finds that this information has no bearing on the classification of retorts as overhead in this case.

*C) Extent of the Inaccuracies in This Review*

As discussed above, the Department finds that: a) [ ] and [ ] are separate legal entities in the underlying review, and b) irrespective of this previous finding (*i.e.*, even if [ ] were found to have been self-producing retort inputs, rather than obtaining them from [ ]), this fact would not impact the decision to classify retorts as an indirect

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<sup>53</sup> See TMI's submission, "Pure Magnesium from the People's Republic of China; A-570-832; Response to the Selection C&D by Tianjin Magnesium International, Co., Ltd.," dated August 27, 2010 ("TMI's August 27, 2010, C&DQR"), Exhibit D-1.

<sup>54</sup> See USM's submission, "Pure Magnesium From the People's Republic of China: Case Brief Of US Magnesium," dated July 15, 2011 ("USM's July 15, 2011, Case Brief"), at 6.

<sup>55</sup> In USM's July 15, 2011, Case Brief, USM, when arguing that the Department erred in treating retorts as indirect material, listed four factors examined by the Department, and none involves whether the input is rented, purchased, or self-produced.

material input in this case. Therefore, we find that there are no inaccuracies on the record with regard to this issue.<sup>56</sup>

For the forgoing reasons, the Department concludes that the factual information provided by USM does not demonstrate *prima facie* evidence of fraud because the documents: a) do not demonstrate that TMI's statements that its supplier [ ] rented retorts to produce pure magnesium during the POR were untrue; b) do not have any material effect on the issue of whether retorts should be classified as overhead or a direct material; and c) do not demonstrate inaccuracies on the record.

Finally, USM's argument that the Department must consider whether an intermediate input methodology is appropriate when reconsidering the retort classification issue is inapposite. USM argued that the Department must consider this methodology because during the POR TMI's producer engaged in production of a major input, *i.e.* retorts. However, because the Department finds that, [ ] did not produce retorts and the Department properly classified retorts as an indirect input, we need not address this argument.

## **Issue 2: Whether Infobanc Data is the Best Information Available to Value Inland Truck Freight**

In the *Final Results*, the Department used Infobanc data to value truck freight. The Court remanded this issue to the Department to reconsider its decision to account for alleged deficiencies with Infobanc data. The Court held that the Department must affirmatively support its selection of Infobanc rates with substantial evidence and address contradictory evidence put forth by USM.

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<sup>56</sup> Although USM did not comment on it, we do note that TMI, when listing [ ] [ ] retort suppliers, referred to one of them as [ ]. However, the Department believes this was an error, as record evidence in the form of a retort lease contract between [ ] and [ ] and affidavit provided by [ ]'s engineer indicates that this supplier was in fact [ ] and not [ ]. See TMI's First DSQR, at 9 and Exhibit SD-3; see also TMI's Second SQR at Exhibit S2-2.



USM argues that the source and terms associated with Infobanc truck rates are unknown, including whether the rates (1) relate to offers for shipments or reflect actual transactions; (2) apply to containerized or bulk shipments; (3) reflect long-term contract or spot prices; and (4) are inclusive of loading and unloading costs.<sup>57</sup> After a reexamination of the record of the review, the Department finds that Infobanc does not describe its sources and the methodology underlying the freight calculation in sufficient detail to address these questions. Thus, we agree that we are unable to determine the source and terms of the Infobanc rates.

Alternatively, the World Bank data are contemporaneous with the POR and based on country-wide information.<sup>58</sup> The World Bank provides information on the source and calculation of the rates it reports.<sup>59</sup> For instance, the World Bank publication, *Trading Across Borders Methodology*, states that Indian “freight forwarders, shipping lines, customs, brokers, port officials and banks provide information on required documents and costs.”<sup>60</sup> Furthermore, a detailed discussion supports how the World Bank data were determined.<sup>61</sup> For example, the survey the World Bank conducted to collect information allows the Department to examine the quality of the methodology used to calculate the reported rates and hence renders those rates more reliable. Additionally, the World Bank publication is more reliable because it provides detailed information about its local partners with whom it works to collect the necessary information for calculate its reported rates.<sup>62</sup> Accordingly, the Department finds that World

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<sup>57</sup> See USM’s July 15, 2011, Case Brief, at 43.

<sup>58</sup> See USM’s submission, “Pure Magnesium from the People’s Republic of China: US Magnesium’s Initial Comments Concerning Valuation of the Factors of Production,” dated December 7, 2010, at Exhibit 7. For instance, in Exhibit 7D, the table of contents page states that the data “are current as of June 1, 2009,” also page 77 of the exhibit states that “[t]he data for all sets of indicators ... are for June 2009.” Also, World Bank sent *Trading Across Border Questionnaire* to companies in India to gather information to derive inland transportation costs; see Exhibit 7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Bank data constitute the best information available on the record and has used these rates to value inland truck freight for this redetermination.

