

December 15, 2010

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

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2008-2009 Administrative Review

SUMMARY:

On June 18, 2010, the Department published its *Preliminary Results* of the antidumping duty administrative review of pure magnesium from the PRC.¹

On July 8, 2010, U.S. Magnesium LLC ("Petitioner") and TMI submitted publicly available surrogate value data to value TMI's factors of production. On July 19, 2010, both Petitioner and TMI submitted rebuttal comments concerning valuation of factors of production.

On July 14, 2010, the Department released additional data related to its reconsideration of its valuation of the labor wage rate in this review in light of a decision in *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010), and afforded interested parties an opportunity to comment on the narrow issue of the new labor wage data.² In addition, when it appeared that TMI did not understand that it had the opportunity to provide rebuttal information concerning the new wage data, the Department granted TMI another opportunity to comment and provide rebuttal factual comments.³ On July 15, 2010, the Department noted an error in the currency-conversion calculation of the hourly wage-rate data for El Salvador and released corrected data to the parties.⁴

¹ *Id.*

² See Memorandum to the File, "Wage Data," dated of July 14, 2010.

³ See Memorandum to the File, "Treatment of Alleged New Information in U.S. Magnesium's Case Brief," dated of August 23, 2010.

⁴ See Memorandum to the File, "Wage Rate Calculation – Error in Currency Conversion of the Hourly Wage Rate for El Salvador," dated of July 15, 2010.

We received case briefs from Petitioner and TMI on July 29, 2010, and Petitioner's rebuttal briefs on August 3, 2010. We rejected TMI's rebuttal brief because the brief was untimely filed.⁵ On August 9, 2010, TMI alleged that Petitioner's case brief contained new factual information and requested the Department to reject it. On August 23, 2010, the Department declined to reject the information because it determined that the information at issue did not constitute new factual information within the meaning of 19 CFR 351.301(c)(3).⁶ Following the time period for case and rebuttal briefs, the Department noted that it inadvertently omitted the underlying data used in making its preliminary determination of the surrogate value for truck freight, and it afforded parties opportunities to comment on and rebut the data concerning truck freight.⁷

On August 5, 2010, the Department requested all interested parties to provide comments on the Department's recent determination in the 2008-2009 administrative review of the antidumping duty order on frozen warmwater shrimp from the Socialist Republic of Vietnam that the wage rate reported by the International Labor Organization for Honduras was inaccurate.⁸ In response, Petitioner filed its comments on August 16, 2010, and TMI provided comments on August 26, 2010. On August 30, 2010, Petitioner submitted rebuttal comments concerning wage rate.

The Department held a hearing on September 1, 2010.⁹ On October 7, 2010, the Department extended the deadline for the final results of review to December 15, 2010.¹⁰

On November 10, 2010, the Department re-opened the record to place additional industry-specific wage-rate information on the record for consideration in the final results, afforded parties an opportunity to provide rebuttal factual information, and requested parties to comment on the industry-specific wage-rate data placed on the record by the Department. On November 15, 2010, TMI submitted factual information on wage rate. On November 19, 2010, TMI submitted comments on the Department's industry-specific wage-rate data. Petitioner filed rebuttal comments to TMI's November 19, 2010 wage rate comments on November 24, 2010.

Following our discussion of the issues are short cite tables, respectively, for: (1) acronyms and abbreviations; (2) litigation; (3) *Federal Register* notices; and, (4) unpublished letters, submissions and memorandum. All short cites are alphabetized by short cite in their respective lists. We are addressing the following issues in this memorandum.

⁵ See Memorandum to the File, "Administrative Review of Pure Magnesium from the People's Republic of China ("PRC"): Return of Untimely Submission of TMI's August 5, 2010 Rebuttal Brief," dated of August 23, 2010.

⁶ See Memorandum to the File, "Treatment of Alleged New Information in U.S. Magnesium's Case Brief," dated August 23, 2010.

⁷ *Id.* at 3; see Memorandum to the File, "Telephone Conversation Concerning Deadlines for the Submission of New Factual Information," dated of August 24, 2010.

⁸ See Memorandum to the File, "Honduras Data on Labor Wage Rate," dated August 5, 2010.

⁹ Petitioner and TMI requested a hearing for issues raised in the case and rebuttal briefs on June 18, 2010, and July 14, 2010, respectively.

¹⁰ See *Pure Magnesium from the People's Republic of China; Extension of Time for the Final Results of the Antidumping Duty Administrative Review*, 75 FR 63440 (October 15, 2010).

Comment 1: Whether the Department Should Apply Total AFA to TMI

Comment 2: Selection of Surrogate Financial Statements

Comment 3: Whether the Department Should Calculate the Surrogate Value for Labor Using Multiple Surrogate Countries or a Single Country, India

Comment 4: Whether the Department Should Expand the List Of Economically Comparable Countries.

