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 2010)

Public Version

SUMMARY

The Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("Court" or "CIT"), issued on August 9, 2010, in *Tianjin Magnesium International Co., Ltd. v. United States and US Magnesium LLC*, Court No. 09-00012; Slip Op. 10-87 (CIT 2010) ("*Remand Order*"). The Court issued its opinion and remand order following Tianjin Magnesium International Co., Ltd.'s ("TMI") 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 Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008) ("*Final Results*"). 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.

In accordance with the Court's remand order and in reconsideration of the record evidence, the Department has determined to value TMI's by-product using Harmonized Tariff Schedule ("HTS") category 2620.40, "Slag, ash and residues (other than from iron or steel) containing arsenic, metal, or their compounds: Containing mainly aluminum," and has recalculated TMI's magnesium by-product offset accordingly. In addition, the Department has further explained the reasoning behind its determination that MALCO's financial statements

constitute the best available information to determine the surrogate financial ratios for this redetermination. Therefore, we made no changes to our calculation of the surrogate financial ratios for overhead, SG&A and profit as a result of this redetermination on remand. As a result of the recalculation of TMI's by-product offset, TMI's margin has changed from 0.63 percent to 10.60 percent in this redetermination on remand.

REMAND SCHEDULE

The Court issued its ruling on August 9, 2010. On September 16, 2010, Department officials met with counsel for US Magnesium LLC ("USM"), defendant-intervenor in the subject litigation and petitioner in the underlying investigation.[1] At that meeting, counsel for USM expressed its opinion and interpretation of the Court's *Remand Order*.[2] 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 was insufficient to properly value the claimed by-product offset. Accordingly, the Department re-opened the record for the 2006-2007 review of pure magnesium and requested that TMI respond to a supplemental questionnaire ("Supplemental Questionnaire") regarding its claimed by-product offset.[3] On September 30, 2010, Department officials met with counsel for TMI.[4] Counsel for TMI expressed its opinion and interpretation of the Court's Remand Order.[5] On October 4, 2010, the Department granted TMI's request for an extension of the deadline to submit its responses to the Supplemental

[1] *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): Meeting with Counsel for United States Magnesium LLC," dated September 24, 2010.

[2] *See id*.

[3] *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.

[4] *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): Meeting with Counsel for Tianjin Magnesium International Co., Ltd.," dated October 4, 2010.

[5] *See id*.

Questionnaire.[6] On October 20, 2010, TMI submitted its response to the Supplemental Questionnaire ("SQR").[7] On October 27, 2010, the Department established a schedule to allow USM the opportunity to comment on TMI's SQR and TMI the opportunity to rebut, clarify, or correct any factual information submitted by USM.[8] In response to USM's request, we adjusted this schedule on October 29, 2010.[9] On November 2, 2010, we received USM's submission ("USM's Rebuttal").[10] On November 8, 2010, the Department granted TMI's request for an extension of the deadline to rebut, clarify, or correct USM's Rebuttal.[11] On November 10, 2010, we received TMI's rebuttal to USM's Rebuttal ("TMI's Rebuttal").[12] On January 21, 2011, we released our Draft Remand Redetermination and provided USM and TMI an opportunity to provide comments based on that draft remand redetermination.[13] We received comments from TMI ("TMI's Comments") and USM ("USM's Comments") on January 27, 2011.[14]

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[6] *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): Extension of the Deadline for the Supplemental Questionnaire Responses," dated October 4, 2010.

[7] *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, 20210.

[8] *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): Deadline to Submit Comments regarding Supplemental Questionnaire Responses," dated October 27, 2010.

[9] *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): Extension of Deadline for U.S. Magnesium to Submit Comments regarding Questionnaire Responses," dated October 29, 2010.

[10] *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.

[11] *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): Extension of the Deadline for the Supplemental Questionnaire Responses," dated November 8, 2010.

[12] *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.

[13] *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.

[14] *See* letter for 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.

Issue 1: Magnesium Waste By-Product

A. Background

During the 2006-2007 administrative review, TMI reported having [ ] suppliers of pure magnesium, each of which used different methods of production. [ ] produced pure magnesium using a [ ][15] which [ ] a by-product. However, one of the primary inputs for the [ ], "magnesium scrap," hereafter the "magnesium input," is a waste product purchased by TMI's supplier for the production of the subject merchandise. TMI's [ ] used the [ ] by-product, "waste magnesium," hereafter referred to as "magnesium by-product." The magnesium by-product is the by-product at issue in this remand proceeding. TMI reported that it sold, rather than re-introduced into production, its magnesium by-product.

In the *Preliminary Results,*[16] we assigned a value to TMI's magnesium input under HTS category 8104.20, "Magnesium and articles thereof, including waste and scrap: Unwrought magnesium: Waste and scrap." At the preliminary stage of the administrative review, we did not grant TMI an offset for its reported magnesium by-product. Despite not granting the by-product offset to normal value, our Preliminary Surrogate Value Memorandum and TMI's Preliminary Analysis Memorandum indicated that TMI's waste magnesium by-product should be valued using HTS category 8104.20.[17] During the briefing stage following the *Preliminary*

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.

[15] [ ]

[16] *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").

[17] *See* Preliminary Surrogate Value Memorandum at Attachment 1 and Memorandum to the File, "Preliminary Results of Review of the Order on Pure Magnesium from the People's Republic of China:

Results, USM and TMI argued that HTS category 8104.11 "Magnesium and articles thereof, including waste and scrap: Unwrought magnesium: Containing at least 99.8 percent by weight of magnesium," more closely reflected TMI's magnesium input, contrary to the Department's determination to use HTS category 8104.20 in the *Preliminary Results*. Also during the briefing stage, USM argued that the Department should continue to deny TMI's claimed magnesium by-product offset, while TMI argued that the Department should grant it. Based upon the parties' comments, the Department determined to change the surrogate value of TMI's magnesium input to HTS 8104.11. Additionally, we determined to grant TMI a by-product offset which we valued with the same HTS category (8104.11) as its magnesium input.[18]

While the valuation of TMI's magnesium input is not at issue in this redetermination, upon remand, the Court directed the Department to further explain its reasons for valuing TMI's magnesium by-product with such a high value, and not differentiating the magnesium input and magnesium by-product.[19] The Court noted that the Department did not establish an adequate connection between the magnesium input and the magnesium by-product such that valuing both with the same HTS category would be reasonable.[20]

The Court noted that both the evidence and the parties' arguments do not support the Department's valuation of TMI's magnesium by-product. In particular, the Court cited affidavits from industry experts placed on the record of the 2006-2007 administrative review by USM ("2006-2007 Affidavits").[21] One of these affidavits attests that, in the [ ], no

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Analysis Memorandum for the Preliminary Results of Review for Tianjin Magnesium International Co., Ltd. ("TMI")," dated May 30, 2008.

