

**Final 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. 09-00535; Slip Op. 11-17 (CIT 2011)**

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 February 11, 2011, in *Tianjin Magnesium International Co., Ltd., v. United States*, Court No. 09-00535, Slip Op. 11-17 (CIT 2011) (“*TMI* (CIT 2011)”). The Court’s opinion and remand order were issued following a challenge to *Pure Magnesium from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 66089 (December 14, 2009) (“*Final Results*”), and accompanying Issues and Decision Memorandum (“IDM”). The Court remanded the *Final Results* to the Department to either (1) find that Tianjin Magnesium International Co., Ltd. (“TMI”) failed to cooperate to the best of its ability and assign it an adverse facts available (“AFA”) rate, or (2) calculate a neutral facts available rate for TMI.

In accordance with the Court’s remand order, the Department reconsidered record evidence with regard to TMI’s actions throughout this segment of the proceeding and concludes that TMI failed to cooperate to the best of its ability. Accordingly, the Department has assigned TMI a rate based on AFA.

BACKGROUND

On December 14, 2009, the Department published its final results in the antidumping duty administrative review of pure magnesium for the period May 1, 2007, through April 30,

2008. *See Final Results*. TMI filed this action to challenge certain determinations reached in those *Final Results*. In the *Final Results* and accompanying IDM, the Department explained that the information to calculate a reliable margin is not available on the record and that TMI's producers failed to cooperate to the best of their ability because they withheld information and significantly impeded the proceeding. Specifically, TMI's producers¹ altered certain requested documents, locked Department officials out of the accounting office where certain production/sales documents were being temporarily maintained and altered, and threw the requested accounting records out the window of the accounting office in an effort to keep them from Department officials. Furthermore, TMI's producers refused to allow Department officials to "examine certain records with physical characteristics indicating that they were from the POR and/or related to the production of subject merchandise."² Accordingly, pursuant to section 776(b) of the Tariff Act of 1930, as amended ("the Act"), the Department applied facts available with adverse inferences in assigning a rate to TMI because the Department found that TMI's producers' acts rendered the factors of production ("FOPs") information to be unverifiable. (IDM at 6).

On February 11, 2011, the Court held that "Commerce lacks 'authority under [section 776(b) of the Act] to use an inference that is adverse to a party to the proceeding absent a factual finding that such party failed to cooperate by not acting to the best of its ability to comply with a

¹ At the outset, it is important to note that although TMI's two producers were separate legal entities during the POR, the producers shared common financial, accounting, and sales departments, each located at one of the two producers' headquarters. One producer owned a factory during the first eight months of the Period of Review ("POR"), and the other producer owned the factory during the remaining four months of the POR and a second factory during the entire POR. Because of this overlap in ownership, most of the officials with whom the Department discussed verification details at the headquarters were employed by both producers in some capacity and acted on behalf of both. *See* the Department's 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 Public of China (Nov. 4, 2009) ("Verification Report") at 2 (Herein, these officials are referred to, collectively, as "producer officials.").

² *See* Verification Report at 3.

request for information.” *TMI* (CIT 2011) at 5 (citations omitted). In addition, the Court instructed that “{i}f TMI is to receive an AFA rate, Commerce must link TMI to its supplier’s failures, as a matter of fact.” *Id.* at 7. The Court remanded the matter to the Department with instructions to “either find that TMI failed to cooperate to the best of its ability and thus assign it an AFA rate, or calculate a neutral facts available rate for TMI.” *Id.*

On March 25, 2011, the Department released the Draft Results of Redetermination and provided TMI and US Magnesium an opportunity to provide comments on the draft redetermination.³ On March 28, the Department and the interested parties came to an agreement regarding the deadline for the parties’ submission of comments on the draft redetermination, and a consent motion was filed with the Court for an extension of time to file the final results of remand redetermination. On April 5, 2011 the Court granted the motion extending the time period for the final results of remand to be filed on or before May 12, 2011. On April 6, both TMI and US Magnesium timely submitted their respective comments to the Department.⁴

ANALYSIS

A. Whether TMI Failed To Cooperate To The Best of Its Ability.

Pursuant to section 776(a) of the Act, if necessary information is not available on the record, or an interested party withholds requested information, significantly impedes the proceeding, or provides information which cannot be verified, the Department may use facts otherwise available in reaching a determination. Pursuant to section 776(b) of the Act, the Department may use an inference adverse to an interested party in selecting from among facts

³ 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. 09-00535; Slip O. 11-17 (CIT 2011), (“Draft Remand”).

⁴ See TMI’s Comments on the Draft Remand (Apr. 6, 2011) (“TMI’s Comments”), US Magnesium’s Comment on the Draft Remand (Apr. 6, 2011) (“Petitioner’s Comments”).

otherwise available, if the Department finds that the party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the Department.

Reexamination of the record of this administrative review demonstrates that, pursuant to sections 776(a)(2)(c) and (d) of the Act, TMI significantly impeded the review and provided information that could not be verified. Accordingly, for purposes of the final results of redetermination, we find that TMI failed to cooperate to the best of its ability during the review at issue, as discussed below.