### **Issue 3: Surrogate Value for Financial Ratios**

In the *Final Results*, the Department selected Hindalco's financial statements to calculate the financial ratios because: 1) evidence showed that two thirds of Hindalco's total metal production by weight during the POR was primary aluminum (which the Department has found to be comparable to primary magnesium production), and 2) no evidence indicated that Hindalco received countervailable subsidies during the POR.<sup>63</sup> Subsequently, USM challenged this selection, noting that Hindalco received the Export Promotion Capital Goods Scheme ("EPCG"), a subsidy which the Department has found to be countervailable.<sup>64</sup> After re-examining Hindalco's financial statements, the Department agrees that Hindalco received benefits under the EPCG during the POR and, thus, the financial statements no longer constitute the best information available for purposes of calculating the financial ratios.<sup>65</sup>

The Department has a well-established practice of disregarding financial statements where there is evidence that the company received subsidies that the Department has previously found to be countervailable during the POR, and where there are alternative, sufficient, reliable, and representative data on the record to calculate the surrogate financial ratios.<sup>66</sup> Thus, we are not relying on Hindustan Zinc Limited, NALCO Aluminum Company Limited, Bharat

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<sup>63</sup> See *Final Results*, and the accompanying IDM at Comment 5.

<sup>64</sup> See *Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review*, 75 FR 43488 (July 26, 2010), and accompanying IDM at Comment 2.

<sup>65</sup> See TMI's submission, "Pure Magnesium from the People's Republic of China (A-570-832); Surrogate Value Information," dated December 7, 2010 ("TMI's SV Submission"), Exhibit SV-13E (Hindalco's financial statements, on page 89, show that Hindalco received EPCG during the POR).

<sup>66</sup> See *Pure Magnesium from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 FR 80791 (December 23, 2010), and accompanying IDM at Comment 2; *Certain Steel Nails from the People's Republic of China: Final Results of the First New Shipper Review*, 75 FR 34424 (June 17, 2010), and accompanying IDM at Comment 4; *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008), and accompanying IDM at Comment 17.A.

Aluminum Co., Ltd., and Century Extrusions, Ltd.’s (“Century’s”) financial statements ,<sup>67</sup> and now Hindalco’s financial statements, because all of these companies received countervailable subsidies during the POR.<sup>68</sup> With respect to the remaining financial statements, the Department continues to find that Midhani Dhatu Nigam Limited (“Midhani”) and Hindustan Copper Limited (“Hindustan Copper”)’s financial statements are inappropriate to calculate financial ratios for the same reasons discussed in the IDM.<sup>69</sup> Additionally, the Department declines to use the 2006-2007 financial statements of Madras Aluminum Company Limited because these financial statements are from three years prior to the POR and, thus, not contemporaneous.

Therefore, the Department finds that Sudal, Bhoruka and Gujarat’s financial statements represent the best information available to value financial ratios. For purposes of selecting surrogate suppliers, the Department examines how similar a proposed surrogate supplier’s production experience is to the NME supplier’s production experience.<sup>70</sup> The Department, however, is not required to “duplicate the exact production experience of” an NME supplier when selecting surrogate financial statements, nor must it undertake “an item-by-item analysis in calculating factory overhead.”<sup>71</sup> Thus, although there are differences in production process between aluminum extrusions and primary pure magnesium, the Department does not find that, given the lack of alternative financial statements in this instance, these differences prohibit a reasonable inference that the two products are comparable.

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<sup>67</sup> TMI’s SV Submission, Exhibit SV-13B (Century’s financial statements, on page 35, show that Century also received EPCG during the POR).

<sup>68</sup> See *Final Results*, and accompanying IDM at Comment 5.

<sup>69</sup> See *id.* For instance, the Department declines to use Midhani and Hindustan Copper’s financial statements because these companies did not produce products that the Department has determined to be comparable to pure magnesium.

<sup>70</sup> See *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) (“OCTG”), and accompanying IDM at Comment 13.

