Final Results of Redetermination Pursuant to Voluntary Remand:
Pure Magnesium from the People's Republic of China
Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC
Court No. 09-00012 (CIT 2011)

SUMMARY

The Department of Commerce ("Department") has prepared these Final Results of Redetermination-II, following our request for voluntary remand, as ordered by the U.S. Court of International Trade ("Court" or "CIT"). The remand covers one respondent from the underlying administrative review, Tianjin Magnesium International Co., Ltd. ("TMI").[1]

On May 26, 2011, the Court remanded this proceeding to the Department "so that the Department of Commerce can determine whether to re-open the proceedings in order to give consideration to the factors set forth in *Home Prod. Int'l Inc. v. United States*, 633 F.3d 1369 (Fed. Cir. 2011)." *Tianjin Magnesium Int'l Co. v. United States*, Court No. 09-00012 (May 26, 2011) ("*Voluntary Remand Order*"). This remand follows the Department's Remand I Redetermination[2] in a challenge to the final results of the 2006-2007 antidumping duty administrative review of the antidumping duty order on Pure Magnesium from the People's Republic of China. *See Pure Magnesium from the People's Republic of China: Final Results of*

[1] The other party to this litigation is US Magnesium LLC, Petitioner in the underlying antidumping duty investigation ("Petitioner" or "USM").

[2] The Court remanded the *Final Results* to the Department to: (1) further explain the valuation of TMI's by-product offset; and (2) further explain the Department's determination to use the surrogate financial ratios for overhead, selling, general and administrative expenses ("SG&A") and profit of Madras Aluminum Co. Ltd ("MALCO") in the normal value calculation. *See Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322 (CIT 2010) ("*First Remand Order*").

On February 11, 2011, the Department filed the final results of redetermination. *See* Memorandum to the File, "*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 and US Magnesium LLC* Court No. 09-00012; Slip Op. 10-87 (CIT 2011)" ("*Remand I Redetermination*").

Antidumping Duty Administrative Review, 73 FR 76336 (December 16, 2008) ("*2006-2007 Final Results*").[3]

On February 7, 2011, the Court of Appeals for the Federal Circuit ("CAFC"), in an unrelated proceeding, held that if a party to litigation presents "clear and convincing new evidence sufficient to establish a *prima facie* case that the agency proceedings under review were tainted by material fraud,…the {CIT} abuse{s} its discretion in refusing to order a remand to allow {the Department} to reconsider its decision in light of the new evidence." *Home Products Int'l, Inc. v. United States*, 633 F.3d 1369, 1381 (CAFC 2011) ("*Home Products*").[4] As a result of this intervening appellate court precedent, on April 14, 2011, the Department requested a voluntary remand from the CIT to determine the applicability of *Home Products* to the Department's remand redetermination.

The Department released the Draft Results of Redetermination Pursuant to Voluntary Remand: Pure Magnesium from the People's Republic of China *Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC* Court No. 09-00012 (CIT 2011) ("Draft Results of Redetermination-II") on August 11, 2011. In accordance with the standard and factors set forth in *Home Products*, the Department determined to re-open and re-examine the *2006-2007 Final Results* in light of newly discovered evidence that the record of the underlying the *2006-2007 Final Results* was tainted by clear and convincing evidence establishing a *prima facie* case of fraud. In weighing the newly discovered evidence, in the Draft Results of Redetermination-II, the Department concluded that TMI, the respondent, failed to establish entitlement to its two claimed by-product offsets. As a result of the Department's

[3] *See Pure Magnesium from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 32549 (June 9, 2008) ("*Preliminary Results*").

[4] *See also Home Products Int'l, Inc. v. United States*, 2010-1194, 2011 WL 2490997 (Fed. Cir. June 22, 2011), as corrected (June 23, 2011).

determination to not grant TMI a by-product offset, TMI's margin changed from 0.63 percent to 21.24 percent in the Draft Results of Redetermination-II. The Department provided parties an opportunity to submit comments regarding the Draft Results of Redetermination. In response to the parties' comments[5] and rebuttal comments[6] concerning the Draft Results of Redetermination-II, the Department has reconsidered the record evidence with regard to the reliability of the record information and TMI's actions throughout this segment of the proceeding. As a result, for purposes of these Final Results of Redetermination-II, the Department determines that TMI significantly impeded this proceeding and, by continuing to claim entitlement to a by-product offset it knew or should have known did not exist, failed to cooperate to the best of its ability. Further, because TMI submitted substantial accounting documents which were not based upon reality, the Department now doubts the remainder of TMI's submissions pursuant to section 782 of the Tariff Act of 1930, as amended ("the Act"). Accordingly, the Department has assigned TMI a rate based on total facts available with an adverse inference ("AFA"). As AFA we have applied the rate of 111.73 percent, which was calculated for Shanxi Datuhe Coke & Chemicals Co., Ltd., a cooperating respondent, in this segment of the proceeding. *See 2006-2007 Final Results.*

BACKGROUND

A. Remand I Redetermination

In the *2006-2007 Final Results*, the Department granted TMI an offset for its reported by-products of waste magnesium and cement clinker. The valuation of one of these by-products,

[5] *See* TMI's Comments on the Draft Results of Redetermination (August 18, 2011) ("TMI's Comments"), and US Magnesium's Comments on the Draft Results of Redetermination (August 18, 2011) ("US Magnesium's Comments").

[6] *See* TMI's Rebuttal Comments on the Draft Results of Redetermination (September 23, 2011) ("TMI's Rebuttal Comments"), and US Magnesium's Rebuttal Comments on the Draft Results of Redetermination (September 23, 2011) ("USM's Rebuttal Comments").

waste magnesium, is at issue in the Court's *First Remand Order*. Whether to grant the by-product offsets was not at issue – rather, the issue was the proper surrogate value to value the by-product offset.[7] Following the Court's remand order, on September 28, 2010, the Department determined that the record evidence provided to the Department during the administrative review regarding TMI's claimed by-product of waste magnesium was insufficient to determine a proper surrogate value for the waste magnesium. Accordingly, the Department re-opened the record for the 2006-2007 review of pure magnesium and requested that TMI respond to a supplemental questionnaire ("SQR") regarding the waste magnesium.[8] On October 20, 2010, TMI submitted its response to the SQR where, *inter alia*, it further described the chemical composition of its claimed by-product of the waste magnesium.[9] On November 2, 2010, US Magnesium LLC ("USM")[10] submitted rebuttal comments ("USM's Rebuttal").[11] USM's Rebuttal included a copy of the public version of the Department's verification report for the 2007-2008 administrative review ("2007-2008 VR").[12] USM argued that the 2007-2008 VR demonstrates

[7] A full discussion of valuation of the by-product is found in the Department's final results of redetermination pursuant to the *First Remand Order*.