1. TMI's Role With Respect To Its Producers' Information

Based upon the record of this review, we find that TMI played an integral role in many critical aspects with respect to its producers' information. In particular, we find that TMI played a crucial role in gathering and preparing the producers' information for submission to the Department. TMI then submitted the information directly to the Department, and certified the accuracy of the information contained in the submission under section 351.303 of the Department's regulations. Importantly, TMI was substantially involved in the process of verification of its producers' information, and in particular the by-product information provided to the Department, as discussed in detail below.

Based upon our review of the record, and in particular TMI's own statements, TMI's personnel traveled to the producers' offices, collected relevant data to answer Department questionnaires, and formatted the data to submit to the Department.⁵ TMI further explained that its personnel also prepared the surrogate value information for submission to the Department.⁶ Further, all of the producers' information was submitted to the Department by TMI and certified as accurate by TMI. Moreover, TMI has a long business relationship with its producers, and

⁵ See TMI's Request for an Extension of Time to Submit Responses to Supplemental Antidumping Duty Questionnaire (Mar. 24, 2009).

⁶ *Id.*

acted as it had in previous administrative reviews by filing all responses, including those which relied upon the producers' data.⁷ The record shows that TMI had full access to all of the producers' accounting and production information relevant to this review.⁸ At no point did any other entity represent or file anything on behalf of the producers during this proceeding. The Department issued questionnaires solely to TMI, and TMI responded to each question directly to the Department in its questionnaire responses.⁹ TMI did not direct that any questionnaire be sent directly to its producers, or indicate to the Department that it would be unable to gather the requested documentation.¹⁰

Additionally, TMI officials, their counsel and their local consultants traveled from TMI's office in Tianjin to the producers' office in a remote area in Shangxi province and actively participated in every aspect of the verification of the producers.¹¹ As the producers had no counsel working for them, TMI and its counsel played a critical role in the preparation and verification process, much as if the TMI officials were in the position of the producers' officials.

⁷ See Response by Tianjin Magnesium International Co., Ltd. to the 2nd Supplemental Questionnaire dated May 4, 2009 at 6 ("As a rational business entity, TMI has no reason to abandon mature suppliers and explore new producers for the U.S. market, and thus incur additional effort and expenses, absent some business purpose for doing so.").

⁸ See, e.g., Response to Section A by Tianjin Magnesium International, Co., Ltd. (October 14, 2008) ("TMI Section A Questionnaire Response") at 22, Exhibits A-10C (Supplier's 2006 and 2007 Financial Statements, A-10D (Supplier's Chart of Accounts), A-10E (Supplier's 2006 and 2007 Financial Statements, A-10F (Supplier's Chart of Accounts); TMI Section D Questionnaire Response (October 29, 2008) Exhibits D-1B (the Production of Process Chart of {TMI's producer}, D-10A (Worksheet Reconciling the Reported Production to the Cost Accounting System); TMI Supplemental Section D Questionnaire Response (April 8, 2009) at 17, Exhibits SD-1C (Inspection Reports for Materials), SD-5A ({TMI's producer} factory POR By-Product Invoices, and SD-7A 9{TMI's producer} Reconciliation to Audited Financial Statements) .

⁹ See Response to Section A by Tianjin Magnesium International, Co., Ltd. (Oct. 14, 2008) ("TMI's Section A Response"); Response to Sections C and D by Tianjin Magnesium International Co., Ltd. (Oct. 29, 2008) ("TMI's Sections C & D Response"); Surrogate Value Information (March 20, 2009) ("TMI's Surrogate Value Submission"); Response to Supplemental A and C Questionnaire dated March 16, 2009 by Tianjin Magnesium International Co., Ltd. (Apr. 6, 2009) ("TMI's Response to Supplemental A & C Questionnaire"); Response to Supplemental D Questionnaire dated March 16, 2009 by Tianjin Magnesium International Co., Ltd. (Apr. 9, 2009) ("TMI's Response to Supplemental D Questionnaire"); Response by Tianjin Magnesium International Co., Ltd. to the 2nd Supplemental Questionnaire dated May 4, 2009 (May 11, 2009) ("TMI's Response to the 2nd Supplemental Questionnaire").

¹⁰ *Id.*

¹¹ E.g., TMI counsel presented minor corrections of the producers' data, participated in the plant tours, and in numerous occasions as illustrated below, provided explanations with regards to its producers' by-product sales and its books and records.

TMI's counsel often answered key questions posed by Department verifiers that dealt directly with normal value, factors of production, and the production of subject merchandise.¹²

2. Cooperating To The Best Of One's Ability.

An interested party fails to cooperate to "the best of its ability" when it "fails to put forth its maximum effort to provide the Department with full and complete answers to all inquiries." See *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382 (Fed. Cir. 2003) ("*Nippon Steel*"). In that case, the Federal Circuit held that "{w}hile the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.* The Court stated that "{w}hile intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. 'Inadequate inquiries' may suffice." *Id.* at 1383.