<sup>71</sup> See *id.*, citing *Nation Ford Chem. Co. v. United States*, F. Supp. 133, 137 (CIT 1997) and *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

Here, the record indicates, and the Department had previously verified,<sup>72</sup> that [ ] began its production process by melting dolomite to produce pure magnesium and eventually solidifying the mixture into pure magnesium.<sup>73</sup> The record indicates that the aluminum extrusion process begins with melting raw materials (such as aluminum ingots and scrap) to produce aluminum billets.<sup>74</sup> The aluminum extruder companies then utilize a casting process to melt feedstock to produce aluminum billets, which are then extruded to make the final aluminum products (processes not employed in the production of pure magnesium).<sup>75</sup> Nevertheless, as in *Magnesium Metal*,<sup>76</sup> the Department finds the production processes of aluminum extrusions sufficiently similar that the differences do not render the products incomparable to pure magnesium. Additionally, we have historically found aluminum products to be comparable to magnesium products.<sup>77</sup> For the aforementioned reasons, the Department has determined that Sudal, Bhoruka, and Gujarat's financial statements constitute the best information available to value the financial ratios, and we have re-calculated the financial ratios accordingly.<sup>78</sup>

#### **Issue 4: Surrogate Value for Labor**

For the *Final Results*, the Department selected the 2007-2008 Indian Annual Survey of Industries ("ASI") data submitted by USM over the International Labor Organization ("ILO")

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<sup>72</sup> See 2008-2009 Verification Report, at 13.

<sup>73</sup> See TMI's August 27, 2010, C&DQR, Exhibit D-1.

<sup>74</sup> See TMI's submission, "Pure Magnesium from the People's Republic of China; A-570-832; Supplemental Rebuttal Brief of Tianjin Magnesium International, Ltd. Regarding Labor and Financial Ratio Calculations," dated August 15, 2011 at Exhibit SVF-3A.

<sup>75</sup> *Id.*

<sup>76</sup> See *Magnesium Metal from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 FR 65450 (October 25, 2010) ("*Magnesium Metal*"), and accompanying IDM at Comment 1.

<sup>77</sup> See, e.g., *id.*; *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008); *Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Magnesium Metal From the People's Republic of China*, 69 FR 59187 (October 4, 2004) (affirmed in final determination); *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China*, 66 FR 49345 (September 27, 2001), and accompanying IDM at Comment 3; *Pure Magnesium NSR Final*, 63 FR 3085, 3088 (January 21, 1998); *Pure Magnesium From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Administrative*, 62 FR 55215 (October 23, 1997) ("*Pure Magnesium NSR Prelim*").

<sup>78</sup> See Draft Redetermination Analysis Memo, at Attachment 1 for the financial ratio recalculation.

India data, concluding that the ASI data are not only the source underlying the ILO data but also that ASI data are more specific to the subject merchandise and contemporaneous with the POR. However, USM challenged the Department's use of the ASI data, arguing that the Department made two errors while calculating the labor rate. First, USM asserted that the Department erroneously selected the period of May 1, 2007, through April 30, 2008, as the base period for the inflation adjustment, instead of the period of the source labor data (*i.e.*, April 1, 2007, through March 31, 2008). Second, USM claimed the Department incorrectly selected India's wholesale price index for the inflation adjustment instead of the consumer price index typically used to adjust for inflation in accordance with the Department's labor policy bulletin.

The Department agrees with USM that it erred when inflating the labor rate with respect to the base period and used the incorrect index to adjust for inflation in the *Final Results*. Accordingly, the Department has corrected those two errors for these draft results of redetermination.<sup>79</sup>

## **INTERESTED PARTIES' COMMENTS ON DRAFT REMAND RESULTS AND THE DEPARTMENT'S POSITION**

As noted above, USM provided comments on the draft remand results regarding (1) its allegation that the new factual information demonstrates *prima facie* fraud by TMI and (2) the selection of financial statements. TMI submitted no comments on the draft remand results.

### **Issue 1: Whether the Documents Submitted By USM Demonstrate *Prima Facie* Evidence of Fraud**

#### USM's Comments on the Draft Remand

USM argues that the Department's analysis of *prima facie* evidence of fraud in the draft remand results is flawed and that TMI committed fraud by failing to disclose that its supplier's affiliate produced retorts. Thus, USM argues, the Department should apply adverse facts

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<sup>79</sup> See Draft Redetermination Analysis Memo, at Attachment 1 for the adjusted labor rate calculation.

available to TMI. USM claims that the Department’s draft remand results glossed over pertinent evidence on the record. Specifically, USM claims that the draft remand results did not properly acknowledge that [ ],<sup>80</sup> and that they were even designated [ ] in the 2007-2008 Verification Report. USM claims that in prior reviews the Department focused on the very close relationship between [ ] and [ ] and concluded that the two entities are essentially one company.<sup>81</sup> USM argues that even though the two factories producing subject merchandise, designated [ ] and [ ] factories, were “owned” solely by [ ] since January 2008, [ ] remained members of the [ ].<sup>82</sup> Thus, USM claims that the close relationship of the companies is established and that the Department improperly found in the draft remand results that during this POR “TMI was the sole respondent/exporter and [ ] was the sole supplier of subject merchandise.”<sup>83</sup>

USM argues that TMI failed its duty to disclose that an affiliate of [ ] produces retorts.<sup>84</sup> USM argues that the Department’s questionnaire indicates that it does not consider physical incorporation to determine whether a retort is a direct or indirect material and that timely disclosure of this information could have resulted in the Department valuing the retorts as a direct input or in the use of an intermediate input methodology.<sup>85</sup> USM claims that the intermediate input methodology could be appropriate here because the supplier and its affiliated input supplier “appear to be” a single entity.<sup>86</sup> USM asserts that TMI failed to provide complete

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<sup>80</sup> See USM’s Comments, at 33.