[8] *See* letter from the Department to TMI, "*Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87 (CIT 2010): By-Product Questionnaire," dated September 28, 2010.

[9] *See* letter from TMI, "Pure Magnesium from the People's Republic of China; A-570-832; Response to the Supplemental By-product Questionnaire by Tianjin Magnesium International, Co., Ltd.," dated October 20, 2010.

[10] USM is the defendant-intervenor in the subject litigation and petitioner in the underlying investigation.

[11] *See* letter from USM, "Pure Magnesium From the People's Republic of China, Remand Pursuant To *Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87: Rebuttal Factual Information And Petitioner's Comments On TMI's Supplemental By-product Response," dated November 2, 2010.

[12] *See* 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 ("2007 – 2008 VR"), attached to USM's Rebuttal at Exhibit 1. USM also placed on the record new information that USM claimed conflicted with TMI's SQR with respect to the composition of TMI's claimed by-products. This new information included: (a) the public version of TMI's first supplemental questionnaire response from the 2008-2009 administrative review, (b) the 2006-2007 Affidavits from industry experts originally, submitted by USM during the 2006-2007 administrative review and cited by the Court in the *First Remand Order,* (c) an affidavit from Anderson Clayton dos Reis, an economist employed as Managing Director at Rima Industrial S/A, attesting that TMI's magnesium by-product is an "environmental

that TMI is not eligible for any by-product offset. Citing the 2007-2008 VR, USM asserts that Department officials were informed by TMI's unaffiliated suppliers[13] that the unaffiliated suppliers did not have any by-product sales during the 2006-2007 period of review ("POR").[14]

On November 10, 2010, we received TMI's rebuttal to USM's Rebuttal ("TMI's Rebuttal").[15] In rebuttal, TMI argued that the Department must rely only on the facts from the underlying 2006-2007 administrative review, *i.e.*, exclusive of the 2007-2008 VR.[16] On January 21, 2011, we released the Remand I Draft Redetermination and provided USM and TMI an opportunity to provide comments based on that draft remand redetermination.[17] We received comments from TMI ("TMI's Comments") and USM ("USM's Comments") on January 27, 2011.[18] TMI's Comments were limited to the issue of valuing its claimed by-product whereas USM's Comments concerned the matter of whether TMI was eligible for a by-product offset in light of the 2007-2008 VR.[19]

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liability" rather than a valuable by-product, and (d) an affidavit from Ramaswami Neelameggham, Technical Development Scientist at US Magnesium LLC, attesting that TMI's by-product has no market value. *See id* at Exhibits 2, 3, 4, 5, and 6, respectively.

[13] TMI was the respondent company in the underlying administrative review, the subject merchandise it sold in the United States was produced by two unaffiliated suppliers. The by-product offsets relate to the production of the subject merchandise by these suppliers.

[14] *Id.*, at 2-3.

[15] *See* letter from TMI, "Pure Magnesium from the People's Republic of China; A-570-832; Remand pursuant to *Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87: Reply to the Rebuttal of US Magnesium dated November 2, 2010," dated November 10, 2010.

[16] *Id.*, at 1. For a discussion of these arguments, *see* the Department's final results of redetermination pursuant to the *First Remand Order*.

[17] *See* Memorandum to the File, "*Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87 (CIT 2010): Draft Remand Schedule," dated January 20, 2011.

[18] *See* letter from TMI, "Pure Magnesium from the People's Republic of China; A-570-832; Remand Pursuant to *Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87 (CIT 2010): Comments on the January 20, 2011 Draft Remand Results," dated January 27, 2011, and letter from USM, "Pure Magnesium From the People's Republic of China/Redetermination Pursuant To Court Remand *Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87 (CIT 2010): US Magnesium's Comments On the Draft Redetermination," dated January 27, 2011.

[19] USM's Comments also address matters not at issue in this *Voluntary Remand*, *e.g.*, the use of MALCO's financial statements. *See* the Department's final results of redetermination pursuant to the *First Remand Order* for a discussion of these other issues.

B. Home Products

In *Home Products*, the domestic interested party initiated an action in the CIT challenging the final results of the Department's second administrative review of the antidumping duty order on ironing tables from the People's Republic of China. While the second administrative review was pending before the CIT, the Department conducted its third administrative review of the ironing tables antidumping order.[20] During the third administrative review, the Department determined that the respondent provided unreliable and incomplete documentation in support of its claimed market-economy inputs.[21] Specifically, the Department determined that "numerous typographical errors and discrepancies appear in the documentation that {the respondent} submitted concerning its alleged purchases of inputs from market economy suppliers."[22] The Department also noted that the same documents were submitted in the first and second administrative reviews of that proceeding.[23]

While the domestic interested party's challenge to the second administrative review results proceeded before the CIT, the domestic interested party moved for remand and to amend its complaint with regard to the second administrative review based upon the new information discovered and relied upon in *AR3 Ironing Tables Final Results*. Before the CIT, the Department opposed this motion on the grounds that the domestic interested party failed to allege that the second administrative review final results were unsupported by substantial evidence on the record of that review. The CIT agreed with the Department, holding that the domestic interested party had not demonstrated a basis for a remand to the Department where the proposed

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[20] *See Home Products* 633 F.3d at 1372.

[21] *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 11085 (Mar. 16, 2009) ("*AR3 Ironing Tables Final Results*").

[22] *Id*.

[23] *Home Products*, 633 F.3d at 1375.

remand was based upon a determination in a subsequent administrative review, rather than based upon the record of the administrative review at issue in the litigation.[24]

The CAFC, in reversing the CIT's decision not to remand the matter to the Department, held: (1) that administrative agencies posses inherent authority to reconsider their decisions and that this inherit authority is more fundamental when protecting the integrity of the agency's proceedings from fraud,[25] (2) that an exception to the "record rule" exists when new evidence of material fraud has been subsequently brought to light,[26] (3) that the petitioner had provided clear and convincing evidence establishing a *prima facie* case of fraud in the second administrative review,[27] and (4) that the CIT abused its discretion by not remanding the matter to the Department to reconsider the closed administrative proceeding in light of the newly discovered evidence.[28]

The CAFC added that, "{i}n ordering that the case be remanded to the Department}, we express no opinion as to whether {the Department} must exercise its authority to reopen; nor do we mandate a finding of fraud. In deciding to reopen, {the Department} may appropriately consider the interest in finality, the extent of inaccuracies in the second administrative review, whether fraud existed in the second administrative review, the strength of the evidence of fraud, the level of materiality, and other appropriate factors."[29]

In light of the *Home Products* decision and similar facts here, we requested a voluntary remand to consider the implications of *Home Products* with regard to the litigation at issue here. We released the Draft Results of Redetermination-II to the parties on August 11, 2011. Both

[24] *Home Products International, Inc. v. United States*, 675 F. Supp. 2d 1192 (CIT 2009).
[25] *Home Products,* 633 F.3d at 1377.
[26] *Id.*, at 1380.
[27] *Id.*, at 1381.
[28] *Id.*, at 1380.
[29] *Id.*, at 1381.