In the process of gathering and preparing its producers' information for submission to the Department in the instant review, TMI had access to information that is normally limited to the producers themselves. In addition, along with such access, TMI obtained an important element of control over the information submitted to the Department. Thus, unlike other situations in which the producer prepares and submits the information directly to the Department or provides the information to the respondent for delivery to the Department, in this case the record indicates that TMI played an expansive role that placed it in a different position vis-à-vis its producers' information. Rather than simply passing along its producers' information to the Department, the record reflects a level of access and control over such information that is similar to the level of access and control over its own information. Accordingly, based upon TMI's role with respect

¹² *E.g.*, "{W}e asked {producers' officials about the value of the cement clinker and whether it was a high value product. TMI's PRC Counsel stated that it {was} of no use to either factory and that they used to throw it out before they began to sell it." (Verification Report at 35); when "we asked how {producers} tracked the total amount that it owed each freight provider... TMI PRC counsel stated that the freight provider keeps track of how much is owed to him." (Verification Report at 37).

to its producers' information in this case, we find that TMI's ability to cooperate to the best of its ability also included the preparation and provision of its producers' information. This obligation was recognized by TMI throughout the underlying review, as demonstrated by TMI's certifications to the Department concerning the accuracy of its producers' information.¹³

In the instant administrative review, TMI failed to meet its obligation to ensure the accuracy of the submissions it certified. In its October 29, 2008 submission of the response to the FOP questionnaire, TMI claimed several offsets to its normal value calculation, including sales of a material it referred to as cement clinker and waste magnesium by-products.¹⁴ TMI also submitted supplemental documentation to support its by-product claims.¹⁵ A by-product is something produced during production of the subject merchandise. The two by-products TMI reported were produced at different stages of pure magnesium production.¹⁶ It was the Department's practice at the time of the underlying review to allow the respondent to offset its normal value with the value of any by-products produced and sold by, or reintroduced into production by, the respondent.¹⁷

After US Magnesium raised serious doubts regarding the compositions of the by-products by filing deficiency comments,¹⁸ TMI, in its submission of surrogate value information, asserted

¹³ See TMI's Sections C & D Response (section D pertains to the FOP questionnaire); TMI's Response to Supplemental D Questionnaire; TMI's Response to the 2nd Supplemental Questionnaire (containing TMI's Producers' FOP information).

¹⁴ See Response to Supplemental C& D by Tianjin Magnesium International Co., Ltd. (Oct., 2008) at D-12.

¹⁵ See Response to Supplemental D Questionnaire dated March 16, 2009 by Tianjin Magnesium International Co., Ltd. (April 8, 2009).

¹⁶ See Response to Section C and D by Tianjin Magnesium International Co., Ltd. (Oct., 2008) at D-3.

¹⁷ See *Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China*, 68 FR 46577 (Aug. 6, 2003) and accompanying IDM at Comment 5. The Department's practice in this regard has changed since the underlying review. The Department's current practice is to allow an offset for the total amount of by-products produced, as opposed to only that amount sold, as long as the respondent can demonstrate that the by-product has commercial value. See *Prestressed Concrete Steel Wire Strand From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 28560 (May 21, 2010) and IDM at Comment 1.

¹⁸ See US Magnesium's Deficiency Comments Concerning TMI's Request For Byproduct Offsets (Feb. 20, 2009).

that the waste magnesium by-product should be valued using the surrogate value for 99.8 percent pure magnesium and the reported “cement clinker” by-product should be valued using a surrogate value for cement clinker.¹⁹ In each of these submissions, both a TMI official and TMI’s named counsel certified the accuracy of the submissions.

Incidents that occurred during the FOP verification also support the conclusion that TMI either failed to investigate or make adequate inquiry concerning the accuracy of the FOP submissions, or knowingly submitted incorrect information to the Department. As a respondent who worked closely with its producers to compile information on the FOPs, TMI was obligated to put forward its maximum effort to provide the Department with full and complete answers, and thus ensure the content and weight of the pure magnesium contained in the waste magnesium by-product.²⁰ As demonstrated at verification, had TMI officials made reasonable inquiries into the information it submitted pertaining to its claim on the by-product offset before certifying to its accuracy, TMI would know that the content of pure magnesium in the waste was less than five percent of the waste by-product, as was found by the Department’s reasonable inquiry at verification:

During the plant tour of the {TMI’s producer} factory, the production manager stated that the waste magnesium is mostly flux and the magnesium content is somewhere between 1-3%. During the by-product portion of verification, Mr. Xie, {the financial manager of TMI’s producers}, stated that it {the waste magnesium content} was between 2-5%. Finally, we spoke with a technician for {one of the producers}, Mr. Bai Yong Jun, who works in the research and development department at {the headquarters}. {The} company officials told us that Mr. Bai would know more about the content of by-products than any other employee. He {Mr. Bai} stated that the pure magnesium content of the waste was about 1-3%.²¹

¹⁹ See TMI’s Surrogate Value Information (Mar. 20, 2009) (“TMI’s SV Submission”) at 8, Exhibit SV-7.

²⁰ We note that the magnesium contained in the waste product is 99.8 percent pure magnesium, however, the magnesium content represents less than 5 percent by weight of the overall waste magnesium product. TMI’s by-product request was that the Department value the full weight of the waste magnesium with a value 99.8 percent pure magnesium.