<sup>81</sup> *Id.* (citing to the 2007/2008 Verification Report).

<sup>82</sup> *Id.*, at 34 (citing to the 2008/2009 Verification Report).

<sup>83</sup> *Id.*, at 34-35.

<sup>84</sup> *Id.*, at 37-38.

<sup>85</sup> *Id.*, at 42.

<sup>86</sup> *Id.*

information in response to the Department’s subsequent questions about retort consumption,<sup>87</sup> and that TMI did not comply with the Department’s requests for information regarding the treatment of retorts. Additionally, USM claims TMI’s failure to provide complete information regarding retorts goes back to the original administrative proceeding. Based on this information, USM claims that TMI had a duty to report information about [ ] retort production and its failure to do so is sufficient to constitute *prima facie* evidence of fraud.<sup>88</sup>

USM also argues that the Department’s analysis of the “level of materiality” and “extent of inaccuracies” is flawed because the Department’s conclusions rely on the issue of how the retorts should be classified, instead of addressing the fraudulent behavior of TMI. USM claims that it never argued that leasing or producing retorts controls the classification issue and avers that such information is irrelevant to the classification issue.<sup>89</sup>

USM argues that the draft remand results failed to acknowledge that the basis for the 1998 classification of retorts, based on physical incorporation, is no longer the Department’s policy.<sup>90</sup> USM argues that the Department should classify retorts as a direct material and that the supplier’s books and records demonstrate that it treats them as a direct material.<sup>91</sup>

USM also points to the fact that the Department has applied adverse facts available to TMI in three previous reviews for reasons related to the disclosure of certain information regarding its unaffiliated producer.<sup>92</sup> USM argues that the Department’s interpretation in the draft redetermination that TMI was not obligated to report the affiliates of [ ] would allow a non-producing exporter respondent not to report information about its producer of the

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<sup>87</sup> *Id.*, at 40-41.

<sup>88</sup> *Id.*, at 43.

<sup>89</sup> *Id.*, at 45.

<sup>90</sup> *Id.*, at 35.

<sup>91</sup> *Id.*, at 36.

<sup>92</sup> *Id.*, at 39.

subject merchandise that an exporter affiliated with the producer would be required to report.<sup>93</sup> USM claims that the Department's approach in the draft redetermination provides an invitation for fraud and is inconsistent with recent case law that addresses respondents' failures to disclose information.<sup>94</sup>

The Department's Position:

We continue to find that the documents<sup>95</sup> submitted by USM do not demonstrate *prima facie* evidence of fraud by TMI. These documents do not contradict or undermine TMI's statement that [ ] rented retorts and does not affect the Department's underlying decision with respect to this issue. We also continue to disagree with USM's claim that the documents demonstrate that [ ] produced retorts, rather than rented them, and with USM's argument that [ ] possible production of retorts necessarily demonstrates that TMI's response that [ ] rented retorts is incorrect. Further, we disagree with USM that TMI failed its duty to report, or was even on notice of an obligation to report, the fact that its supplier may have had an affiliate that produces retorts.

As discussed in the draft remand results, the documents in question specifically refer to [ ], not [ ]. The 2007-08 verification report explicitly states that [ ] and [ ] are "separate legal entities," and "kept distinct financial records during the POR." During that POR, "beginning in January 2008, the [ ] pure magnesium plant was transferred to [ ], at which point [ ] became the sole producer of subject merchandise for the remainder of the POR." The Department verified the relevant documents

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<sup>93</sup> *Id.*, at 40.

<sup>94</sup> *Id.*, at 38-39.

<sup>95</sup> These documents refer to (1) a Chinese magnesium industry bulletin published on August 26, 2011, (2) a web page of a company USM claims is [ ], and (3) a Chinese magnesium industry directory published in 2006.



recording the ownership transfer from [ ] to [ ].<sup>96</sup> During the subsequent two reviews (*i.e.*, the 08-09 and 09-10 reviews), the two plants that produced the subject merchandise (*i.e.*, [ ] and [ ]) continued to be in the sole control of [ ], and [ ] was no longer TMI's supplier of pure magnesium for those reviews.<sup>97</sup> No evidence on the record of this review contradicts these findings.