TMI and Petitioner submitted comments on August 18, 2011. On September 6, 2011, the Court granted our request to extend the time period for the Final Results of Redetermination-II. Pursuant to the Court's order, these Final Results of Redetermination-II are to be filed on or before October 31, 2011. On September 14, we provided both parties an opportunity to submit rebuttal comments. On September 23, 2011, both TMI and US Magnesium timely submitted their rebuttal comments to the Department.

DRAFT RESULTS OF REDETERMINATION-II

Whether to Consider Information from a Subsequent Segment of a Proceeding and Reconsider the *2006-2007 Final Results*

In *Home Products*, the CAFC held that "where a party brings to light clear and convincing evidence sufficient to make a *prima facie* case that the agency proceedings were tainted by a material fraud, the Trade Court abuses its discretion when it declines to order a remand to require the agency to reconsider its decision in light of the new evidence."[30] Because of the procedural posture of *Home Products*, the newly discovered evidence was first raised when the CIT possessed jurisdiction over the Department's determination. Therefore, the Court determined whether clear and convincing evidence established a *prima facie* case of fraud.[31] Here, the Department is presented with the newly discovered evidence in the first instance, and accordingly, must make the determination whether the new evidence is "clear and convincing sufficient to make a *prima facie* case" of fraud.

Defined as the intermediate standard of proof, clear and convincing evidence is more than a preponderance of the evidence, but less than beyond a reasonable doubt.[32] The Supreme Court

[30] *Id.* at 1378.
[31] *Id*. at 1381.
[32] *Buildex Inc. v. Kason Industries, Inc.*, 849 F. 2d 1461, 1463 (CAFC 1988).

explained this standard in determining whether a particular statute precluded judicial review.[33] The Supreme Court held that clear and convincing evidence of legislative intent precluding judicial review must be shown to overcome the general presumption in favor of judicial review. Similarly, the CAFC's standard requires clear and convincing evidence establishing a *prima facie* case of fraud to overcome the general presumption in favor of finality of agency action. Therefore, where the evidence is so clear, direct, weighty, and convincing to enable the Department to reach a clear conclusion without hesitancy of the truth of the premise of the facts asserted, the clear and convincing evidence standard will be met.

The second part of the standard requires evidence sufficient to make a *prima facie* case of fraud. The Supreme Court has defined "*prima facie* case" as "something to give colour to the charge … that has some foundation in fact."[34] To make out a *prima facie* case of fraud, it is not necessary that a *prima facie* case for each element of fraud be set forth.[35] Accordingly, the Department considers a *prima facie* case of fraud to be met where there is evidence sufficient to allow a prudent person to suspect fraud, as a general matter.[36]

Here, the newly discovered evidence in the 2007-2008 VR demonstrates that there were no by-product sales in the 2006-2007 POR and that voucher pages for the 2006-2007 POR were fabricated during the 2007-2008 verification. The statement made by the pure magnesium producer that by-products were not sold and the evidence of fabricated voucher pages are clear and convincing evidence which enable the Department to conclude without hesitation that there were no by-product sales during the 2006-2007 POR. Further, the new evidence establishes that TMI made a misrepresentation of fact that it was entitled to by-product offsets for sales made

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[33] *Block v. Community Nutrition Institute, et al*, 467 U.S. 340, 350 (1984).
[34] *Clark v. United States*, 289 U.S. 1, 15 (1933).
[35] *United States v. BDO Seidman LLP*, 492 F. 3d 806, 819 (7th Cir. 2007).
[36] Under common law, fraud requires an individual to fraudulently make a misrepresentation of fact for the purpose of inducing another to act. *See* Rest. 2d of Torts 525.

during the 2006-2007 POR. The Department is able to infer that the by-product sales claim was made for the purpose of inducing the Department to offset its normal value for those sales, otherwise TMI would not have requested an adjustment to normal value. Based on the foregoing, the Department concludes that clear and convincing evidence establishes a *prima facie* case of fraud sufficient to consider the additional factors set forth by the CAFC to determine whether to re-open the 2006-2007 administrative review.[37]

After concluding that clear and convincing evidence established a *prima facie* case of fraud, the CAFC instructed in *Home Products* that, "{i}n deciding whether the proceeding should be reopened, {the Department} may appropriately consider the interests in finality, the extent of the inaccuracies in the … administrative review, whether fraud existed in the … administrative review, the strength of the evidence of fraud, the level of materiality, and other appropriate factors." *Id.* We consider each of these enumerated factors below.

First, with regard to finality of the Department's administrative proceedings, the Department has consistently explained, and the Court has agreed, that each administrative segment results in a separate determination based upon the administrative record in that segment of the proceeding. *See Shandong Huarong Mach. Co. v. United States*, 29 C.I.T. 484, 491 (CIT 2005) ("As {the Department} points out 'each administrative review is a separate segment of proceedings with its own unique facts.'"); *see also Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (Feb. 13, 2006) ("each administrative review of the order represents a separate administrative proceeding and stands on its own"); *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper*

[37] In cases in which the procedural posture is similar to that of *Home Products*, the Department expects the Court will make this first determination and then remand the case to the Department to determine whether to re-open the closed segment based upon the factors discussed.

Review, 67 FR 11283 (Mar. 13, 2002) ("what transpired in previous reviews is not binding precedent in later reviews"). For example, (a) the Department could reach a different conclusion from one administrative review to the next based upon a different analysis of the facts; (b) the Department could alter its methodology from one segment of the proceeding to another; (c) the Department could reach two different conclusions in two segments based upon whether it conducted verification or not; and, (d) the Department could make an error of fact in one segment of the proceeding and if no party raised that error through the ministerial error provisions of the statute or litigated that error, it becomes final and conclusive. In each of these above examples, the type of reconsideration of a closed proceeding envisaged by the CAFC would not be appropriate.

Because of the strict statutory timelines to conduct investigations and reviews, and the specified time period to correct errors in section 751(h) of the Tariff Act of 1930, as amended ("the Act"), and as implemented in 19 CFR 351.224(e), the Department considers its determinations as final and conclusive on all parties, including the Department, unless specific issues are challenged before the CIT. This approach provides all parties to the Department's proceedings certainty in the amount of duties to be levied on entries of subject merchandise and certainty as to which issues remain open through litigation. Thus, the Department has consistently considered administrative reviews to be final and conclusive, except for the exceptional circumstances, where a separate agency through an administrative process or separate tribunal has concluded that the Department's proceeding was tainted by fraud, collusion, or perjury, thereby calling into question the integrity of the agency's proceedings. *See, e.g., Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F. 3d 1352, 1360-61 (CAFC 2005) ("*TKS*") (reopening of proceeding permissible to address claims of fraud in closed proceeding). Because

the CAFC affirmed the Department's reconsideration in *TKS* by holding "administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so," *see TKS*, 529 F.3d at 1361 (emphasis added), the Department adopted a practice which limits re-opening closed proceedings to those in which a court, like the district court in *TKS*, or another administrative authority made a finding of fraud.