²¹ See Verification Report at 34-35.

Accordingly, it is clear that the true composition of the waste magnesium by-product was easily ascertainable by TMI, or TMI's representatives, before TMI submitted the by-product information to the Department that the waste magnesium should be valued using a surrogate value for a product of 99.8 percent pure magnesium by weight. Therefore, the Department finds that TMI did not meet its obligation under *Nippon Steel* or *PAM, S.p.A.*, to make a reasonable inquiry into the composition of the magnesium waste before certifying as accurate the description of this by-product and submitting its by-product offset claim to the Department. *See PAM, S.p.A. v. United States*, 582 F.3d at 1336 (Cir. Fed. 2009). Similar to the respondent in *Pacific Giant*²² who collected and compiled the FOP data from its unaffiliated producers, TMI could not shun the obligation to make a reasonable inquiry on the composition of magnesium waste. In particular, in this case, TMI compiled all the FOP data, which necessarily required access to the producers' production records and other ledgers and thus placed TMI in a position to know about the information. Indeed, as shown above, the composition of waste magnesium appeared to be common knowledge among the producers' officials. Therefore, the Department finds that TMI failed to put forth its "maximum efforts" to investigate the accuracy of its submission on the FOPs, and accordingly did not act to the best of its ability to cooperate in the review. *See Nippon Steel* at 1383-84.

Alternatively, TMI knowingly made false claims about the composition of the waste magnesium by-product for valuation purposes. As the Court held in *Nippon Steel*, such deliberate concealment "surely evinces a failure to cooperate." *Id.* at 1383. TMI is an experienced respondent that has undergone numerous administrative reviews in which it claimed

²² *See Final Results of Determination Pursuant to Court Remand*, Ct. No. 01-00340 (CIT Oct. 10, 2002) at 12, *aff'd*, *Pacific Giant, Inc. v. United States*, 26 CIT 1331 (2002) (The Department found and the Court confirmed that a respondent continues to be "responsible for ensuring the accuracy and completeness of all of its process's factors of production data," even if the information is provided by its producer).

and received by-product offsets to the normal value calculation, was familiar with the Department's methodology of calculating dumping margins, and thus understood that a by-product offset is influential to its final dumping margin.²³ In the instant case, if the waste magnesium by-product were valued as 99.8 percent pure magnesium, the normal value for the subject merchandise would be significantly lower than if the waste magnesium by-product were valued as five percent (or less) pure magnesium; and as a result, the dumping margin would be lower than would otherwise be the case. Similarly, if the by-product could not be substantiated through documents demonstrating the by-product had value, the by-product offset would be denied altogether; as a result, the dumping margin would be higher. Because TMI was the party dealing with the Department during each administrative review, it was TMI who knew that a higher content level of pure magnesium in the waste would lead to the Department's selection of a high value surrogate value which would result in a lower dumping margin for TMI. Either way, TMI failed to act to the best of its ability to cooperate because it either failed to make reasonable inquiries or deliberately concealed the true nature of the by-product in reporting to the Department.

In addition to its failings with regard to the waste magnesium by-product, TMI failed to conduct a reasonable inquiry into the authenticity of its producers' claim of by-product sales of cement clinker before submitting the information to the Department and certifying to the accuracy of such information. For instance, TMI's counsel knew that cement clinker was once

²³See *Pure Magnesium from the People's Republic of China: Factor Valuation Memorandum for the Preliminary Results* (Apr. 3, 2006) ("2004-2005 Pure Magnesium Preliminary Results FOP Memo") (TMI reported the by-product it produced was "cement clinker."); *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Administrative Review*, 73 FR 76336 (Dec. 16, 2008) ("2006-2007 Pure Magnesium Final Results").

discarded as waste before the factories allegedly began to sell it.²⁴ Given this knowledge, TMI had an obligation to examine the specific issue of whether the producers actually sold it before submitting such information to the Department and certifying to its accuracy. Moreover, if TMI did not see the accounting records and vouchers associated with these by-product sales when TMI was compiling the answers to the Departments questionnaires, then TMI should not have made by-product claims to the Department for these materials. Second, if TMI did see the vouchers when it was compiling the verification information, it would have known that the documentation presented at verification was recently created and should not have allowed the documents to be presented to the Department for purposes of the verification. Hence, a reasonable inquiry would have enabled TMI to recognize that its producers recently created the vouchers, yet TMI presented the falsified data to the Department anyway. In such a case, TMI should have withdrawn the by-product sales claims. Based upon the record evidence, we find that TMI had the ability to take the necessary steps to provide the Department with accurate information, but failed to take the necessary steps to cooperate to the best of its ability.

Finally, we note that the producers ended the Department's verification when they would not let Department officials examine documentation relating to the FOPs, which was found in the same room as the fabricated by-product documents.²⁵ We can only assume that the producers refused to let Department officials examine these documents for the same reason they tried to prevent Department officials from examining the by-product documentation – that these documents relating to the FOPs and labor would contradict the information submitted to the Department. Due to the refusal to let Department officials examine these documents, the

²⁴ During verification (on Tuesday, July 14, 2009), when “we asked {producer} company officials about the value of the cement clinker and whether it was a high value product. TMI’s PRC Counsel stated that it is of no use to either factory and that they used to throw it out before they began to sell it.” (Verification Report at 35).