[18] Following publication of the *Final Results* and receipt of ministerial error comments by both USM and TMI, the Department considered the valuation of the magnesium by-product to be a ministerial error. However, the Department did not receive leave from the Court to correct the ministerial error through publication of Amended Final Results.

[19] Remand Order at 22.

[20] Remand Order at 22.

[21] Remand Order at 19.

material is added to the magnesium input when the [ ] are produced and thus the magnesium input retains its significant value.[22] Alternatively, the affidavit attests, the magnesium by-product generated in the [ ] has relatively small quantities of magnesium and is thus improperly valued as magnesium.[23] The other affidavit attests that the magnesium by-product, resulting from the [ ], contains insufficient amounts of magnesium to be considered magnesium scrap, and is thus "in the nature of a slag."[24]

The Court also cited to USM's argument that the Harmonized Commodity Description and Explanatory Notes precludes classification of TMI's magnesium by-product under HTS category 8104.[25] The Explanatory Notes, which were originally submitted by TMI during the administrative review in support of valuing its magnesium input with HTS category 8104.11,[26] state that HTS heading 8104 specifically excludes "slag, ash and residues from the manufacture of magnesium." The Court noted that the Department did not address USM's arguments regarding the Explanatory Notes, which the Court states "appear to support" USM's argument that TMI's by-product offset should not be valued under HTS category 8104.11.[27] The Court also noted the Department's determination to value the by-product of the other respondent in the review using HTS category 8104.20.00, but concluded that the record evidence does not indicate whether the production process of that respondent was sufficiently similar to TMI's supplier to be useful to the analysis.

[22] Remand Order at 19.
[23] Remand Order at 19.
[24] Remand Order at 19.
[25] Remand Order at 20.
[26] *See* letter from TMI title "Pure Magnesium from the People's Republic of China; A-570-832; Response to the Supplemental Questionnaire by Tianjin Magnesium International, Co., Ltd.," dated March 7, 2008, at Exhibit 2.
[27] Remand Order at 22.

B. Pre-Draft Redetermination Submissions by the Parties

TMI's SQR

In TMI's SQR, TMI describes the chemical composition of its magnesium by-product as "waste magnesium: Mg>99.8%."[28] TMI states that the magnesium by-product's physical characteristics consisted of "{s}mall balls of pure magnesium in a flux matrix… {*i.e.,*} the remaining magnesium which are at the bottom of the crucible and dispersed in the used flux."[29] TMI adds that "{t}he magnesium has the same chemical analysis and physical characteristics as pure magnesium ingots, the only difference being the size."[30] According to TMI, these balls are not refined by TMI's producer.[31] That is, the magnesium by-product must be separated from the total waste yield and that process is completed by the purchaser of the magnesium by-product.[32] TMI provided a picture of this "combined scrap magnesium/flux."[33]

With respect to the production records of the magnesium by-product, TMI explains that its producer tracks the magnesium by-product when the by-product is weighed at the time of sale.[34] TMI provided: (a) copies of invoices; (b) warehouse-in slips; (c) relevant sub and general ledgers sections; (d) a list of purchasers of the magnesium by-product; and (e) an exhibit demonstrating TMI's accounting of the magnesium by-product.[35]

USM's Rebuttal

USM placed the following information on the record in its Rebuttal:

- A copy of the public version of the Department's Verification Report for the 2007-2008 administrative review ("2007-2008 VR").[36]

[28] *See* TMI SQR at 1.
[29] *See* TMI SQR at 1.
[30] *See* TMI SQR at 1.
[31] *Id* at 2.
[32] *Id* at 2.
[33] *Id* at Exhibit S2-1.
[34] *Id* at 4
[35] *Id* at Exhibits S2-2A through S2-5.
[36] *See* USM's Rebuttal at Exhibit 1.

- An excerpt of the public version of TMI's second supplemental questionnaire response from the 2007-2008 administrative review ("2007-2008 SQR").[37]

- An excerpt of the public version of TMI's first supplemental questionnaire response from the 2008-2009 administrative review ("2008-2009 SQR") which, according to USM, conflicts with TMI's SQR.[38]

- An affidavit from Anderson Clayton dos Reis, an industry expert attesting that TMI's magnesium by-product is an "environmental liability" rather than a valuable by-product ("dos Reis Affidavit").[39] The dos Reis Affidavit was signed on July 20, 2009.

- Copies of the 2006-2007 Affidavits from industry experts originally submitted by USM during the 2006-2007 administrative review and cited by the Court.

USM argues that the Department must properly weigh the submitted information in this remand proceeding in which the Department re-opened the record of review. According to USM, the Department has properly opened the record and the information USM submitted, notwithstanding its coming to light in subsequent administrative reviews, is relevant to the issues being considered.[40]

USM argues that the Department should not grant TMI the claimed by-product offset because record evidence, namely the 2007-2008 VR, demonstrates that TMI's supplier did not have any by-product sales during the 2006-2007 POR and thus is ineligible for such an offset. Alternatively, TMI argues that should the Department grant TMI the claimed offset, it should re-examine the record carefully in selecting the appropriate surrogate value for the offset.

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[37] *Id* at Exhibit 2.

[38] *Id* at 7 and Exhibit 3.

[39] *Id* at 8 and Exhibit 4.

[40] *Id* at 2. To support its contentions, USM cites to *NTN Bearing Corp. of America v. U.S.*, 132 F. Supp.2d 1102 (CIT 2001) (unless barred by the Court, the Department may reopen an administrative record in order to comply with a remand order); *Atlas Copco, Inc. v. Environmental Protection Agency*, 642 F.2d 458 (D.C. Cir. 1979) ("*Atlas Copco*"); *Port of Seattle v. FERC*, 499 F3d 1016 (9th Cir. 2007) ("Port of Seattle") ; *Borlem S.A.-Enpreedimentos Industrialis v. United States*, 913 F.2d 933 (Fed. Cir. 1990) (*Borlem*); *Williams v. Sullivan*, 905 F.2d 214 (8th Cir. 1990) ("*Williams*"); *Union Camp Corp. v. United States*, 53 F. Supp. 2d 1310 (CIT 1999) ("*Union Camp*"); and *Luoyang Bearing Corp. v. United States*, 358 F. Supp. 2d 1296 (CIT 2005) ("*Luoyang Bearing*").