Balanced against finality of the Department's proceedings are the factors set forth by the CAFC, *i.e.*, the extent of the inaccuracies in the administrative review at issue, whether fraud existed in the administrative review, the strength of the evidence of fraud, the level of materiality, and other appropriate factors. Beginning this section of the analysis, the Department recognizes that the procedural posture of this case is different vis-à-vis the *Home Products* case. Whereas in *Home Products* the CAFC made factual findings that the domestic interested party produced evidence to establish a *prima facie* case of fraud and that the fraud, if it occurred, was likely material (*see Home Products*, 633 F. 3d at 1381), here no Court has made similar findings. Although these factors are not mandatory, they are important to consider to overcome the Department's general presumption in favor of finality of agency determinations. Accordingly, we consider these factors with regard to the review at issue in this remand.

Turning to the extent of the inaccuracies on the administrative record, during the 2006-2007 administrative review proceedings, TMI provided invoices for all of its suppliers' purported waste magnesium and clinker sales for each month of the POR and copies of accounting records purportedly demonstrating how the invoices tied to its suppliers' accounting system.[38] Also, in its SQR, TMI submitted copies of invoices, warehouse-in slips, relevant sub-

[38] *See* letter from TMI "Pure Magnesium from the People's republic of China; A-570-832; Response of Tianjin Magnesium International Co., Ltd. to the Second Supplemental Questionnaire," dated November 20,

ledger and general ledger sections, a list of purchasers of the waste magnesium, and an exhibit purporting to demonstrate TMI's suppliers' accounting of the waste magnesium.[39]

During the 2007-2008 administrative review verification, TMI's suppliers described, for the first time, a complicated arrangement whereby they allegedly transferred waste magnesium and cement clinker by-products to certain parties that accepted the by-products in lieu of payment for freight services previously rendered.[40] In order to verify this arrangement, Department officials requested evidence demonstrating that the arrangement was in effect prior to the 2007-2008 POR that was being verified.[41] In response, TMI's suppliers stated that they did not start selling by-products until April or May 2007, *i.e.*, the last month of the 2006-2007 POR and the first month of the 2007-2008 POR.[42] Department officials examined the accounting records of TMI's suppliers and found an entry for a by-product transaction in the April 2007 records.[43] The verifying officials asked to see the voucher book for April 2007 in order to examine the voucher for this transfer and to verify that it comported with the description provided by TMI and its suppliers.[44] Department officials found that the voucher book for April 2007, as well as voucher books during and after the subject 2007-2008 POR, were being altered during the verification proceedings to include fabricated receipts supporting the arrangement described at verification for the sale of the by-products.[45] The existence of these fabricated documents, in light of the supplier's statement that it did not have by-product sales during the

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2008, at ("TMI's By-Products' Submission") at Exhibits S2-1, S2-2, and S2-3.

[39] *See* letter from TMI, "Pure Magnesium from the People's Republic of China; A-570-832; Response to the Supplemental By-product Questionnaire by Tianjin Magnesium International, Co., Ltd.," dated October 20, 2010.

[40] *See* 2007-2008 VR at *34-37*.

[41] *Id*.

[42] *Id* at 40.

[43] *Id*.

[44] *Id*.

[45] *Id* at 38 and 42.

06-07 POR indicate inaccuracies in several key record documents from this administrative review.[46]

Second, the Department considers whether fraud existed and the strength of the evidence of fraud. As explained in applying the common law of fraud above, there is clear and convincing evidence that TMI made a misstatement of fact that it was entitled to a by-product offset to normal value for sales of cement clinker and magnesium waste by-products. Specifically, the Department (with TMI officials present) (a) was informed directly by the suppliers that prior to April/May 2007 there had been no by-product sales, and (b) discovered that during the verification the parties fabricated the voucher pages they used to attempt to substantiate their claimed sales of by-products.[47] Although no by-product sales had occurred, TMI submitted documentation to the Department to receive a favorable offset to normal value.

Third, we consider whether the misstatement of fact regarding entitlement to by-product offsets is material to the Department's calculation of TMI's dumping margin in the 2006-2007 administrative review. Because dumping occurs when an exporter sells a product in the United States at a price lower than the product's normal value, the amount by which normal value exceeds the U.S. price is determined to be the dumping margin. *See* section 773(a) of the Act. In all cases involving a nonmarket economy country, normal value normally is calculated based on a factors-of-production analysis whereby each input is valued based upon data from a surrogate market economy country. *See* section 773(a) of the Act. Section 773(c) of the Act is silent as to the treatment of by-products. However, the Department has interpreted the Act to allow the granting of an offset to the costs of production for a by-product generated in the

[46] *See generally*, TMI Section D Questionnaire Response; TMI Supplemental Questionnaire Response dated Nov. 20, 2008; TMI Remand Supplemental Questionnaire Response.

[47] *See* 2007-2008 VR.

manufacturing process of the subject merchandise that has commercial value.[48] In order to receive the offset, the respondent has the burden to: (i) demonstrate that the generated by-product has commercial value (*i.e.*, is sold or re-used in the production of the subject merchandise; and (ii) provide all the information necessary for the Department to incorporate such offsets into the margin calculation.[49]

If the Department grants such an offset, the result is a lower normal value and a reduced dumping margin. That is, the difference between normal value and export price would be smaller because normal value would be reduced by the value of the by-product offset. Conversely, where no by-product offset to normal value is warranted, the dumping margin would be higher. Accordingly, in this case, TMI's claims regarding the by-product offsets, and the evidence that they are not warranted, are material to the final dumping margin calculation.

Finally, we turn to any additional factors. In considering whether to re-open a closed segment of the proceeding, the Department finds that it should consider whether the newly discovered evidence was discovered or raised within a reasonable period of time after the conclusion of the segment of the proceeding, whether the entries which entered during the period impacted by the fraud remain unliquidated, or whether the party responsible for the misstatements of fact continues to benefit from a low cash deposit rate. In this case, the evidence was uncovered in the segment of the proceeding immediately following the closed proceeding. Additionally, TMI's entries during the 2006-2007 POR remain unliquidated due to an injunction on liquidation ordered by the CIT. Because the Department published its final results in the subsequent segment, TMI's cash deposit has changed. The balance of these additional factors

[48] *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 460 F. Supp. 2d 1365 (CIT 2006).