Moreover, USM's claim that "[ ]<sup>98</sup> finds no support on the record. As explained in the draft remand results, even though both the 2007-2008 and 2008-2009 verifications of the sales and accounting activities of [ ] took place in [ ]'s headquarters, we treated, and continue to treat, them to be separated legal entities. Furthermore, no record evidence shows that [ ] is a member of the [ ]. In fact, the second piece of evidence proffered by USM states that [ ] specifically refers to [ ].<sup>99</sup>

However, according to USM, the 2008-2009 Verification Report states that [ ] (the "shareholder company") "was set up from [ ] and [ ] in 2008 because it was preparing to go public, though it has not yet done so," thus, it demonstrates that [ ]

[ ] We disagree that that record supports USM's conclusion. Rather, record evidence shows that the shareholder

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<sup>96</sup> See 2007-2008 Verification Report, at 2 and 6. ("We observed an amount for [ ] RMB and [ ] RMB booked into [ ]'s others payable account and debiting their bank deposit account. We observed corresponding bank notices, showing the respective amount paid from [ ] to [ ]. The Department then requested to see a report from [ ]'s others payable account showing all payments for the transfer of the [ ] factory. We were provided with this documentation, along with the transfer agreement. We requested a sample of several payment documents, each of which tied to the sub-ledger.")

<sup>97</sup> See 2008-2009 Verification Report, at 5; *see also* TMI's Section A Response, at 11.

<sup>98</sup> See USM's Comments, at 33.

<sup>99</sup> See USM's March 1, 2013, Submission, at Attachment 1, Exhibit 2.

company referred in the 2008-2009 Verification Report is not interchangeable with the [ ]. This is because, as USM’s third piece evidence (*i.e.*, a 2006 industry directory describing the [ ]) indicates, [ ] was established at least as early as in 2006,<sup>100</sup> while the shareholder company was set up from [ ] and [ ] in 2008. Furthermore, although the 2007-08 Verification Report refers to [ ], the next part of that sentence clearly states that the companies are separate legal entities.<sup>101</sup> For this reason, the Department finds that USM’s allegation that [ ] and [ ] “appear to be” the same company is not convincing. Rather, the Department finds that the record does demonstrate that [ ] and [ ] were previously found to be two separate legal entities and that [ ] became the sole producer of subject merchandise during the previous POR. This evidence is consistent with what TMI reported during this review.<sup>102</sup>

USM speculates that [ ] production of retorts demonstrates that TMI committed fraud by stating that [ ] rented its retorts. Again, we disagree that the record supports this conclusion. We agree that record shows that [ ] and [ ] were affiliated in the past two reviews, and we agree that the documents show that [ ] produces retorts. However, as we have discussed in the draft remand results, this does not support the conclusion that [ ] produced retorts and that TMI incorrectly reported this information during the review. The previous reviews did not establish that [ ] and [ ] are a single entity, and thus USM’s evidence of [ ] producing retorts is not evidence of fraud by TMI. We do not find that the new record evidence demonstrates that [ ] produced retorts rather than rented them. Given these facts, the Department finds that the record does not support application of an adverse inference to TMI.

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<sup>100</sup> See USM’s March 1, 2013, Submission, at Attachment 1, Exhibit 3.

<sup>101</sup> See 2007-2008 Verification Report.

<sup>102</sup> See TMI’s Section A Response, at 11.

Furthermore, we disagree with USM’s assertion that TMI had some duty to report that [ ] produces retorts, such that a failure to do so demonstrates *prima facie* evidence of fraud by TMI. Contrary to USM’s claim, the Department’s original questionnaire<sup>103</sup> did not ask TMI to report any affiliates of its non-affiliated producer. USM cited Question 3.a of the Department’s original questionnaire (Section A - Corporate Structure and Affiliate) to argue that TMI failed to disclose important information about [ ] affiliate production of retorts. In fact, Question 3.a of the questionnaire specifically states the following:

Provide an organization chart and description of your company’s {i.e., (respondent)} operating structure. Describe the general organization of the company and each of its operating units...

In addition, for all affiliated producers of the merchandise under consideration, please provide information for the following table (underlining added).

<b>Producers of Merchandise Under Consideration</b>	<b>Producers of Merchandise Under Consideration that match CONNUMS sold in, or to, the United States</b>	<b>Description of the <u>Affiliated</u> Producer’s Relationship to the Respondent</b>
Company A		
Company B		
Company C		

The above question directs TMI, the respondent in this review, to report its affiliate producers. In response, TMI responded that [ ] was its unaffiliated producer.<sup>104</sup> However, the Department did not design this question to seek information regarding affiliates of non-affiliated producers. Whether a non-affiliate producer has other affiliates has no implication on the dumping margin calculation pertaining to the respondent if these affiliates are not involved in the production of the subject merchandise exported by the respondent, as in this

<sup>103</sup> See the Department’s letter, “2009-2010 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People’s Republic of China: Questionnaire,” dated June 30, 2010.