According to USM, TMI's SQR attempts to value the entire magnesium by-product as 99.8 percent magnesium.[41] USM adds that this method of valuing TMI's magnesium by-product should be rejected because TMI's SQR clearly states that the producer does not separate the pure magnesium from the total waste product within which it is contained.[42]

TMI's Rebuttal

In rebuttal, TMI argues that the Department must rely only on the facts from the 2006-2007 administrative review.[43] In support, TMI cites *Home Products Int'l v. United States*, 675 F. Supp. 2d 1192 (CIT 2009) ("*Home Products Int'l*") and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) ("*Vermont Yankee*").[44] TMI adds that the Department should reject USM's new information because the information was not developed during the 2006-2007 administrative review and because it does not relate to the 2006-2007 administrative review.[45] TMI also argues that the "expert information" placed on the record by USM neither relates to the producer in question nor the Chinese market for magnesium by-product and that it is thus "pure speculation."[46]

Lastly, TMI argues that the evidence submitted in its SQR demonstrates that TMI's producer sold the magnesium by-product and benefited from the sale by the reduction in its cost of production.[47] TMI concludes by stating that the magnesium by-product "existed within a matrix in amounts of 1-5 percent of the total" by-product generated during production.[48]

[41] *Id* at 18.
[42] *Id* at 18.
[43] TMI's Rebuttal at 1.
[44] *Id* at 2 and 3. *Home Products Int'l* cites *Vermont Yankee* and stands for the same proposition.
[45] *Id* at 2.
[46] *Id* at 2-4.
[47] *Id* at 3.
[48] *Id* at 5.

C. Consideration of new factual information

With respect to USM's new information, the Department determines not to rely on the 2007-2008 VR, the 2007-2008 SQR, the 2008-2009 SQR, and the dos Reis Affidavit. The Department determines that these submissions, unlike the 2006-2007 Affidavits submitted during the underlying administrative review and cited to by the Court, did not exist at the time the Department made its original determination in the *Final Results*. Accordingly, for this remand redetermination, we have limited the record evidence to that which would have been available during the time the Department conducted the underlying administrative review.

The Department considers each administrative review of the order as a separate administrative segment of a proceeding which stands on its own and is formed by the record of that segment of the proceeding.[49] Accordingly, the Department determines to limit its reexamination on this remand to the original administrative record or to information that would have been available during the administrative review.[50] In this instance, the Department needed to seek additional data in order to arrive at a value for TMI's magnesium by-product in compliance with the CIT's directive. USM and TMI were both afforded an opportunity to submit additional data and to provide comment on the information requested of TMI. Thus, USM had full opportunity to review that information and provide rebuttal information that would have been available during the review and/or provide comments regarding TMI's SQR.

[49] *See* 19 CFR 351.102(47) ("segment of the proceeding refers to a portion of that proceeding that is reviewable under section 516A of the {Tariff} Act {of 1930, as amended}.); *Stainless Steel Sheet and Strip in Coils from Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (February 13, 2006) ("each administrative review of the order represents a separate administrative proceeding and stands on its own."); *see also Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) ("what transpired in previous reviews is not binding precedent in later reviews."); *Shandong Huarong Mach. Co. V. United States*, 29 CIT 484, 491 (CIT 2005) ("As Commerce points out 'each administrative review is a separate segment of proceedings with its own unique facts.'").

[50] *See* Final Results of Redetermination Pursuant to Remand, *Dorbest Ltd. v. United States*, Slip Op. 10-79 (CIT 2010) fn 46 (Nov. 10, 2010).

In deciding which information to rely on in its final decision, the Department must balance the interest of conducting efficient and expeditious administrative proceedings against an equally compelling interest in conducting accurate fact finding.[51] If parties felt free to continually add new information that became available years after the *Final Results* were completed and published, there would be no finality to the administrative process.[52] We are further concerned that permitting later-developed or discussed evidence sets an undesirable precedent by which complaining parties could benefit unfairly from such information.[53] That is, parties could challenge issues with the purpose of trying to find additional evidence in a subsequent proceeding and then requesting that the Department take notice of the subsequently discovered evidence and re-consider its relevance to a prior, closed proceeding. As recognized in *Vermont Yankee,* administrative consideration of evidence creates an inevitable gap between the time the record is closed and the time the administrative decision is promulgated, as well as the time the decision is then judicially reviewed.[54] If complaining litigants are able to demand reconsideration "because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope the administrative process could ever be consummated in an order that would not be subject to reopening."[55]

After weighing the above considerations, we find that limiting the data relied upon in this remand redetermination to that which would have been available at the time of our original administrative review best satisfies the competing interests of administrative finality, fairness, and accuracy. This decision is further consistent with the Court's finding in *Dorbest*, where the

[51] *Union Camp*, 53 F. Supp.2d 1310, 1328 (CIT 1999).
[52] *Union Camp*, 53 F. Supp.2d 1310, 1328 (CIT 1999).
[53] *Union Camp*, 53 F. Supp.2d 1310, 1326 (CIT 1999).
[54] *Vermont Yankee*, 435 U.S. 519, 554-555 (1978).
[55] *Vermont Yankee*, 435 U.S. 519, 554-555 (1978) (*citing ICC v. Jersey City*, 322 U.S. 503, 514 (1944)).

Court defined "available" to mean "'available during the investigation.'"[56] Further, the CIT recently held that the "court must avoid the temptation to consult extra-record facts and evidence unfolding in subsequent, ever-changing administrative reviews of antidumping orders."[57] We find the same principle equally applicable in this remand proceeding.