[49] *See Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value***,** 74 FR 16838 at Issues and Decision Memorandum at Cmt 8 (Apr. 13, 2009).

tips in favor of re-opening the closed segment because it is being re-opened within a reasonable period of time and the Department will be able to properly assess duties on TMI's entries.

Further, as the Department determined in reconsidering a sunset determination of large newspaper printing presses,[50] the Department finds that re-opening the 2006-2007 administrative review in this case also protects the integrity of our proceedings, based on the specific facts at issue here, as described above. The courts have held that agencies have this inherent authority.[51] Moreover, it is well established that "federal agencies have the power to reconsider their final determinations."[52] In *LNPPs*, a federal district court concluded that the respondent and its former counsel falsified business records, destroyed documents, and "agreed to a fraudulent price increase to avoid a finding of dumping;" which occurred during the 1997-1998 administrative review of the antidumping duty order.[53] There, we found it reasonable to reconsider the sunset review to examine the likelihood of continued dumping, and to allow all parties an opportunity to participate. We found that such an examination is necessary because the respondent's misconduct in the 1997-1998 administrative review was so egregious that it renders the results of the subsequent sunset review unreliable.[54] These same considerations are present here because of TMI's submission of documentation which is now contradicted by new evidence. The Department relied upon this documentation in the 2006-2007 administrative review, rendering TMI's rate as calculated in that review unreliable.

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[50] *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Reconsideration of Sunset Review*, 73 FR 67131 (Nov. 13, 2008) at Issue 1 ("*LNPPs*").

[51] *See, e.g., Tokyo Kikai Seisakusho, Ltd. et al. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008); *Alberta Gas Chem. Ltd. v. Celanese Corp.*, 650 F. 2d 9, 13-14 (2d Cir. 1981).

[52] *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1320 (CIT 2002) (citing *Trujillo v. Gen. Elec. Co.*, 621 F. 2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider")).

[53] *See Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 321 F. Supp. 2d 1039 (N. D. Iowa 2004), *aff'd by Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 434 F. 3d 1081 (8th Cir. 2006), *denied certiorari by* Tokyo Kikai Seisakusho, Ltd. v. Goss Int'l Corp., 126 S. Ct. 2363 (2006).

[54] *See LNPPs* at Comment 1.

For the foregoing reasons, the Department concludes that finality of the 2006-2007 administrative review is overcome by the evidence and materiality of fraud, the reasonable time period following the final results, and that the entries at issue remain unliquidated. Therefore, the Department is re-opening the closed 2006-2007 administrative review and considering this newly discovered evidence.

Taking the New Evidence Into Account

As explained above, the standard of evidence required for considering whether to re-open a closed segment of a proceeding is clear and convincing evidence establishing a *prima facie* case of fraud. However, once the Department re-opens a closed segment, it re-considers its determination based upon the weight of the evidence, including the new evidence from the subsequent segment of the proceeding, now on the record of the case. Here, TMI claimed that its normal value should be reduced by the value of its suppliers' sales of by-products. For support of this offset, TMI provided voucher pages and accounting records. However, newly discovered evidence indicates that TMI's suppliers did not have by-products sales during the 2006-2007 POR. In examining the effect of this evidence on our *2006-2007 Final Results*, we now determine that TMI has failed to establish entitlement to a by-product offset for either by-product.

In weighing the evidence, we determine that the verification findings regarding by-product documentation and the statement by TMI's suppliers are compelling evidence that TMI's suppliers did not have by-products sales. Specifically, the Department (a) was informed directly by the suppliers that prior to April 2007 there had been no by-product sales and (b) discovered that during the verification the parties fabricated the voucher pages they used to attempt to

substantiate their claimed sales of by-products.[55] As explained above, it is the respondent's burden to establish entitlement to any adjustment.[56] Here, the claim for by-product offsets is belied by the new evidence. Therefore, TMI and its suppliers clearly failed to meet the burden to establish entitlement to by-product offsets because they failed to provide sufficient and reliable information. In our Draft Results of Redetermination-II, we denied TMI's by-product offset and calculated a dumping margin for TMI of 21.24 percent. However, we have revised our determination after reviewing the interested parties' comments and for purposes of these Final Results of Redetermination-II we are applying total adverse facts available in calculating TMI's dumping margin. We find that TMI significantly impeded the proceeding and failed to cooperate to the best of its ability. For a full discussion of our analysis of this issue, please see the Department Position to Comment 2 below. Accordingly, as adverse facts available, TMI's dumping margin is 111.73 percent.

INTERESTED PARTIES' COMMENTS ON THE DRAFT RESULTS OF REDETERMINATION-II

Issue 1: Whether the Department Properly Opened the Record of the 06-07 AR to Consider Evidence Obtained During the 07-08 AR

USM argues that the Department properly considered the 2007-2008 VR and, thus, properly found a *prima facie* case for material fraud. In support of this argument, USM relies on the evidence contained in the 2007-2008 VR, which "demonstrates that there were no by-product sales in the 2006-2007 POR and that the voucher pages for the 2006-2007 POR were fabricated during the 2007-2008 verification." *Draft Results of Redetermination-II* at 8.

[55] *See* 2007 -2008 VR.

[56] 19 CFR 351.401(b)(1) states that "the interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."

TMI first argues that the Department improperly ascribed fraud to it based on alleged actions of unaffiliated companies. According to TMI, the Department made no finding that TMI is affiliated with the producer, yet assumes that TMI has knowledge or control of the producer's activities. Furthermore, TMI states that the Department points to no lack of cooperation by TMI, instead connecting TMI to the actions of the producer through inferences and innuendos. TMI continues by asserting that the Department failed to notice that TMI was successfully verified in two subsequent reviews.

Secondly, TMI contends that the Department failed to connect TMI to any material act that was intended to deceive. According to TMI, there was no direct evidence of fraud and no evidence of fraud by TMI. TMI states that the proper standard of analysis to be followed includes proving that an act was material and that it was undertaken with the intent to deceive, as well as the weighing the equities in order to determine whether inequitable conduct warrants the remedy. Specifically, there must be a "deliberate decision" to deceive. In light of this standard, TMI asserts that, in the draft results, the Department failed to establish that TMI knew of the alleged misconduct, knew of its materiality, or made conscious decisions not to disclose information in order to deceive. According to TMI, the only available information comes from outside the record and only makes suspect information of an unaffiliated supplier. TMI asserts that the Department provides no analysis "showing that fraud can be established rather than a lower level of culpability, such as negligence or gross negligence."[57]

In USM's rebuttal to TMI's comments, USM contends that the Department should find fraud in the 2006-2007 review based on substantial evidence. According to USM, the review included evidence that TMI claimed byproduct offsets it *knew* to be nonexistent and that it *knowingly* submitted fabricated documents, including invoices, warehouse-in slips, and key

[57] See TMI's Comments at 3.