²⁵ See Verification Report 43- 44.

Department has determined that all of the FOP data in the review was unreliable and unverified.²⁶ Again, it was TMI that compiled, submitted, and certified the accuracy of the FOP data. Accordingly, we consider that TMI did not act to the best of its ability in regards to the FOP data found to be unreliable in this review.

In light of these facts, the Department determines that TMI, the entity which compiled the FOP information and reported it to the Department, failed to cooperate to the best of its ability by not conducting a reasonable investigation into the accuracy of the information before submitting it to the Department and certifying as to its accuracy, or by knowingly submitting and certifying incorrect and unverifiable information.

3. TMI Failed To Prepare For Verification As Instructed In The Department's Verification Outline.

Prior to verification, the Department issued to TMI a detailed verification outline which described the types of source documents required at verification.²⁷ The verification outline referred to all stages of the verification including that portion which was conducted at TMI and that portion which was conducted at the producers' facilities. The verification outline also explicitly stated that it was "the responsibility of the respondent to be fully prepared for" the proceeding,²⁸ but TMI failed to prepare adequately for the verification.

As discussed above, TMI officials and its counsel traveled to the FOP verification and actively participated in the verification on behalf of the producers. TMI's counsel spoke on behalf of the producers throughout the verification, making it evident to the verifiers that it was

²⁶ See IDM at 6.

²⁷ See the Department's 2007-2008 Administrative Review of Pure Magnesium from the People's Republic of China (Jun. 29, 2009) ("Verification Outline").

²⁸ See Verification Outline at 1.

TMI who prepared for the verification and knew the specific documentation the Department officials requested. For instance,

On Tuesday, July 14, 2009 we asked {producer} officials about the value of the cement clinker and whether it was a high value product. **TMI's PRC²⁹ counsel** stated that it is of no use to either factory and that they used to throw it out before. (Verification Report at 35) (emphasis added).

We asked {producer} officials for records that showed the distinct amounts paid to each freight provider, under the above-noted scheme ... We asked how {producers} tracked the total amount that it owed each freight provider ... **TMI's PRC³⁰ counsel** stated that the freight provider keeps track of how much is owed to him. (*Id.* at 37) (emphasis added).

Accordingly, TMI played a critical role in the verification of key information.

At verification, for the first time, TMI and its producers informed the Department of a complex sales scheme to account for sales of by-products. In this scheme, the producers arranged for their freight providers to haul away a by-product which was to be accepted as payment for freight services previously rendered.³¹ A very basic requirement of verification of a claimed by-product offset (for sales of the by-product) is that the entity demonstrate the sale of the full quantity claimed as the offset.³² When the Department attempted to verify the source documents supporting this sales scheme, the source documentation was in various stages of alteration. Had TMI or its counsel adequately prepared for verification, they either would have seen that the documentary support for the by-product was in the process of being created, or not seen any such documentary support, would have advised the producers that documentation would be required by Department verifiers, and asked if such documentation existed. Thus, it is clear that TMI either did not adequately prepare for the verification of the by-products, or knew that the supporting documentation was not kept in the normal course of doing business, but

²⁹ In the Draft Remand, the Department inadvertently omitted "PRC" in the block quote.

³⁰ In the Draft Remand, the Department inadvertently omitted "PRC" in the block quote.

³¹ See Verification Report at 36.

³² See Verification Outline at 16 (The outline asks to "Demonstrate how the by-product is sold").

instead was created for purposes of verification, and then nevertheless presented it to the Department to support its by-product offset request.

Additionally, apart from its failure to take necessary steps for verification, we find that TMI actively impeded the Department's efforts to verify the by-products sales schemes. For example, when the Department asked how the producers kept track of the total amount that they owed to each freight provider, TMI's counsel proffered an unsupportable reason, stating that the freight provider keeps track of how much the producers owed to him. This statement is unsupportable because the inference is that the producers do not track the accounting with these freight providers themselves. Based on basic accounting principles, a company could not balance its books, or be sure it is paying its full accounts payable, or not overpaying, if it does not keep track of the accounting itself. After none of the proffered explanations satisfied Department officials' inquiries, TMI and TMI's counsel offered another explanation. The day after the Department uncovered the alterations of the by-products vouchers, TMI's counsel offered that "the vouchers and corresponding source documents {were} bound into voucher books before the accounts {were} settled, therefore it {was} necessary to cut out pages, or otherwise alter them after the fact, if mistakes {were} found after the accounts were settled."³³ This statement directly contradicts TMI's producers' financial manager's previous statements.³⁴ After Department officials reminded TMI and its producers' officials that the financial manager explicitly informed them the prior day that accounts were settled before the voucher book was bound, "TMI's PRC counsel stated that we {the Department officials} must have misunderstood the {producer's} financial manager's statement from the previous day."³⁵ Based on the above facts, the Department determines that TMI not only failed to provide necessary source

³³ See Verification Report at 39.