Comment 5: Whether the Department's Wage Data Memorandum Contained Data Errors.

Comment 6: Whether To Use ILO Wage Data Contemporaneous With the POR Rather Than Using Pre-POR Data and Adjusting for Inflation as reported in the Wage Rate Memorandum.

Comment 7: Whether the Department Should Exclude Indian Data from the Wage Rate Calculation

Comment 8: Whether the Countries Used to Determine the Wage Rate in this Case Are "Significant Producers of Comparable Merchandise"

Comment 9: Valuation of Dolomite

Comment 10: Valuation of Flux

Comment 11: The Source of the Surrogate Value for Foreign Inland Freight

Comment 12: The Surrogate Value for Brokerage and Handling

Comment 13: The Appropriate HTS Classification for Magnesium Waste/Scrap ("MGS") and Magnesium Metal Waste/Scrap ("ALLOYS")

Comment 14: The Per-Unit Basis for Plastic Bags, Steel Bands, and Plastic Bands

DISCUSSION OF THE ISSUES

Comment 1: Whether the Department Should Apply Total AFA to TMI

- Petitioner argues that the Department should apply total AFA to TMI as the Department did in the 2007/2008 review of this antidumping duty order. Petitioner claims that TMI has presented false documentation in the instant and two most recent reviews in support of its claimed by-product offset. According to Petitioner, the Department granted TMI a by-product offset in the 2006/2007 review but did not verify TMI's information. However, Petitioner adds that during the verification of the 2007/2008 review the Department:

- discovered that TMI's supplier fabricated the by-product voucher books which TMI provided in support its offset for the last month of the 2006/2007 review, the entire 2007/2008 POR, and the first month of the 2008/2009 review;
 - was informed by a company official that there were no by-product sales during the 2006/2007 POR; and
 - was prevented by TMI's supplier from verifying the claimed by-product offset by, for example, being locked out of the accounting office.
- Petitioner contends that, during the verification of the current review, TMI presented one of the same fabricated voucher books that the Department reviewed during the 2007/2008 verification. Petitioner adds that although TMI did not otherwise impede the Department during the 2008/2009 verification (*e.g.*, Department verifiers were not locked out of the accounting office), the verification's outcome was nonetheless more egregious than the 2007/2008 verification as TMI attempted to deceive the Department with the same fabricated by-product voucher books.
 - Accordingly, Petitioner argues that adverse inferences are appropriate because TMI did not act to the best of its ability when it resubmitted the same false documents to the Department. Petitioner notes that TMI knew of the false documentation and thus TMI should have ensured the authenticity of the submitted documentation in the instant review. In support of its position, Petitioner cites, *Nippon Steel* (CAFC 2003), *Shanghai Taoeni* (CIT 2005), *Hand Trucks/PRC* (July 28, 2008) IDM at Comment 1, *Qingdao Taifa* (CIT 2009), *Bags/Thailand* (January 17, 2007) IDM at Comment 10, *Universal Polybag* (CIT 2008), and *Porcelain-on-Steel Cooking Ware/PRC* (April 26, 2006) IDM at Comment 2.
 - Petitioner adds that total AFA is warranted in this review because TMI's actions during the past three administrative reviews bring into question the accuracy of any and all information that TMI provided during the current review. Specifically, Petitioner notes the following in support of total AFA:
 - TMI knowingly provided false information from its supplier a couple months after the 2007/2008 verification, using the same reporting methodologies, and not demonstrating that the 2008/2009 information is more reliable than the information presented in the 2007/2008 review;
 - TMI failed to ensure the accuracy of submitted information by certifying the 2008/2009 submissions where TMI is responsible for the accuracy and completeness of its supplier's data.
 - As a result, Petitioner argues that it is immaterial that the Department did not find any significant discrepancies with respect to issues other than the by-product offset. Consequently, Petitioner maintains that TMI lacks credibility, even in relation to information that the Department verified. Petitioner cites the following cases in support of its position: *Shanghai Taoeni* (CIT 2005), *Shandong Huaron* (CIT 2006), *Universal Polybag* (CIT 2008), *Pacific Giant* (CIT 2002), *NSK* (CIT 2004), *Mannesmannrohren-Werke* (CIT 2000), *Tianjin Machinery* (CIT 2007), *OCTG/PRC* (April 19, 2010) IDM at Comment 9, *Certain Steel Grating/PRC* (June 8, 2010) IDM at Comment 3, *Reiner*

Branch (CIT 2002), *Certain Steel Grating/PRC* (June 8, 2010) IDM at Comment 3, *Line Pipe Prelim/PRC* (April 24, 2008), *Borden* (CIT 1998), and *Shandong Huaron* (CIT 2007). Petitioner distinguishes the instant review from *SKF* (CIT 2009) where the CIT held that the Department may not apply adverse inference to a respondent due to the uncooperative behavior of the respondent's supplier. According to Petitioner, in the instant review, it was TMI—and not its supplier—that was responsible for the submitted information.