We disagree with USM that *Union Camp* stands for the proposition that new evidence, made part of the administrative record on a remand order (*i.e.*, not existing at the time of our initial determination), creates a legal obligation for the Department to rely on any and all submitted data. In *Union Camp*, the CIT remanded and ordered the Department to reopen the administrative record and consider new evidence that came to light in a subsequent review.[58] However, the *Union Camp* Court also cited the well-established principle of administrative law that an agency is afforded broad discretion to fashion its own administrative procedures, including the authority to enforce time limits concerning the submission of data.[59] In addressing whether the newly discovered evidence should be considered by the Department on remand, the CIT has found that, "{s}uch a weighing of the competing policy interests involves choices of administrative procedure which Commerce . . . is uniquely qualified to make."[60] Accordingly, the *Union Camp* Court preserved the Department's authority to determine whether the new evidence should be considered in the remand order results stating that "it is Commerce, and not this Court, which is in the best position to initially decide whether it should consider new evidence."[61] In the instant case, in the interest of finality (as discussed above), the Department

[56] *Dorbest I*, 462 F. Supp. 2d 1262, 1299-1300, *citing Vermont Yankee*, 435 U.S. 519, 555 (S. Ct. 1978); *see also Daido Corporation v. United States*, 869 F. Supp. 967, 973 (CIT 1994) (The court declined to re-open the record during judicial review to allow evidence that did not exist at the time of the final determination).

[57] *Home Products Int'l*, 675 F. Supp. 2d 1192, 1199-1200 (CIT 2009).

[58] *Union Camp*, 53 F. Supp.2d 1310, 1323 (CIT 1999).

[59] *Union Camp*, 53 F. Supp.2d 1310, 1326 (CIT 1999) (The court granted the Department discretion to decide the appropriateness of considering extra-record evidence on remand).

[60] *Union Camp*, 53 F. Supp.2d 1310, 1328 (CIT 1999).

[61] *Union Camp*, 53 F. Supp.2d 1310, 1326 (CIT 1999).

limited its examination to only information that would have been available at the time of the administrative review.

We also disagree with USM that the Court of Appeals for the Federal Circuit's ("CAFCs") decision in *Borlem* is applicable in this instance. In *Borlem* the CIT directed the U.S. International Trade Commission ("USITC") to reconsider its final injury determination due to an incorrect less than fair value determination by the Department. Specifically, the Department revised its calculated margin for a respondent company in a less than fair value investigation after court remand.[62] The CAFC held that, based upon that revision, the USITC must re-consider its determination of material injury in accordance with its statutory duty.[63] The CAFC later distinguished the mistake of fact that formed the basis for its decision in *Borlem* from newly discovered evidence.[64]

According to USM, *Luoyang Bearing* also supports its argument that the Department must use the new evidence it submitted.[65] We disagree. In the underlying administrative review, one of the respondents requested revocation from the order pursuant to 19 C.F.R. § 351.222 of the Department's regulations.[66] However, the Department calculated the respondent's margin to be 7.37 percent for the final results and, therefore, the respondent was not eligible for revocation. In reviewing the record on a remand order, the Department discovered a clerical error and recalculated the respondent's margin to 0.00 percent.[67] The Department determined in the remand results not to revoke the dumping order due to evidence that the respondent continued dumping during the subsequent administrative review.[68] The *Luoyang Bearing* Court affirmed

[62] *Borlem S.A. v. United States*, 913 F.2d 933, 935 (Fed. Cir. 1990).
[63] *Borlem S.A. v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990).
[64] *Borlem S.A. v. United States*, 913 F.2d 933 (Fed. Cir. 1990).
[65] USM's Rebuttal at 4.
[66] *Luoyang Bearing*, 358 F. Supp. 2d 1296, 1301 (CIT 2005).
[67] *Luoyang Bearing*, 358 F. Supp. 2d 1296, 1300 (CIT 2005).
[68] *Luoyang Bearing*, 358 F. Supp. 2d 1296, 1301 (CIT 2005).

noting that the while the respondent fulfilled two of the three regulatory criteria for revocation pursuant to 19 C.F.R. § 351.222(b)(2)(*i*) (*i.e.*, was assigned a *de minimis* margin for the three most recent administrative reviews and agreed in writing to immediate reinstatement of the order upon the Department's further finding of dumping), it had failed the third ("Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping."). The regulations specifically require the Department to consider evidence of future behavior for purposes of considering revocation, which is what the Department did in that case.[69]

In contrast, there is no regulatory or statutory criteria being fulfilled by considering the new information submitted by USM in this case. Accordingly, we do not find that allowing litigants the opportunity to continually submit new information best serves the interests of administrative finality, and are therefore not relying on new information submitted by USM which would not have been available during the time we conducted the underlying administrative review.

The Department considers the remaining cases which USM cites for support to be inapposite to the Department's unique administrative review process which contemplates annual reviews based upon different and changing facts.[70] However, we discuss below why each case cited differs factually from this remand redetermination. These cases are similar to *Luoyang Bearing* in which certain statutes or regulations at issue address later-developed evidence, or the court found that the agency could not use later-developed facts for one purpose without providing the party the opportunity to present its own later-developed evidence.

[69] *Luoyang Bearing*, 358 F. Supp. 2d 1296, 1301 (CIT 2005).

[70] *See also Vermont Yankee* where the Supreme Court states that "Absent constitutional constraints or extremely compelling circumstances the administrative agencies' should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee*, 435 U.S. 519, 543 (1978).

Atlas Copco concerned the Environmental Protection Agency's ("EPA") implementation of the Noise Act of 1972. In auditing portable air compressors for prescribed noise emissions standards, companies that failed the audit a second time were afforded an administrative hearing on the narrow issues of whether the audit was conducted properly and whether the criteria for failing were met.[71] Petitioners argued, and the *Atlas Copco* Court agreed, that the scope of the hearing was arbitrary as the EPA denied the Petitioners the opportunity to provide evidence on matters specifically contemplated by the Noise Act of 1972.[72] USM argues that *Atlas Copco* stands for the proposition that agencies, including the Department, do not have discretion to exclude or ignore relevant reliable facts once the agency determines to allow new evidence.[73] We disagree that *Atlas Copco* is applicable in the instant proceeding. First, the issue at hand is not whether the Department is denying the parties an opportunity to provide evidence in the instant proceeding. Rather, the Department is considering all evidence that would have been available at the time of the administrative review. As stated, both TMI and USM had the opportunity to provide information and argument on the valuation of TMI's magnesium by-product. Second, our determination not to consider USM's evidence taken from subsequent review periods does not deny USM the opportunity to provide evidence specifically contemplated by the Tariff Act of 1930, as amended, or the Department's regulations that were available at the time of the underlying review segment. Thirdly, USM can rely upon any already available expert reports (*e.g.*, the 2006-2007 Affidavits cited by the Court) and TMI's supplemental questionnaire response to argue the appropriate surrogate value the Department should use in valuing TMI's by-product offset.