³⁴ *Id.* at 39.

³⁵ *Id.*

documents for Department officials to verify the alleged complex third-party scheme, but also held itself out to the Department as an authoritative source for explaining the response to the Department's questionnaire and any verification issues that arose during the verification, even going so far as to contradict the producers' financial manager's description of how the producers' books are maintained. TMI's involvement in the verification is further evidenced in this example by its attempt to defend its producers' alteration of the accounting records at issue.

Although the staff at the producers' facilities was responsible for altering the documentation, and an official of the producers is the one who prohibited the Department verifiers from completing verification, the Department finds that TMI, who worked closely with its producers to compile the FOP data and provided unverified information to the Department, was jointly responsible for the failure of the verification. As shown above, TMI had access to its producers' FOP data and was familiar with its producers' claimed third-party payment schemes, and was integrally involved in the preparation and the verification of the responses pertaining to the producers' information, but never disclosed those schemes to Department officials prior to verification. Had TMI adequately prepared for the verification by examining supporting documents, TMI should have discovered those by-product vouchers were not verifiable. The Department concludes, based on this, that TMI failed to cooperate to the best of its ability in preparing for verification for this proceeding.

Based on the above, the Department determines that TMI, the entity which compiled the FOP information and reported it to the Department, and the entity which was responsible for preparing for the Department's verification, failed to cooperate to the best of its ability by not conducting a reasonable investigation into the accuracy of the information before submitting it to

the Department and certifying as to its accuracy, or by knowingly submitting and certifying incorrect and unverifiable information.

INTERESTED PARTIES' COMMENTS ON DRAFT REMAND

A. Whether TMI Failed To Cooperate To The Best of Its Ability.

TMI claims that the Department appears to have implemented a new standard for analyzing unaffiliated companies, alleging that the Department created a strict liability standard for respondents who are unaffiliated with producers, that results in an assumption that the respondent has control regardless of the lack of affiliation. TMI avers that the action of an unaffiliated producer cannot be ascribed to a respondent absent a showing of control. TMI argues that the Department refers to no actual facts of record in the draft remand results to show that TMI was uncooperative, but rather only enumerates conclusory inferences to which it responds as follows:

- TMI's ability to obtain the internal accounting information of the producers and report this information to the Department does not mean that TMI "had full and complete access to, or understanding of, the information," but rather that it relied on the information provided by its producers.
- The fact that it responded to the Department's questionnaires is not remarkable, as the Department directed the questionnaire not to the producer, but to TMI as the respondent.
- The accounting records TMI obtained from the producer and reported to the Department showed there was a sale of a valuable by-product. When that information could not be verified, the Department could have just disallowed the byproduct offset instead of assigning TMI a rate based on AFA.
- TMI's submission of surrogate value information has nothing to do with preparation of the FOP information.
- TMI officials' and its counsel's attendance at the verification of the producers may not be taken to mean that TMI directed the verification. Rather, they were observers, and TMI could not confirm the accuracy of the producers' information. TMI alleges that the Department confuses the statements and clarifications of its counsel during the verification, arguing that the record reflects only the intervention of its counsel trying to

explain the Chinese language statements and explanation presented by the producers. TMI also claims that the Department does not make clear that the producers were themselves not represented by its counsel.

Lastly, TMI challenges that the Department's finding on magnesium waste, one of the reported by-products, was incorrect, arguing that the product that gave the waste its value was the magnesium, which itself was pure. TMI alleges that the Department provides no information of record to show that TMI in any way knew or intended any misdescription.

US Magnesium agrees with the Department's finding that TMI provided information that could not be verified and significantly impeded the review. US Magnesium supports the Department's decision in the draft remand results to reassign to TMI the 111.73 percent AFA rate originally assigned in the *Final Results*. US Magnesium agrees with the Department's conclusion that TMI played a crucial role in gathering and preparing its producers' information for submission to the Department and that TMI either failed to investigate the accuracy of the FOP submissions or knowingly submitted incorrect information to the Department. US Magnesium further comments that the Department's analysis and conclusions set forth in the Draft Remand are well-supported by the record evidence. US Magnesium charges that TMI attempts to excuse its submission of false factual information when TMI argues that it had to take certain information from its suppliers on face value. US Magnesium comments that the Department properly determined in the Draft Remand that TMI could not escape its duty to investigate the accuracy of the FOP submissions.³⁶

³⁶ US Magnesium, however, wishes the Department to make clear that "exporters are responsible for the accuracy of all submitted information used in calculating their antidumping margins, even if an unaffiliated entity submits some of that information directly to the Department."³⁶ (*See* US Magnesium's Comments at 3). US Magnesium argues that any other policy would permit respondents to shun responsibility of ensuring accuracy of information by claiming they were unaware of false claims or were powerless to ensure the accuracy of information obtained from unaffiliated entities, or by arranging to have producers submit responsible data directly to the Department. The Department finds that this issue is not before the Department in this remand, and therefore, has limited its analysis to the facts of this particular case.