<sup>104</sup> See TMI’s Section A Response, at 11.

review. Record evidence also shows that TMI has no affiliation with its supplier of subject merchandise, [ ], in this review.<sup>105</sup> Thus, contrary to USM’s claim, TMI would have no duty to report whether its non-affiliate supplier [ ] had an affiliate that produced retorts.

The cases cited by USM to support its contention that TMI has an obligation to report this information in response to Question 3.a. and that the Department is remiss in not finding TMI acted fraudulently by not doing so, are off point.<sup>106</sup> Each of those cases deals with a situation where a respondent failed to answer a question specifically asked of it and/or failed to divulge pertinent information.<sup>107</sup> That is clearly not the case here. Moreover, the Department has not set up a “new construction of the law,” we have merely pointed out that record evidence does not contradict or undermine TMI’s response to the relevant questions in the Department’s questionnaires.

We also do not agree with USM that TMI should have been on notice that it needed to report that its supplier was affiliated with a producer that manufactured retorts. As explained in the draft remand results, the issue in this review is whether the Department should classify retorts as direct inputs or overhead. The issue is not whether the retorts were rented/purchased from an affiliate or self-produced. TMI maintained throughout this review, and still maintains, that its supplier rented the retorts it used in production, and supported this contention with record evidence. Therefore, USM’s speculative argument has not persuaded us that simply because

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<sup>105</sup> See TMI’s Section A Response, at 11-12, Exhibits A-3, A-4, A-8 and A-10. We do not find USM’s unexplained observation that two of [ ]’s three vice managers share the same surname [ ] as the owner of TMI to change this analysis.

<sup>106</sup> See USM’s Comments, at 38-39.

<sup>107</sup> For instance, in *Universal Polybag Co. Ltd. v. United States*, 577 F. Supp. 2d 1284, 1294-97 (CIT 2008), the respondent King Pac’s failure to provide timely information during the proceeding and continued withholding of information regarding “minor corrections” at verification justified the application of adverse facts available. In *Shanghai Taoen Int’l Trading Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1344-45 (CIT 2005), the respondent Taoen purposefully withheld fundamental information before verification.

TMI's supplier could have sourced its retorts from an affiliate created an obligation on TMI to report that its supplier's affiliate produced retorts.

The Department disagrees with USM's characterization that TMI failed to provide complete responses to the Department's supplemental questionnaires concerning retorts. When the Department requested TMI to provide retort consumption, TMI responded that its supplier rented retorts<sup>108</sup> and provided the retort consumption by compiling the weight loss of the steel tubes (*i.e.*, retorts) for making a unit of subject merchandise as well as the physical characteristics of the retorts.<sup>109</sup> In response to the Department's request for [ ]'s internal documentation preparing during the normal course of business indicating the retorts are treated as overhead, TMI provided a rental lease of retorts as well as excerpts of Chinese accounting literature showing that rent is treated as an indirect manufacturing expense in China.<sup>110</sup>

We also disagree with USM's implied claim that because we applied adverse facts available to TMI in the three most recent administrative reviews, the situation here is comparable. In those reviews, the Department's determination was based on information regarding TMI's *own* request for a by-product offset that was supported by information provided by [ ] about its *own* books and records. Those facts are distinguishable from USM's argument here. Here, USM argues that TMI should receive adverse facts available because TMI should have submitted information about an affiliate of TMI's supplier, [ ]. However, as explained above, in the Department's general questionnaire, we asked TMI to report its affiliated producers, not affiliates of its non-affiliated producer. Moreover the issue of whether retorts were rented or purchased from affiliates, or self-produced by TMI's producer, is

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<sup>108</sup> See TMI's First DSQR, at 9.

<sup>109</sup> See TMI's Second SQR, at 3, Exhibits 2S-3 and 2S-4.

<sup>110</sup> See TMI's First DSQR, at 9, Exhibits SD-3 and SD-4.

irrelevant to the margin calculation because we classified retorts as an indirect material and valued them as overhead expenses.

As explained above, the Department has determined that the new information submitted by the petitioner does not indicate any fraud during the underlying review and does not undermine the evidence on the record. For that reason, the Department's determination in the *Final Results* with respect to the issue of retorts and retort classification remains unchanged. To fully address USM's argument, however, the following provides additional clarification regarding the determination in the *Final Results* to classify retorts as an indirect material and the lack of relevance between the factual information and the classification issue.