accounting records. USM also quoted one of TMI's supplier's financial manager as stating: "{the supplier} did not start selling byproducts until 'April or May' 2007." USM stated that this admission, along with evidence that 2006-2007 vouchers were fabricated and presented in the 2007-2008 AR, shows that there were no byproduct sales during the 2006-2007 POR.[58]

In further support of its rebuttal, USM alleges that TMI acted independently of its unaffiliated supplier. For example, it was TMI, not an unaffiliated supplier, which submitted fabricated documents to enhance its eligibility. Moreover, USM asserts that TMI failed to conduct adequate investigation into its byproduct submissions, which were readily discoverable, during the 2007-2008 review. According to USM, in order to determine fraud, the Department must adhere to the standard set forth in *Home Products*: if a party presents "clear and convincing evidence sufficient to make a *prima facie* case that the agency proceedings were tainted by a material fraud, the Trade Court abuses its discretion when it declines to order a remand to require the agency to reconsider its decision in light of the new evidence." Thus, USM argues, the Department need not find a *prima facie* case for each element of fraud, and it need not make a finding beyond a reasonable doubt that TMI intended to deceive.

In TMI's rebuttal to USM's comments, TMI argues that no connection has been made to the record establishing a finding of fraud, nor have the elements of fraud been demonstrated, which, according to TMI, all must be established, particularly that the party has the necessary scienter (*i.e.*, knowledge). As such, TMI points out that the element of TMI knowingly having made a "false statement of a material fact" is not present on the record.

Department Position:

We continue to find that the record contains clear and convincing evidence establishing a *prima facie* case of fraud by TMI, and as discussed above, we determine that the evidence of fraud

[58] USM's Rebuttal Comments at 2-3.

and its materiality are sufficient to overcome the general presumption in favor of finality. As an initial matter, the Court of Appeals in *Home Products* did not limit the consideration to re-open a proceeding where there was a *prima facie* case of fraud by the named respondent. Rather, the relevant inquiry is focused on whether there is evidence of fraud in the segment of the proceeding. Nonetheless, such a distinction is unnecessary here where TMI submitted information it knew, or had reason to know, was inaccurate to induce the Department into calculating a lower dumping margin. Additionally, we do not agree with TMI that the Department needs to make a finding of affiliation or control between TMI and its producer in order to find that there is clear and compelling evidence of fraud with regard to TMI. Our analysis herein, while acknowledging the actions of the unaffiliated supplier, is focused on TMI's role in the proceeding.

We also disagree with TMI that each element of fraud must be established for the Department to re-open a closed segment of the proceeding. Had TMI's standard been the Court of Appeal's intent, the Court would have used that standard rather than the one it adopted: "clear and convincing evidence establishing a prima facie case of fraud." The Court's standard is lower than that advanced by TMI. Further, we agree with Petitioner that once this finding is made and the Department opts to consider the subsequent information, the Department's analysis of the new information on the record is not subject to finding the elements of fraud. As discussed in Issue 2, below, once the Department re-opens the proceeding, the Department weighs the evidence as it would in normally making its antidumping determination, just as if it had all of this evidence before it during the administrative review in the first instance.

Issue 2: Taking the New Evidence Into Account.

USM contends that the Department did not consider the extent of the falsified documents on the record. USM states that, in addition to the falsified documents taken into account by the Department, which include invoices, warehouse-in slips, and general ledgers, there were

important omissions from the Department's list, which included falsified core accounting records. According to USM, these falsified documents were submitted twice under certification, the second of which was submitted during the First Remand, well after the 2007-2008 verification and final results. Thus, USM alleges, TMI had full knowledge that the documents were false when it submitted them during the First Remand. USM also states that the Department correctly determined that TMI's fraud was material, as it had a considerable impact on the weighted-average dumping margin.

Secondly, USM argues that the Department erred in not considering whether TMI's actions during the 2006-2007 review or this remand demonstrated a failure to cooperate to the best of its ability. USM states that the primary justifications for applying AFA in the 2007-2008 review apply equally in the instant remand because the facts and lack of cooperation are largely similar: 1) TMI failed to meet its obligation to ensure the accuracy of the submission it certified; 2) TMI failed to put forth its "maximum efforts" to investigate the accuracy of its submission on FOPs; and 3) if TMI did not fail to ensure accuracy, it knowingly submitted incorrect information to the Department. These acts and omissions, USM contends, relate to the same adjustment to production costs that is fundamental to the material fraud finding in this review. Furthermore, USM argues that, under the "duty to inform" standard of *Pacific Giant and Tianjin Magnesium Int'l*, Slip Op 11-100, TMI was required to advise the Department, in this remand, that the documents TMI submitted were false. The Department cited this exact type of behavior in the 2007-2008 Redetermination. Thus, USM argues, the Department's failure to assign total AFA to TMI under these circumstances would put TMI in the same position it would have been in had it not committed material fraud, and would invite similar efforts to deceive the Department in the future.

Thirdly, USM argues that the CIT has already ruled that TMI's 2006-2007 AR data are unreliable. USM relies on the 2007-2008 final order resolving the appeal, in which the Court cited the Department's statement from the final results that TMI's underlying data in the 2006-2007 review was unreliable. Moreover, USM contends that TMI submitted falsified core accounting records. USM states that the Department typically applies total AFA when a respondent is found to have submitted falsified or unreliable core accounting records, which the CIT has affirmed. *See Qingdao Taifa Group Co. v. United States*, 637 F. Supp. 2d, 1231, 1239-1240 (Ct. Int'l Trade 2009); *Washington Int'l ins. Co. v. United States*, Ct. No. 08-00156, 2010 Ct. Intl. Trade LEXIS 13 (Ct. Int'l. Trade Feb. 9, 2010).

Fourthly, USM contends that respondents that commit material fraud necessarily have failed to cooperate, making application of an adverse inference appropriate. According to USM, a material fraud finding subsumes a failure to cooperate finding. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (material fraud evinces a failure to cooperate); *Universal Polybag Co., Ltd. V. United States*, 577 F. Supp. 2d, 1284, 1294 (Ct. Int'l Trade 2008) (lying to the Department is inexcusable); *Shanghai Taoen Int'l Trading Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1345 (Ct. Int'l Trade 2005) (AFA are warranted "where respondent purposefully withholds, and provides misleading, information"). Furthermore, USM points out that the Department consistently applies total AFA when a respondent submits fabricated documents. The most obvious of which, according to USM, is the Department's application of total AFA to TMI in the 2007-2008 review.