[71] *Atlas Copco*, 642 F. 2d 458, 466 (D.C. Cir. 1979).

[72] *Atlas Copco*, 642 F. 2d 458, 466 (D.C. Cir. 1979). For example, the *Atlas Copco* Court notes that the Noise Act of 1972 contemplated a discretionary determination as to whether any or all of the Petitioners' failing compressors were required to undergo further testing.

[73] USM Rebuttal at 3.

In *Port of Seattle*, the Federal Energy Regulatory Commission ("FERC") declined to consider evidence that was made available after its evidentiary proceeding.[74] Under the Federal Power Act ("FPA"), the FERC may order sellers of electricity to pay refunds to buyers who purchased energy at unjust or unreasonable rates as defined by FPA.[75] In that case, evidence of energy market manipulation was released by the FERC eight months after the FERC ruled against the Petitioner/buyers.[76] The FERC reopened the evidentiary record in light of the new evidence.[77] In its administrative hearing, however, the FERC did not "respond to or take into account the new evidence… of market manipulation submitted with FERC's approval".[78] The *Port of Seattle* Court ruled that "FERC's failure to consider or examine the new evidence… was arbitrary and capricious."[79] According to USM, *Port of Seattle* stands for the proposition that an agency must examine new evidence submitted by parties after the record has closed and when the agency has permitted the parties to do so.[80] We disagree. The FERC's decision to not consider the new evidence was advantageous to the Defendant/sellers. In contrast, the Department's decision to consider only evidence that would have been available at the time of the underlying administrative review is not prejudicial or preferential to either party. Here, TMI's SQR is not information developed after the administrative review. Accordingly, the Department is not considering later developed evidence provided by TMI to the exclusion of USM's new information. Rather, TMI's evidence is from the underlying administrative review at issue in the proceeding.

[74] *Port of Seattle*, 499 F. 3d 1016, 1022 (9th Cir. 2007).
[75] *Port of Seattle*, 499 F. 3d 1016, 1023 (9th Cir. 2007).
[76] *Port of Seattle*, 499 F. 3d 1016, 1025 (9th Cir. 2007).
[77] *Port of Seattle*, 499 F. 3d 1016, 1025 (9th Cir. 2007).
[78] *Port of Seattle*, 499 F. 3d 1016, 1025 (9th Cir. 2007).
[79] *Port of Seattle*, 499 F. 3d 1016, 1035 (9th Cir. 2007).
[80] USM Rebuttal at 3.

In *Williams*, the Social Security Administrative Law Judge ("ALJ") found the plaintiff ineligible for benefits and the Appeals Council affirmed the ALJ's decision.[81] In her request for review of the ALJ's decision with the Appeals Council, four months after the ALJ's decision, the Plaintiff submitted additional medical evidence.[82] The Appeals Council denied her request for review and refused to consider the new medical evidence.[83] The 8th Circuit remanded to the ALJ with instructions to consider the new medical evidence as was required by the Social Security Administration's ("SSA") regulations.[84] Thus, the Plaintiff in *Williams* was denied the opportunity to provide new information specifically contemplated by the SSA's regulations. In the instant remand redetermination, it is not the case, nor is USM arguing that the Act, or the Department's regulations, specifically contemplates that the Department consider USM's new information. Thus, we determine that *Williams* does not support USM's argument.

For the foregoing reasons, the Department is not considering USM's new information that was not available at the time of the proceeding for determining the value to assign to TMI's magnesium by-product.

D. By-Product Valuation

With respect to the valuation of TMI's magnesium by-product offset, the Department determines to value the offset with HTS category 2620.40. As an initial matter, it is the Department's practice to allow a by-product offset for a product that was generated and collected from the production of subject merchandise and for which the respondent can demonstrate a commercial value, either through sale or reintroduction into production.[85] For example, when a

[81] *Williams*, 905 F.2d 214, 215 (8th Cir. 1990).
[82] *Williams*, 905 F.2d 214, 215 (8th Cir. 1990).
[83] *Williams*, 905 F.2d 214, 215 (8th Cir. 1990).
[84] 20 C.F.R § 404.970(b) (1989) reads: "If new and material evidence is submitted, the Appeals Counsel shall consider the additional evidence…" *Williams*, 905 F.2d 214, 216 (8th Cir. 1990).
[85] *See Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Eighth New Shipper Review*, 70 FR 42034, 42037 (July 21, 2005), unchanged in *Certain Preserved*

by-product is sold and income realized from it, that income is considered to demonstrate that there is a commercial value to the by-product.[86] The record evidence submitted by TMI in this case, *i.e.* copies of invoices, warehouse-in slips, relevant sub and general ledgers sections, and a list of purchasers of the magnesium by-product, was submitted as support for TMI's contention that it sells the by-product, thereby demonstrating that is has commercial value.

As indicated previously, the Department valued TMI's by-product in the *Final Results* using HTS category 8104.11. In reexamining the record evidence, the Department determines that it is not appropriate to value TMI's magnesium by-product with HTS category 8104.11. Instead, the Department determines to value TMI's magnesium by-product with HTS category 2620.40. In its SQR, TMI initially described its magnesium by-product as "waste magnesium: Mg>99.8%,"[87] *i.e.*, consisting of magnesium of purity greater than 99.8 percent. However, TMI then explained that the balls of pure magnesium were contained within a used flux matrix. TMI then stated, in its Rebuttal, that the magnesium by-product "existed within a matrix in amounts of 1-5 percent of the total."[88] TMI also stated that the purchaser of the by-product separates the pieces of magnesium from the total "matrix." Thus, it is now clear that, although TMI reported as its by-product the total weight of the "matrix" of magnesium and used flux, and characterized its by-product as being comprised of magnesium of 99.8 percent purity, the by-product is actually predominantly low value used flux with only 1-5 percent of the total consisting of small pieces of pure magnesium.

Mushrooms from the People's Republic of China: Final Results of the Eighth New Shipper Review, 70 FR 60789 (October 19, 2005).

[86] *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006), and accompanying Issues and Decision Memorandum at Comment 11.

[87] *See* TMI SQR at 1.