DEPARTMENT'S POSITION

We disagree with TMI's characterization of the Department's position in the draft remand results that the Department enunciated a strict liability standard for respondents and unaffiliated producers.³⁷ Notwithstanding TMI's argument, the Department's draft remand reexamines the record with respect to TMI's conduct and ascribes TMI's failure to cooperate to the best of its ability directly to TMI, based on TMI's own actions. Specifically, as discussed in detail above, the Department concludes that TMI had full access to its producers' information and played an integral role in many important aspects with regard to identifying and compiling its producers' information for submission to the Department. For instance, "TMI's personnel traveled to the producers' office in a remote area, collected relevant data to answer questionnaires, and formatted the data to submit to the Department." *Supra*, at 3. "TMI officials, their counsel, and their local consultants also traveled to its producers' office and actively participated in every aspect of the verification of the producers." *Supra*, at 5. Accordingly, the Department finds that TMI's conduct, as discussed in detail above, supports a conclusion that TMI failed to cooperate to the best of its ability. For example, notwithstanding TMI's participation at the verification, where it was clear to all present that the magnesium waste byproduct consisted of a matrix of materials that included roughly three to five percent pure magnesium by weight, TMI continued to argue in its subsequent briefs to the Department that the full quantity of the matrix should be valued using a surrogate value for a product that consists of 99.8 percent pure magnesium by weight.

The Department further disagrees with TMI's contention that the Department must address the issue of affiliation and control. Affiliated parties are specifically defined in the Act

³⁷ As defined by Black's Law Dictionary, strict liability is a concept in tort and criminal law by which the act of selling a product in a defective condition, or engaging in acts which endanger the public welfare, is sufficient for finding liability for harm caused.

and the Department's regulations.³⁸ However, the issue of affiliation is irrelevant in this review; rather, pursuant to the remand order from the Court, the Department, herein, considers TMI's conduct in responding to the Department's requests for information. In conducting this analysis, the Department finds that TMI's actions, as described above, demonstrate a pattern of behavior establishing that TMI failed to act to the best of its ability to comply with the Department's requests for information and the Department's verification of the FOPs.

The Department disagrees with TMI's assertion that the Department refers to no actual facts of record in showing that TMI was uncooperative. Contrary to TMI's assertion, the Department cites several incidents showing that TMI failed to cooperate to the best of its ability. For example, TMI, who worked closely with its producers to compile information on the FOPs, either failed to make a reasonable inquiry into the composition of the magnesium waste or ignored what it knew about the composition by reporting the full amount of the waste by-product as pure magnesium when the waste consisted of less than five percent pure magnesium, and failed to make reasonable inquiries that the type of documents submitted to the Department to establish the by-product sales were kept in the normal course of business. Although we evaluate TMI's conduct on the whole, we examine the particular facts TMI takes issue with below.

With regard to TMI's argument that it merely relied on the data provided by its producers, as discussed above, the record demonstrates otherwise. Specifically, the record demonstrates that TMI played an integral role with respect to compiling and reporting its producers' information in this review and, thus, TMI knew or should have known the details of the producers' operation. Additionally, TMI officials and its counsel were present throughout and played a key role at verification. Under such circumstances, TMI should have learned the same information that the Department learned throughout the course of the verification, *e.g.*, the

³⁸ See section 771(33) of the Act and 19 CFR 351.102(a)(3).

content of the magnesium waste by-product, and adjusted its post-verification claims accordingly, yet it did not.

With respect to TMI's comment that it is not remarkable that it responded to the questionnaire because the questionnaire was issued to TMI and not the producer, the Department does not disagree about the party to whom it issued the questionnaire. In this case however, TMI seems to ignore the fact that rather than forwarding the questionnaire to its producers, and having them collect and forward the responsive data back to TMI for submission to the Department, the record demonstrates that TMI itself travelled to the producers' facilities to prepare and compile the responses to the questionnaires. Part of this process was determining which information would be responsive to the Department's questions. In fact, TMI sought and received extensions of time on the grounds that its officials travelled to the producers locations to compile the requested information. Thus, the Department does not find credible TMI's claim that it did not have "full and complete access to, or understanding of, the information." TMI comments at 4.

The Department also rejects TMI's claim that accounting records establish the existence of by-product sales, notwithstanding the Department's discovery during the verification that the supporting documentation submitted by TMI was fabricated. At the very least, the vouchers purporting to establish payment for the by-product sales were not maintained in the producers' accounting records and cannot be relied upon. This information would, presumably, be the information upon which the accounting records rely. Additionally, as shown in the Verification Report, Department officials were unable to examine certain records with physical characteristics indicating that they were from the POR and related to the production of subject merchandise, further undermining the integrity of the accounting documents that were provided at verification as supporting documentation for the by-product claims and any other reported data.

The Department also disagrees with TMI that a reasonable application of AFA based on the company's failed verification would be to reject the by-product sales. As explained in detail above, due to TMI's and its producers actions in this proceeding, the entire FOP section of the questionnaire responses failed to verify as a result of the Department being denied access to information found at the verification. In such a case where the Department finds that it has no reliable FOP data, the Department also finds that the information to construct an accurate and otherwise reliable margin is not available on the record.³⁹ Simply denying the by-product offset would not be the appropriate manner to address such an extensive verification failure. Moreover, because the Court did not remand the matter for this purpose, TMI's contention improperly expands the scope of the Court's remand order.