Finally, USM contends that TMI's pattern of behavior cannot be ignored. According to USM, TMI has submitted fraudulent documents on three successive reviews. In arguing that TMI's behavior cannot be ignored, USM relies on *Reiner Branch GmbH & Co. KG v. United*

States, where the CIT found that when determining whether to apply total AFA, "the Department may also draw some inferences from a pattern of behavior." 206 F. Supp. 2d 1323, 1337 (Ct. Int'l Trade 2002). Furthermore, USM states that a pattern of behavior may call into question all information submitted by the respondent. USM closes by stating that failure to apply total AFA creates bad precedent and that the Department must protect the integrity of its administrative process. According to USM, TMI's actions warrant total AFA, but if the Department does not apply total AFA, it should add a cost to the normal value for TMI's disposal of its by-products.

In rebuttal, TMI argues that no information of record shows that it failed to cooperate. TMI states that there is nothing on the record indicating that it withheld information that was requested, failed to provide information in a timely manner or in the form or manner requested, significantly impeded a determination, or provided unverifiable information. TMI posits that if its responses were believed to be defective, Petitioner could have commented during the review or when the record was open during the first remand, or the Department could have issued further questions. TMI contends that facts of a subsequent review cannot be used for previous reviews because the facts of each review stand on their own.

Moreover, TMI argues, decisions of the CIT do not require immediate application. TMI further asserts that the Department does not consider itself bound to decisions of the CIT. According to TMI, if this were a real issue, Petitioner could have raised it when the factual record was open during the first remand and in faulting TMI, Petitioner ignores its own failure to raise an issue earlier. TMI avers that for this reason, the Department should not give this argument any weight since the record is not open at this time. Finally, TMI states that it responded to the questions asked of it by the Department and cannot be faulted for questions that were not asked.

Department Position:

Upon review of the comments submitted by the parties, and the record of this proceeding, the Department has reconsidered its finding from the Draft Results of Redetermination-II, and determines that TMI's actions in the 06-07 AR and this remand warrant the application of total AFA.

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if necessary information is not on the record, or an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information," the Department may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Reexamination of the record of the 06-07 AR, in light of the evidence discovered in the 2007-2008 AR, demonstrates that, pursuant to sections 776(a)(2)(c) and (d) of the Act, TMI significantly impeded the review. Specifically, TMI significantly impeded this proceeding by submitting documentation which the Department found fabricated at verification and which was undermined by TMI's producer's statement that it did not have by-product sales prior to April/May 2007. During the 06-07 AR segment of the proceeding, TMI submitted extensive accounting records to support its claim for a by-product offset. TMI had a duty to investigate this information before submitting it to the Department. This information was readily ascertainable to TMI. Evidence of the discoverability of this information is in the 07-08 VR wherein Department officials asked the producer if there were by-product sales prior to the period of review. The producer replied that there were no sales. TMI, being a diligent respondent, could have, and should have, asked the same question before requesting for a favorable adjustment.

Even assuming TMI had misunderstood its supplier's information, TMI submitted additional by-product documentation during the first remand in response to the SQR. This submission was made several months after the 07-08 verification when the producer explained that it had no by-product sales for the prior period. At the time TMI was issued the SQR, TMI had direct knowledge how its producer answered the Department's questions at verification. As evidenced from the VR, TMI company officials and TMI's counsel were present for the verification and were involved in

attempting to clarify answers for Department verifiers. Accordingly, even if TMI had not made adequate inquiries early in the proceeding, by the time of this remand, TMI had direct knowledge that its producer did not have by-product sales during the underlying administrative review period.

Because TMI continued to request a favorable offset to its normal value calculation in the face of discoverable evidence to the contrary, and its clear knowledge to the contrary by the time of this remand proceeding, TMI significantly impeded the proceeding in accordance with section 776(a) of the Act. Section 782(d) of the Act is inapplicable here because TMI's submission of by-product information during the course of the remand was not deficient. It appeared to be responsive to the Department's questionnaires issued at that time. Nevertheless, it was undermined by the 07-08 VR. Accordingly, the Department determines that it is not practicable at this point to ask TMI why it submitted information it knew was undermined by statements made by its producers.

To examine whether an interested party cooperated by acting to the best of its ability under section 776(b) of the Act, the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the interested party has hindered the calculation of accurate dumping margins. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil*, 65 FR 5554, 5567 (February 4, 2000). Compliance with the "best of its ability" standard is determined by assessing whether the interested party has put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed.Cir. 2003). To conclude that a manufacturer or importer has not cooperated to the best of its ability and to draw an adverse inference under section 776(b) of the Act, the Department examines two factors: (1) that a reasonable and responsible respondent would have known that the requested information was

required to be kept and maintained under the applicable statutes, rules, and regulations; and (2) that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to respond fully and accurately is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from the records. *Id*. While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. *Id*.

TMI was an experienced respondent, having participated in the 04-05 AR, and would have known that documentation needed to be kept and maintained. As discussed above, TMI did not put forth its maximum effort to investigate the validity of its by-product offset claim, nor the documentation submitted in support of its claim. Further, during this remand, TMI continued to claim a by-product offset and submit documentation in support of that offset, long after it came to light that the supplier had not sold the by-products and had falsified the documentation. Thus, TMI knowingly made false claims and submitted false documentation to the Department. Accordingly, the *Nippon Steel* standard of deliberate concealment is clearly met where TMI intended to submit this information. Such a conclusion is supported by the Court of International Trade's holding that "TMI failed to perform the tasks required of it by the AD law, or to timely seek direction from {the Department}."[59]

We do not find persuasive TMI's arguments that if TMI's responses were believed to be defective, Petitioner could have commented during the review or when the record was open during first remand, or that the Department could have issued further questions. First, the fact that the responses were defective did not come to light until after the 06-07 review. Second, Petitioner did comment when the record was open during the first remand. And finally, we do

[59] *Tianjin Magnesium Int'l v. United States*, Slip Op. 11-100 * 6 (Ct. Int'l Trade 2011).

not find that it would have been worthwhile to issue further questions after it came to light that TMI had provided false answers and falsified documents to support the questions already asked.

We also do not agree with TMI's assertion that facts of a subsequent review cannot be used for previous reviews because the facts of each review stand on their own. As explained at length, above, the Department has the authority to use facts from subsequent reviews, and does so under limited circumstances. TMI is also incorrect that the Department is somehow barred from taking into account the decision of the CIT in the subsequent segment of the proceeding in which the Court affirmed the application of total AFA. In this case we find that the decision of the Court in the 07-08 remand, upholding our finding that TMI failed to cooperate to the best of its ability is equally applicable to the 06-07 review, where the finding at issue is based on the same information underlying our decision, and the Court's affirmation thereof, in the 07-08 review. Accordingly, we find, based on the record before us that TMI failed to cooperate to the best of its ability by continuing to submit data despite discoverable information which undermined those data.