- Petitioner concludes that by denying TMI a by-product offset as we did in the *Preliminary Results*, and not applying total AFA, TMI will be no worse off than it would be had TMI cooperated to its fullest. According to the Petitioner, the Department's failure to address TMI's repeated attempts to provide false documentation by way of not applying an adverse inference, will compromise the integrity of the Department's administrative process. In support, Petitioner cites the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994) at 868, 870 noting that adverse inference is a tool, at the Department's disposal, to ensure that parties fully cooperate. Petitioner also cites *Todyo Kikai* (CAFC 2008), *Olympic Adhesives* (CAFC 1990), and *Rhone Poulenc* (CAFC 1990) noting that the courts have upheld the Department's authority to protect against fraud.
- Lastly, Petitioner argues that the Department should select an AFA rate of 111.73 percent, the highest rate in the instant proceeding. According to Petitioner, the rate is appropriate because: (a) it is TMI's current AFA rate; (b) the rate corresponds to the same "uncooperative behavior"; and (c) it is the only trustworthy evidence of dumping on the record. In support, Petitioner cites *Rhone Poulenc* (CAFC 1990), *NSK* (CIT 2004), *Shanghai Taoeni* (CIT 2005), *F.lli De Cecco* (CAFC 2000), *Mittal Steel* (CIT 2007), *Line Pipe Prelim/PRC* (April 24, 2008), *Pure Magnesium/PRC* (December 16, 2008), *KYD* (CAFC 2010), *Universal Polybag* (CIT 2008), and *Gallant Ocean* (CAFC 2010).

Department's Position: We disagree with Petitioner that we should apply total AFA to TMI in this review. However, the Department is not granting TMI a by-product offset because TMI has not provided sufficient information to warrant one. First, we note that TMI attempted to support its by-product offset with the same voucher book we found to be unreliable in the 2007/2008 verification. However, the record nonetheless demonstrates that TMI otherwise cooperated to the best of its ability, *i.e.*, there is no evidence that TMI withheld any requested information. Petitioner's citations in support of its claim that TMI did not act to the best of its ability, *Nippon Steel* (CAFC 2003), *Shanghai Taoeni* (CIT 2005), *Hand Trucks/PRC* (July 28, 2008) IDM at Comment 1, *Qingdao Taifa* (CIT 2009), *Bags/Thailand* (January 17, 2007) IDM at Comment 10, *Universal Polybag* (CIT 2008), and *Porcelain-on-Steel Cooking Ware/PRC* (April 26, 2006) IDM at Comment 2 are not applicable to this proceeding. In each of the cited proceedings, the Department applied adverse inferences to the respondents because: (a) the respondents failed to provide the Department with data that the Department requested, and (b) this requested data was necessary to construct a dumping margin. Here, with the exception of its claim for a by-product offset, TMI provided complete answers to the Department's questions and we thus have the necessary information on the record to construct an accurate and reliable margin for TMI. Thus, it is the Department's determination that TMI did cooperate to the best of its ability.

Accordingly, the Department disagrees with Petitioner's claim that all of TMI's submitted information is now unreliable because of a finding by the Department in a previous proceeding or a failure of the respondent to adequately demonstrate its eligibility for an adjustment to normal value in the instant proceeding. In calculating an accurate dumping margin, the Department looks to the material, energy, and labor inputs, *i.e.*, the factors of production. As a result of TMI's verification in the instant review, the Department determines that the integrity of TMI's reported FOPs have not been compromised due to the presentation of the by-product voucher book in question. During the instant review's verification, we examined TMI's suppliers' manufacturing facilities and verified TMI's suppliers reported FOPs.¹¹ We observed production lines, finished goods inventory, and interviewed TMI's and the suppliers' employees.¹² We additionally audited various raw material inventory reports, production orders, worksheets, and financial statements.¹³ Accordingly, we find that TMI's verified FOP and sales data submitted on the record of this administrative proceeding is reasonable, reliable, reflects data kept in its normal course of business, and does not prevent the Department from calculating an accurate dumping margin.