We continue to disagree with USM's claim that we should classify retorts as a direct material. As explained in the *Final Results*, the Department analyzes on a case-by-case basis whether a material is a direct or indirect material.<sup>111</sup> Here, record evidence indicated to us that we should treat retorts as an indirect material. First, in the final analysis memo,<sup>112</sup> the Department disagreed with USM's claim that TMI's supplier treats retorts as a direct material input in its books and records:

The CPS {Cost of Production Subledger} is part of TMI's Exhibit SD-6a, which records the cost of production reconciliations for one of the [ ] production plants. Petitioner argues that the fact that retorts are listed on this document as "material consumption" indicates that they are treated as a direct material input. The CPS, however, [ ], items that would not be considered direct material inputs, along with other line-items that are not material inputs, such as [ ]. Thus, the fact that TMI's supplier lists retorts in this document does not indicate that they are a direct material, but rather part of the cost of production. In light of the above facts, taken together, we find that because the retorts are not frequently replaced and are not

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<sup>111</sup> See *Final Results*, and accompanying IDM at Comment 4.

<sup>112</sup> See the Department's memorandum to the file, "Analysis Memorandum for the Final Results of the 2009-2010 Administrative Review of Pure Magnesium from the People's Republic of China: Tianjin Magnesium International Co., Ltd. ("TMI")," dated December 5, 2011.

physically incorporated into the pure magnesium product, they are overhead and not a direct material.<sup>113</sup>

The Department also explained that the CIT in *Bridgestone* recently upheld the Department's discretion to consider various criteria when determining whether a material is a direct or indirect material.<sup>114</sup> In *Bridgestone*, the court held that the Department reasonably exercised its discretion when it considered two of four possible criteria when determining whether an input was a direct or indirect material.<sup>115</sup> Similarly, in the *Final Results*, the Department explained that it found two criteria in particular which demonstrate that it properly treated retorts as an indirect material.<sup>116</sup>

Lastly, as to USM's assertion that the draft remand results failed to acknowledge that the basis for the 1998 classification of retorts, based on physical incorporation, is no longer the Department's policy, we disagree. Although USM points to a supplemental questionnaire to argue that "physical incorporation is no longer required for finding an item to be an indirect material," this does not demonstrate that the Department does not consider physical incorporation in its analysis. Indeed, as explained above, the CIT recently upheld the Department's decision in which it considered physical incorporation whether looking at the direct versus indirect material analysis.

Accordingly, based on the above, the Department continues to find that the documents submitted by USM do not demonstrate *prima facie* evidence of fraud by TMI.

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<sup>113</sup> None of the evidence presented by USM undermines the Department's original determination with respect to retorts. Record evidence demonstrates that TMI's producer does not treat retorts as raw material on its books and records. [ ]'s December 2009 monthly production cost sheet, under the category of "raw material," *i.e.*, direct materials, lists (1) Fesi; (2) Dolomite; (3) Flux; (4) Fluorite Powder; (5) Sulphur Powder; and (6) Sulfuric Acid, and does not include retorts; *see* TMI's August 27, 2010, C&DQR, Exhibit D-2h.

<sup>114</sup> *See Bridgestone Ams., Inc. v. United States*, 710 F. Supp. 2d 1359 (CIT 2010).

<sup>115</sup> *Id.*, 710 F. Supp. 2d at 1363-64.

<sup>116</sup> *See Final Results*, and accompanying IDM at Comment 4 (explaining in full the Department's position with respect to the treatment of retorts as an indirect material).

## **Issue 2: Surrogate Value for Financial Ratios**

### USM's Comments on Draft Remand Results

USM argues that the Department's finding that aluminum extruded and thin gauge aluminum production is comparable to primary magnesium production is in direct conflict with the Department's analysis set forth in the immediately preceding review of this order. In the 2008-2009 pure magnesium review, USM states, the Department rejected Sudal's, Bhoruka's and Gujarat's financial statements because it found that the production process was not similar or comparable to that of TMI's producer. USM argues that because all of the pertinent facts concerning the production processes and subject merchandise are identical in these two segments, the Department should continue to use MALCO's 2006-2007 financial statements in this review even though they are not contemporaneous. USM further argues that the Department has a long history of using non-contemporaneous financial statements to determine surrogate financial ratios when there were no better alternatives on the record. USM points out that the CIT affirmed the Department's use of a set of six-year-old financial statements.<sup>117</sup>

### Department's Position

After reexamining the record of this review, the Department has determined that MALCO's statements are the best available information with which to calculate surrogate financial ratios. As explained in the *Final Results*, when selecting financial statements for the purpose of calculating surrogate financial ratios, the Department's policy is to use data from market-economy surrogate companies based on the specificity, contemporaneity, and quality of the data.<sup>118</sup> Guidance regarding surrogate values for manufacturing overhead, general expenses, and profit is provided by 19 CFR 351.408(c)(4), which states that these values will normally be

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<sup>117</sup> See USM's Comments, at 15.