Finally, we do not agree with TMI's argument that the Department and Petitioner are somehow at fault for not raising the issue of TMI's false claims for a by-product adjustment during the administrative review. First, during the original conduct of this review we had no information to lead us to suspect the false nature of the information submitted. At the time of the 2007-2008 verification, the Court possessed jurisdiction over the case, and the Department could not issue deficiency questions to TMI. With regard to Petitioners, they raised this contention at the first instance they were able -- on the record of this remand after TMI responded to the Department's supplemental questionnaire with by-product information.

The Department also concludes that TMI's submission of these falsified documents which are undermined by subsequent record evidence calls into question the remainder of TMI's responses.

The discrepancies between TMI's suppliers' submitted documentation showing sales of by-products, and TMI's suppliers' admission that it did not sell these by-products, as well as the discovery of falsified documentation supporting the sales of these by-products, establish a pattern of behavior that undermines the reliability and credibility of TMI's entire set of questionnaire responses. Specifically, the authenticity of the accounting records, warehouse documents and receipts submitted by TMI in both the 2006-2007 review and this remand are completely contradicted by the evidence uncovered in the 2007-2008 review verification. This also includes the refusal of TMI's producer to allow Department verifiers to review other documents related to normal value. Accordingly, the Department is unable to rely on any of the FOP or other data supplied by TMI, and thus there is no reasonable basis upon which to calculate a margin. As a result, we find that necessary information is not available on the record within the meaning of section 776(a)(1) of the Act. Further, pursuant to 776(b) of the Act, by maintaining its claim for a by-product offset in light of the admissions at verification, TMI failed to cooperate to the best of its ability.

We also disagree that the Department points to no lack of cooperation by TMI. Specifically, TMI in the 06-07 review: 1) failed to meet its obligation to ensure the accuracy of the submission it certified; 2) failed to put forth its "maximum efforts" to investigate the accuracy of its submission; and 3) if TMI did not fail to ensure accuracy, it knowingly submitted incorrect information to the Department in its questionnaire responses. See *Tianjin Magnesium Int'l*, Slip Op 11-100 (Ct. Int'l Trade 2011). See *Tianjin Magnesium Int'l*, Slip Op 11-100 (Ct. Int'l Trade 2011).

Furthermore, TMI's actions in the present remand also show a failure to cooperate, as TMI, well after the 2007-2008 verification, at which it was present, continued to submit

documentation to support its by-product adjustment claim when it was clear that this documentation was falsified and the by-product offsets were not warranted.

Finally, we note that TMI's claim that it was successfully verified in the two subsequent administrative reviews subsequent to the 2006-2007 review is simply untrue. TMI failed verification and was assigned total AFA in the 2007-2008 review. That determination was recently upheld by the CIT.

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 is assigning TMI a margin based on total adverse facts available. As AFA, the Department is assigning TMI the rate of 111.73 percent, the highest calculated rate on the record of this proceeding, for these Final Results of Redetermination-II. This was the rate calculated for the other respondent in the *2006-2007 Final Results* and, thus, is not secondary evidence and does not need to be corroborated in accordance with section 776(c) of the Act. Because it is a calculated rate for another exporter of subject merchandise during the same period of review, we find it relevant to the pure magnesium industry and accordingly are applying it to TMI.

Issue 3: Zeroing

TMI alleges that the Department incorrectly calculated the U.S. price by applying zeroing. TMI asserts that zeroing is generally referred to as the Department's practice of setting all margins where no dumping occurred at zero and not offsetting the amount of dumping by the amount of "overselling."[60] TMI contends that this practice is inconsistent with the Department's international obligations. TMI refers to two cases from the Court of Appeals for the Federal Circuit. *See Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011); *JTEKT Corp. v. U.S.*, Nos. 2010-1516, 2010-1518 (CACF June 29, 2011). The cases were remanded so the Department could explain the

[60] *See* TMI Comments at 5.

use of zeroing in investigations and the use of zeroing in administrative reviews. TMI argues that the Department applied zeroing in this administrative review and failed to provide a sufficient rationale as required by the courts. TMI claims that the Department has stated to the courts that there is no statutory basis under Section 771(35) of the Trade Agreements Act of 1979 for treating investigations and reviews differently. *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1366 (Fed. Cir. 2011). Also, as mentioned by TMI, past distinctions used by the Department have been rejected by courts. *JTEKT Corp. v. U.S.*, Nos. 2010-1516, 2010-1518 (CACF June 29, 2011). In light of this, TMI argues that there is no satisfactory explanation justifying different interpretations of the same statutory provision.

In rebuttal, USM argues that TMI's comments on zeroing must be rejected because its objections to zeroing go beyond the limited scope of this remand. USM points out that, on the single issue raised, the Department was instructed to "revisit the issue of whether to reopen closed proceedings with subsequently discovered evidence in light of *Home Products*. Thus, USM believes considering zeroing during the 2006-2007 review would be beyond the scope. Also, USM argues that TMI is barred from raising the zeroing issue now because it failed to raise the issue during the administrative phase. According to USM, TMI failed to exhaust all administrative remedies before seeking judicial review. Finally, while TMI argues that the Department's zeroing methodology should not be applied, USM points out that TMI cites no authority not already rejected by the Court and the Department.

Department Position: The Department agrees with the Petitioner that this issue raised by TMI is beyond the scope of this remand. TMI neither raised this perceived inconsistency in its administrative case brief or in its brief before the Court. Accordingly, the Court did not address this issue.

Issue 4: Whether TMI Had Sufficient Time to Comment on the Draft Results of Redetermination-II

TMI argues that the Department provided it with insufficient time to comment on the Draft Results of Redetermination-II. According to TMI, the Department's analysis memo was dated August 11, 2011, but the BPI version was not provided to TMI until August 16, 2011. The deadline for filing comments was August 18, 2011. TMI also argues that only PDF versions were provided, not native data files, which prevented it and counsel from easily reviewing voluminous data. TMI pointed out that the Department's own regulations provide for a minimum of 5 days to make ministerial error comments.

In rebuttal, USM points out that all parties had equal time to comment on the Draft Results of Redetermination-II. According to USM, all parties received the documents on August 12, 2011 and in PDF format. USM states that the regulatory provisions relied upon by TMI do not address ministerial error comments concerning draft remand results. USM also points out that TMI will have two more opportunities to comment.

Department Position: The Department agrees that TMI did not receive the BPI margin calculations until August 16, 2010. This was due, in part, to the fact that these documents had to be sent via overnight delivery to TMI at its office in Chicago. We note that TMI received the narrative of the draft redetermination promptly on the same day as the Petitioner, August 11, 2011. We further note that none of the issues submitted by TMI in its affirmative or rebuttal comments to the draft redetermination concerned the BPI margin calculation. Nevertheless, we believe that any detriment that TMI may have suffered by receiving the BPI margin calculations later than the Petitioner were cured by the opportunity to submit rebuttal comments. Accordingly, the Department finds that TMI did not suffer harm.

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Paul Piquado
Assistant Secretary
for Import Administration

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(Date)