[88] *Id* at 5.

Because TMI's magnesium by-product is predominantly 95 to 99 percent used flux (*i.e.*, flux that has been incinerated in the production process), the Department finds that the use of HTS 8104.20 or 8104.11 to value this by-product would be inappropriate, as the Explanatory Notes to HTS 8104 clearly state that HTS category 8104 specifically excludes "slag, ash and residues from the manufacture of magnesium."[89] The same Explanatory Note also states that HTS category 2620 is the proper category for these materials. Given the above, and TMI's description of its by-product as consisting of 95 to 99 percent incinerated flux (*i.e.*, ash) we find that HTS category 2620.40 ("Slag, ash and residues (other than from iron or steel) containing arsenic, metal, or their compounds: Containing mainly aluminum"), is the best available information on the record as supported by record evidence, to value TMI's magnesium by-product. The above also comports with the 2006-2007 Affidavits cited by the Court regarding the [ ] and the [ ]. Both of these affidavits indicate that the [ ]'s yields of magnesium by-product flux has a low value of magnesium. The Department finds that the overwhelming majority of the magnesium by-product is not unwrought magnesium as initially claimed by TMI.

With respect to the Court's reference to the Department's valuing Datuhe's magnesium by-product with HTS category 8104.20, the Department determines that it would not be reasonable to attempt to base the valuation of TMI's magnesium by-product on Datuhe's by-product. As noted by the Court, we do not have the sufficient information on the record to know if it would be accurate to apply Datuhe's information to TMI. Additionally, discussion of Datuhe's production process would necessitate discussion of Datuhe's business proprietary information.

[89] Remand Order at 21.

ISSUE 2: SURROGATE FINANICAL RATIOS

A. Background

With respect to the surrogate financial ratios, the Department used the financial statements of MALCO, an aluminum producer, to calculate the surrogate financial ratios for purposes of the underlying *Final Results*. There, the Department determined that: (a) aluminum was a comparable product to pure magnesium; (b) MALCO's audited financial statements demonstrated a profit; (c) they were contemporaneous with the POR; and (d) there was no record evidence that MALCO received subsidies found to be countervailable by the Department.[90] MALCO's financial statements were based on a nine-month fiscal year from July 1, 2006 – March 31, 2007.[91] For the *Final Results*, the Department explained that MALCO changed its accounting year from a July to June period, to an April to March period, in fiscal year 2007-2008.[92] Therefore, MALCO's 2006-2007 fiscal-year (covering a majority of the POR) covered only a nine-month period (*i.e.*, July 2006 to March 2007). Notwithstanding the shortened fiscal year, the Department determined, based on an analysis of the financial statements, that MALCO's 2006-2007 audited financial statements were complete and included all the appropriate year-end adjustments.[93] For the *Final Results*, the Department rejected the financial statements of National Aluminum Co. Ltd. ("NALCO") and Hindalco Industries Ltd. ("HINDALCO") due to record evidence that both companies received countervailable subsidies.[94]

[90] *See Final Results* and accompanying Issues and Decision Memorandum at Comment 6B.
[91] *See*
[92] *See id.*
[93] *See id.*
[94] *See Final Results* and accompanying Issues and Decision Memorandum at Comment 6C. The rejection of the remaining financial statements on the record is not at issue.

In remanding the Department's selection of MALCO's financial statement, the Court stated that the Department's conclusion that MALCO's financial statement reflected all the appropriate year-end adjustments was "speculative."[95] The Court noted that, aside from the 2006-2007 administration review of magnesium metal from the People's Republic of China[96], there is no Department precedent that a nine-month period is adequate when a twelve-month period has been the Department's preference.[97]

Lastly, the Court stated that the Department did not address possible distortions in MALCO's financial statements, namely:

- seemingly erratic production levels over prior years (*e.g.*, an increase of four-hundred percent of aluminum ingot over the previous year);
- that MALCO commissioned a dry scrubbing unit which caused a production disruption and may have affected its profits;
- that MALCO's financial statements exhibited fluctuations in the cost of raw material and expenses (*e.g.*, sporadic incurrence of insurance and bonus payments) throughout the fiscal year; and
- that MALCO's financial statements specifically stated that, "the figures are not comparable with those of the previous year."

Accordingly, the Court remanded this issue to the Department to further explain why, given MALCO's nine-month fiscal year and "distorted" nature, MALCO's financial statements constitute the best available information.[98] According to the Court, while the Department does not consider the financial statements of companies receiving subsidies to be the best available information, the Department has used such statements if the circumstances warrant.

[95] Remand Order at 28.
[96] See Magnesium Metal from the People's Republic of China: Final Results of Antidumpng Duty Administrative Review, 73 FR 40293 (July 14, 2008).
[97] Remand Order at 26.
[98] See Remand Order at 28.

B. Analysis

In accordance with the Court's Remand order, the Department has revisited its determination regarding which financial statements constitute the best available information on the record for calculating the surrogate financial ratios. As a result, the Department continues to determine that MALCO's financial statements constitute the best available information on the record. First, the Department notes MALCO's financial statements were audited by an independent auditing firm and the auditor provided a clean opinion on the statements, thus indicating that the auditor did not find anything significant to question in the statements.[99] In addition, Indian Generally Accepted Accounting Principles ("GAAP") permits a change in a company's reporting period.[100] Second, in such circumstances, Indian GAAP requires that the company state in the notes to the financial statements that the values of the changed fiscal year are not comparable to the previous year, as was done in the MALCO financial statements.[101] Accordingly, this statement is not a reflection of something amiss in the statements, but merely an indication that because the reporting periods are different, the data will not be fully comparable.

Third, in reviewing the comparability of expenses between the shortened fiscal year and other fiscal years, the Department finds that there is a relative correlation. Specifically, even though the absolute value of the revenues and expenses may not be comparable, the percentage of individual expenses to revenues and per-unit production costs are comparable across the years, as demonstrated below:

[99] *See Final Results* and accompanying Issues and Decision Memorandum at Comment 6B.
[100] *See* Indian GAAP is Accounting Standard (AS) 5 at http://www.icai.org/post.html?post_id=474.
[101] *See* Indian GAAP is Accounting Standard (AS) 5 at http://www.icai.org/post.html?post_id=474.