<sup>118</sup> See *Final Results*, and accompanying IDM at Comment 5.



based on publicly available information from companies that are in the surrogate country and that produce merchandise that is identical or comparable to the subject merchandise. Although the statute does not define “comparable merchandise,” it is the Department’s practice to, where appropriate, apply a three-prong test that considers the: (1) physical characteristics; (2) end uses; and (3) production process.<sup>119</sup> Additionally, for purposes of selecting surrogate producers, the Department examines how similar a proposed surrogate producer’s production experience is to the NME producer’s production experience.<sup>120</sup> MALCO is a producer of aluminum, which we previously determined to be a comparable product to pure magnesium.<sup>121</sup> Similar to TMI’s supplier, MALCO produces only an unwrought metal product and does not produce downstream products.<sup>122</sup> We recognize that in the 2008-2009 review of magnesium metal, a similar metal to pure magnesium, the Department found that the production experience of two aluminum downstream product companies (*i.e.*, Sudal and Gujarat) was comparable to the respondent’s producer’s experience.<sup>123</sup> The Department explained that the producer’s secondary production process, which involved melting magnesium scrap and alloys in a smelter and then solidifying the mixture in molds to make magnesium metal ingots, was similar to that of Sudal and Gujarat.<sup>124</sup>

After reexamining the record of this review, we find that unlike in the 2008-09 magnesium metal review in which the producer used a secondary production process, TMI’s

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<sup>119</sup> See *Certain Woven Electric Blankets From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 38459 (July 2, 2010), and accompanying IDM at Comment 2; *Certain Cased Pencils from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 48612 (July 25, 2002), and accompanying IDM at Comment 5.

<sup>120</sup> See *OCTG*, and accompanying IDM at Comment 13.

<sup>121</sup> See *Pure Magnesium NSR Prelim, confirmed in Pure Magnesium NSR Final*.

<sup>122</sup> MALCO’s financial statements show that its ingot sales (2,591 metric tons (“MT”)) and Properzi rods (25,635 MT) represented more than 98 percent of total aluminum sales (28,674 MT) during the reporting period, Properzi rods are an unwrought product, like billets and ingots; see the Department’s memorandum to the file, “The 2006-2007 Financial Statements for Madras Aluminum Company (“MALCO”) and Infobanc Truck Freight Rate Data,” dated October 4, 2011, Attachment 1 (“MALCO’s financial statements”), page 71 and 78.

<sup>123</sup> See *Magnesium Metal*, and accompanying IDM at Comment 1.

<sup>124</sup> *Id.*

producer utilized a primary production process. This process begins by calcining dolomite with coal and then mixing calcined dolomite with chemical compounds (*i.e.*, ferrosilicon and fluorite powder) to create metal balls, which were placed into a reduction furnace to produce magnesium crown that will be further refined to remove impurities.<sup>125</sup>

As USM argued in its comments on the draft remand, TMI's producer's finished product, pure magnesium, is unwrought metal while Sudal, Bhorka, and Gujarat begin their production with an unwrought metal and finish with a wrought metal products.<sup>126</sup> Thus, like in the 2008-2009 pure magnesium review, we find that Sudal, Bhorka, and Gujarat's production experience occurs at a different level of production from TMI's producer. In comparison, MALCO produced primary aluminum, which the Department has previously found to be comparable to pure magnesium.<sup>127</sup> Because TMI's producer manufactured primary pure magnesium instead of magnesium metal, we find that relying on MALCO's financial statements is more appropriate in these remand results than those of the three downstream aluminum producers, even though their production experience is somewhat similar to TMI's producer's production. Although MALCO's 2006-2007 financial statements are an additional year removed from TMI's POR, we nevertheless find MALCO's financial statements to be most appropriate in this review because MALCO is the only candidate for surrogate financial statements on the record that employs the same production process as the one used by TMI's producer.

Accordingly, the Department has revised its draft determination and selected MALCO's 2006-2007 financial statements to calculate TMI's producer's financial ratios in the final redetermination.

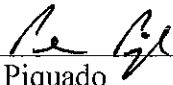
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<sup>125</sup> See TMI's August 27, 2010, C&DQR, at D-3.

<sup>126</sup> See TMI's SV Submission, Exhibits SV-13A, page 41 (for Sudal); SV-13C, page 44 (Bhorka); and SV-13D, page 35 (for Gujarat).

<sup>127</sup> See *Pure Magnesium NSR Prelim*, confirmed in *Pure Magnesium NSR Final*.

As noted above, no party commented on the Department's decision in the draft remand results to rely on World Bank data to value truck freight and the correction of the labor wage calculation. Therefore, the Department has not changed its findings in the final remand results with respect to those two issues.

  
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Paul Piquado  
Assistant Secretary  
for Import Administration

11 July 2013  
Date