In regard to TMI's assertions that submission of surrogate value information has nothing to do with **preparation** of the FOP data (emphasis added), we agree to some extent, as the preparation of the FOP data should intuitively precede collection of surrogate value data. However, this misses the point that surrogate value data is supposed to reflect the FOP data as provided to the Department. It appears that TMI makes this point to further its argument that it relied on the FOP data as presented to it, and filed surrogate value data accordingly. However, the record demonstrates that the composition of the magnesium waste was common knowledge at the producers' factories and headquarters, and it is implausible for TMI, who worked closely with the producers in responding to the Department's questionnaire, to contend that it was not aware of this information.

With regard to TMI's comment on the attendance of its officials and counsel at the verification of the producers, the Department disagrees that the role of TMI was limited to

³⁹ See *Hand Trucks and Certain Parts Thereof from the People's Republic of China: Final Results of 2005-2006 Administrative Review*, 73 FR 43684 (Jul. 28, 2008).

observation. As reflected in the Verification Report, TMI and its counsel spoke on behalf of all parties throughout the verification, including the FOP portion. For instance, when the Department's officials asked about the value of the reported cement clinker, TMI's representative, not the producer, stated that the reported cement clinker was of no use to either factory and was thrown away before the producers began to sell it. *Supra* at 12 and Verification Report at 35. When the Department inquired about the third-party sales scheme regarding the waste magnesium, TMI's representative, not the producer, proffered explanations to support the scheme. *Supra* at 12-13. This is not reflective of an individual playing a passive role as observer. Rather, TMI injected itself into all aspects of the verification. For purposes of verification, the Department employed a professional interpreter who translated conversations between the Department officials, TMI, and TMI's producers' representatives. To say that the Department confuses the statements and clarification of counsel for translation purposes during the verification, as alleged by TMI, is incorrect. Rather, incidents that occurred during the verification of the producers only support that TMI closely worked with and acted on behalf of its producers, which allowed TMI and its counsel to speak authoritatively, as they did throughout the verification. The incidents cited above in the Verification Report where TMI and its representatives spoke on behalf of its producers are not concerned with Chinese language translations as TMI claims. Rather, these statements are to either provide context or offer additional answers, for instance, the discourse on cement clinker cited above. Another telling example is when the Department asked how the producers tracked the amounts that it owed each freight provider, and TMI's PRC counsel, not the producer, stated that "the freight provider keeps track of how much is owed to him." *Id.* at 37.

The Department agrees with TMI that the Verification Report does not state that there were any verification failures in the U.S. sales portion of the verification. However, the verification consisted of verification of the sales information from TMI and the producer's FOP information. This information lies at the core of the antidumping duty calculation.⁴⁰ Accordingly, it is incorrect for TMI to assert that it was successfully verified when in fact the FOP information was unverifiable.

With respect to the Department's findings on magnesium waste, the Department finds TMI's arguments that it correctly described this input to lack credibility. In its response to the Department's antidumping questionnaire, TMI reported that the production of one metric ton of magnesium resulted in a certain amount of waste magnesium. TMI, however, did not report the weight of the pure magnesium contained within the magnesium waste; rather it reported the entire weight of the waste (flux plus pure magnesium portions).⁴¹ TMI reported as the proposed surrogate value for that total weight, the Harmonized Tariff Schedule number for 99.8 percent pure magnesium. As the Department later learned during the verification, the pure magnesium constitutes only somewhere between one to five percent of the total waste by-product, by weight. As described above, this information was readily ascertainable.⁴² Thus, the Department continues to maintain that TMI knew or should have known that the content of pure magnesium

⁴⁰ See *Shanghai Taoen Int'l Trading Co. v. United States*, 360 F. Supp. 1339 (CIT 2005); see also *Since Hardware (Guangzhou) Co., Ltd. v. United States*, Slip Op. 10-108 (CIT 2010).

⁴¹ See TMI's Response to Sections C&D, (Oct. 29, 2008), Exhibit D-11.

⁴² TMI made a claim for a by-product offset for a certain quantity of waste to be valued at the value for 99.8 percent pure magnesium. Here we provide hypothetical values to demonstrate the inappropriateness of the claim as made by TMI. A party generates 400 kilograms of magnesium waste. The pure magnesium accounts for one to five percent of the waste by weight (*i.e.*, the 99.8 percent pure magnesium balls within the waste account for one to five percent of the weight of the waste). The value of the waste is \$2.50 per kilogram. The value of pure magnesium (99.8% pure) is \$450.00 per kilogram. TMI's by-product claim was that the Department should grant it a by-product offset for 400 kilograms at the \$450.00 value for pure magnesium, rather than an offset for 400 kilograms at the \$2.50 value.

in the reported magnesium waste could not account for more than five percent of the total reported waste by-product.

Accordingly, based on all of the above, the Department finds that TMI failed to cooperate to the best of its ability in this proceeding. Thus, the Department continues to assign, as AFA, the rate of 111.73 percent for TMI in this Final Results of Redetermination on remand.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

(Date)