Further, we disagree with Petitioner that the Department's determination in the 2007/2008 administrative review is controlling in this subsequent proceeding. At verification of the prior review, TMI's suppliers withheld requested information regarding FOP data and impeded the proceeding by not allowing Department verifiers to examine relevant documentation at verification.¹⁴

In contrast, none of these facts are present in the instant review. The Department verified TMI and its reported suppliers in the current review's verification. With the exception of the voucher book, which was previously found unreliable, being presented to the Department in support of TMI's claim for a by-product offset, the verification report does not suggest that TMI and its suppliers were uncooperative. Moreover, each administrative review of the order represents a separate administrative segment of a proceeding and stands on its own.¹⁵

The Department determines that the precedent cited by Petitioner, *Shanghai Taoeni* (CIT 2005), *Shandong Huarong* (CIT 2006), *Universal Polybag* (CIT 2008), *Pacific Giant* (CIT 2002), *NSK* (CIT 2004), *Mannesmannrohren-Werke* (CIT 2000), *Tianjin Machinery* (CIT 2007), *OCTG/PRC* (April 19, 2010) IDM at Comment 9, *Certain Steel Grating/PRC* (June 8, 2010) IDM at Comment 3, *Reiner Branch* (CIT 2002), *Certain Steel Grating/PRC* (June 8, 2010) IDM at Comment 3, *Line Pipe Prelim/PRC* (April 24, 2008), and *Borden* (CIT 1998), is distinguishable as it addresses the application of adverse facts to respondents based upon those respondents providing misleading or unverifiable information in that segment of the proceeding. Thus, notwithstanding the developments in the previous two reviews, the Department is not persuaded

¹¹ See TMI's Verification Report at 13-15 and 25-33.

¹² See *id* at 13-15.

¹³ See *id* at 8-10 and 22-25.

¹⁴ See *Pure Magnesium/PRC* (December 16, 2009) IDM at Comment 1.

¹⁵ See *Stainless Steel/Taiwan* (February 13, 2006) ("each administrative review of the order represents a separate administrative proceeding and stands on its own."); see also *Garlic/PRC* (March 13, 2002) ("what transpired in previous reviews is not binding precedent in later reviews."); Commerce's interpretation of the statute was affirmed by the CIT in *Shandong Huarong* (CIT 2005) ("As Commerce points out 'each administrative review is a separate segment of proceedings with its own unique facts.'").

that all of TMI's submitted information is now unreliable. Because we are not applying adverse facts to TMI, we do not address Petitioner's comments regarding *SKF* (CIT 2009).

Lastly, we disagree with Petitioner's argument that by merely denying TMI its claimed offset and not applying total AFA, TMI will be no worse off than it would be had TMI cooperated to the best of its ability. We also disagree that by not addressing TMI's alleged repeated behavior with the use of adverse inference, the integrity of the Department's administrative process will be compromised. Petitioner's first claim presumes that TMI did not cooperate during this review. However, with the exception of establishing its eligibility for a by-product offset, TMI answered each of the Department's questionnaires and participated fully in verification. Second, the Department does not believe that its proceedings lack integrity. The Department applied its statutory authority in the prior segment of this proceeding to encourage a party to cooperate to the best of its ability. In the current segment, there is no evidence to indicate that TMI failed to meet its burden. Accordingly, we are satisfied that, as to TMI's FOP data, we are relying on accurate information to calculate a dumping margin for TMI. At the same time, because TMI failed to provide sufficient and reliable information to warrant granting its requested by-product offset, we have not made that adjustment to TMI's normal value. Thus, contrary to Petitioner's argument, it is not the case that the integrity of the Department's administrative process has been compromised.

Comment 2: Selection of Surrogate Financial Statements

- Petitioner urges the Department to reverse its preliminary results, which rely on the financial statement of Sudal, a producer of extruded aluminum products, to calculate surrogate financial ratios for the following reasons:
 - production of extruded aluminum products (*e.g.*, level of production, proportion of comparable operations, complexity of the production process, and the skill level required in production and marketing) is not comparable to production of pure magnesium;
 - the economics (*e.g.*, the investment requirement and type of machinery/equipment used) are not comparable between the two types of products;
 - the physical characteristics of aluminum extrusions are not comparable to those of pure magnesium; and
 - the end uses of aluminum extrusions are not comparable to pure magnesium. Specifically, Petitioner claims that 90 percent of pure magnesium is used in aluminum alloys, casting, and iron/steel desulfurization while aluminum extrusions are of wide variation in end-use application (*e.g.*, Sudal's end-uses include "lifts and elevators, automobiles").
- Petitioner claims that the Department has a long-established practice of determining whether merchandise is identical or comparable to the subject merchandise by examining three criteria: (1) production process; (2) physical characteristics; and (3) end uses. Citing *NSK* (CIT 2010), Petitioner asserts the Department must provide sufficient justification for its ultimate selection of surrogate financial statements.
- Petitioner claims that the Department previously rejected the respondent's position that the production of aluminum extrusions was comparable to production of pure magnesium. For support, Petitioner cites the Department's statements in *Pure Magnesium/PRC*