Expense	9 months: 2007-2008	12 months: 2006-2007	MALCO Financial Page
Direct materials/sales revenue	39%	41%	65
Personnel/sales revenue	4.7%	4.9%	65
Manuf Exp/sales revenue	6.4%	7.7%	65
Profit before tax less other income not related to production	1428 mill 30.45%	1310.93 24.85%	65
OH/MLE (est)	11%	13%	65 and 72 at Schedule 15
GNA/COM (est)	2.7%	2.8%	65
Interest/COM (est)	0	8.6%	65
Per –unit COP/QTY (est)	92,460 Rs/mt	87,175 Rs/mt	65 and 78 at Schedule 20
Aluminum ingots qty/total prod quantity	9%	1.7%	20 and 78
Properzi rods quantity/tot prod quantity	89%	98%	20 and 78
Rolled products quantity	2%	0.3%	20 and 78

While the Department does not know the exact reason that MALCO changed its fiscal year, there are several likely and reasonable explanations that might account for the change, none of which would discredit the reliability of the statements. For example:

- MALCO could have sought to align its reporting period with the corporate tax year in India which is April to March;[102]
- the Vedanta Resources PLC Group, to which MALCO belongs, reports it financial data on the April to March fiscal year period;[103] and
- MALCO states in its annual report that its shares were delisted from the Madras Stock Exchange and relisted on the National Stock Exchange Limited on April 12, 2007, and the change might have taken place to coincide with this.[104]

Fourth, with respect to the supposed "erratic production levels" cited by the Court, the Department notes that on MALCO's financial statements, MALCO states that production

[102] *See* http://law.incometaxindia.gov.in/DIT/Income-tax-acts.aspxsee at Section 2(9). The tax year is called the "assessment year."

[103] *See* http://www.vedantaresources.com/uploads/vedantara07.pdf and MALCO's financial statements at 72 showing that the fiscal year ends on March 31, 2007.

[104] *See* MALCO's financial statements at 33.

volumes increased because of efforts to "debottleneck" production and otherwise enhanced productivity.[105] There is no evidence on the record that the increase in the production of aluminum ingots was aberrational during the nine months. Instead, the annual report discusses the company's explicit efforts to increase production, *i.e.*, implement strategies to improve profitability.[106] MALCO additionally states that it shifted production to aluminum ingots from porperzi rods which may further emphasize that the increase in overall production is not aberrational but rather a reflection of the product shift perhaps due to market demand.[107] In fact, in MALCO's financial statements, MALCO's CEO states that the company's profitability improved significantly due to: 1) higher production volume; 2) higher sales realization; and 3) an improvement in operating efficiencies.[108]

Fifth, with respect to the installation of new equipment and the disruption of production, the Department notes that MALCO states that the company introduced the latest dry scrubbing system to treat fumes arising out of the pot room, that the project was timely, and that maintenance costs of this system were lower than the previous system.[109] Thus, there is no indication that there was a disruption in production operations which would have correspondingly affected profits. Rather, as noted above, all indications are that MALCO was in fact beginning to increase efficiency and productivity at this time.

Lastly, with respect to the fluctuation in the cost of raw materials, the Department notes that MALCO's annual report states that the unit costs at MALCO remained stable during the course of the changed fiscal year despite increasing coal and freight charges,[110] the largest

[105] *See* MALCO's financial statements at 31.
[106] *See id*.
[107] *See id*.
[108] *See* MALCO's financial statements at 8.
[109] *See* MALCO's financial statements at 16.
[110] *See* MALCO's financial statements at 11.

change in costs related to financial expenses. The drop in these expenses was due to the payoff of short-term loans. This does not appear aberrational as the company states that it had reached a cash surplus and was heading towards debt free status.

Thus, in accordance with the Court's Remand Order instructing the Department to further explain its reasoning for using MALCO's financial statements, the Department continues to determine that MALCO's financial statements constitute the best available information to determine the surrogate financial ratios, notwithstanding its nine-month fiscal year. The Department reaches this conclusion when assessing MALCO's financial statements in relation to those of NALCO and HINDALCO. The Department has found that NALCO and HINDALCO received actionable subsidies and are thus less representative as reliable surrogate financial ratios. We will use financial statements with actionable subsidies if no other sufficiently reliable and representative data is on the record. Accordingly, because we determine that MALCO's financial statements are subsidy-free, complete, reliable, and representative, we continue to determine that MALCO's financial statements constitute the best available information.

INTERESTED PARTIES' COMMENTS ON DRAFT REDETERMINATION

A. USM's New Factual Information From Subsequent Proceedings

1. USM's Comments

USM argues that the Department must consider, in its Remand Redetermination, the new factual information it submitted. USM claims that the new factual information purportedly demonstrates that TMI is not eligible for a by-product offset. First, according to USM, the Department properly re-opened the record to allow TMI and USM the opportunity to submit new factual information.[111] USM cites 19 C.F.R. § 351.301(c)(1) of the Department's regulations which, USM claims, guaranteed USM the opportunity to submit factual information in response

[111] *See* USM's Comments at 4.

to new information submitted by TMI.[112] USM argues that its factual information is properly on the record and the Department does not have the authority to disregard it. USM further argues that any decision made by the Department that does not take USM's submitted evidence into account will be unsupported by the record evidence in this case. In support, USM cites *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicle*"), *Port of Seattle, Anshan Iron & Steel Company, Ltd. v. United States*, 358 F. Supp. 2d 1236, 1320 (CIT 2004) ("*Anshan Iron*"), and 19 U.S.C. § 1516a(b)(1)(B).

Secondly, USM argues that federal agencies are empowered to reconsider their final determinations, and thus the Department has no basis to refuse to consider all of USM's submitted evidence.[113] USM cites *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1320 (CIT 2002) ("*Elkem Metals*") in support. Accordingly, USM argues that the Department cannot ignore verified evidence on the record of the instant remand proceeding allegedly demonstrating that TMI is ineligible for a by-product offset.[114] USM cites 19 U.S.C. § 1516a(b) in support.

Thirdly, USM argues that the Department is obligated to consider evidence that shows that its prior determination was made in error. USM asserts that the Department has already determined, in the administrative review subsequent to the 2006-2007 administrative review, that TMI was ineligible for a by-product offset in the 2006-2007 administrative review.[115] In support of its argument that the Department's decision to ignore this information in its Draft Redetermination is in error and must be corrected, USM cites *Borlem, Essar Steel Limited v. United States*, 721 F. Supp. 2d 1285, 1300-1301 (CIT 2010) ("*Essar Steel*"), *Greene County*

[112] *See id* at footnote 11.
[113] *See id* at 5.
[114] See id.
[115] *See id.* at 6.

Planning Board v. Federal Power Commission, 559 F.2d 12227, 1233 (2nd Cir. 1977) ("*Greene County*"), *Anshan Iron*, and *Union Camp*.

Fourthly, USM argues that the Department's interest in finality is outweighed by the interest in calculating a margin as accurately as possible.[116] According to USM, the antidumping statute's basic purpose is to "determine current margins as accurately as possible."[117] In support, USM cites *Lasko Metal Prod. v. United States*, 43 F.3d. 1442, 1443 (Fed. Cir. 1994) ("*Lasko Metal*"), *Allied-Signal Aerospace Co. v. United States*, 996 F.2d at 1185, 1191 (Fed. Cir. 1993) ("*Allied-Signal*"), the *Remand Order, Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 847-48, 159 F. Supp. 2d 714, 727 (2001) ("*Shandong Huarong*"), *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1000-1001 (CIT 1998) ("*Olympia*"), and *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 13 (2nd Cir. 1981) ("*Alberta Gas*"). USM adds that the Department's determination to not consider later-developed evidence in a closed proceeding does not account for "extreme" circumstances such as the instant case where, according to USM, the Department has already determined that TMI's by-product evidence is false.[118] USM further adds that the Department's concern for finality is misplaced as the instant proceeding is not closed where the *Final Results* are on appeal and being reconsidered in the agency remand.[119]

Lastly, USM posits that the alleged fact that TMI was ineligible for a by-product offset was available during the relevant 2006-2007 administrative review.[120] USM argues that this alleged fact could have been resolved during the 2006-2007 administrative review but for the

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[116] *See id.* at 8.

[117] *See id*. citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("*Rhone Poulenc*").

[118] See id. at 10. In support, USM cites CF. Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Changed Circumstances Review, 71 FR 11590 (March 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

[119] *See id* at 11.

[120] See id.

fact that the Department had only eighteen days from the time TMI submitted the supporting documentation and the statutory deadline for the *Final Results* in that segment.[121]

2. Department's Position

The Department disagrees with USM that the Department must consider USM's new factual information. First, as explained in our draft Redetermination, USM's new factual information cannot be considered "record evidence" as it was not available at the time the Department made its original determination in the *Final Results*. USM's citation to *Motor Vehicle* does not support its contention that the Department's determination in the Draft Redetermination to not consider USM's new factual information is contrary to the record evidence. *Motor Vehicle* concerned the National Traffic and Motor Vehicle Safety Act of 1966 whose implementation required, *inter alia*, consideration of "relevant available motor vehicle safety data."[122] Thus, *Motor Vehicles* is distinguishable because, unlike the instant case, the statute required the agency to accept any information distinct from a statutory framework of annual administrative reviews. With respect to USM's re-citing *Port of Seattle* in its Comments, the Department notes, as an initial matter, that it continues to be guided by the administrative principle articulated by the Supreme Court in *Vermont Yankee, i.e.*, that "the {administrative} agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.'"[123] As we stated in our draft Redetermination, the Department has consistently explained, and the CIT has

[121] See id.

[122] See *Motor Vehicle* 463 U.S. 29, 32 (1983). Similarly, *Anshan Iron* also concerned evidence—the respondent's factors of production—that was available during the proceeding of a less than fair value investigation.

[123] Vermont Yankee, 435 U.S. 519, 480 (1978), citing Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326,333 (1976).

agreed, that each of the Department's administrative proceedings result in a separate determination based upon the administrative record in that proceeding.[124] Accordingly, the Department could reach a different conclusion from one administrative review to the next based upon an analysis of the different facts presented during each respective segment of the proceeding. However, a different conclusion or fact presented in a later segment of a proceeding would not require the Department to re-open closed segments of that same proceeding (in other words, facts presented in one administrative review of an antidumping duty order would not require the Department to re-open a prior, already closed administrative review of that same order). Notably, USM does not identify a case in which the Department has sought a remand or while on remand has re-examined the record, based upon evidence from a subsequent administrative review.

Secondly, while the Department agrees with USM that the Department can reconsider its final determinations in certain situations,[125] the Department disagrees with USM that it must consider USM's new factual information on the record of the instant Remand.[126] USM's argument concerning the Department's authority to reconsider its final determinations simply does not logically extend to the argument that the Department must now consider the evidence from subsequent proceedings on the record of the instant remand. TKS held that the Department has the discretion to exercise its inherent authority to re-open its prior proceedings. TKS was limited to the unique circumstance in which a district court found the respondent engaged in fraudulent behavior. No such finding was made with respect to the instant case. USM's further related arguments that the Department's conclusion will not be supported by substantial evidence

[124] *See* footnote 49 supra.

[125] The Federal Circuit and the CIT have recognized that such authority is inherent in the power to decide. *See Tokyo Kikai Seisakusho, Ltd. vs. United States*, 529 F.3d 1352 (CAFC 2008) ("TKS").

[126] As we agree with USM that the Department has the authority to reconsider its previous final determinations, we do not address USM's reference to *Elkem Metals* in this regard.

on the record is misplaced as the Department has established that the requisite evidence is the evidence that would have been available during the underlying proceeding. The evidence from the underlying administrative review are internal vouchers, provided by TMI, that indicate that the producer sold the by-product for remuneration.

Thirdly, we disagree with USM that the Department is obligated to consider evidence from subsequent proceedings that shows that its determination in an earlier proceeding was made in error. The Department finds that case law cited by USM for this proposition is misplaced. The decision in *Borlem* was the result of the unique interagency functions of the trade remedy laws, *i.e.*, between the Department and the ITC.[127] As discussed in the Draft Redetermination, the Department does not find that these unique circumstances are present and thus applicable to the instant case. Similarly misplaced is USM's reliance on the appellate court opinions in *Elkem Metals*[128] and *Alberta Gas.*[129] These cases are also limited to the ITC reconsideration of its domestic injury determination which underlies any antidumping duty order. The Courts held that it was appropriate and in the public interest for the ITC to reconsider its findings based upon evidence of perjury or a finding of fraud. These cases present the clear distinction between the ITC's determinations of injury and the Department's yearly administrative reviews.

In *Essar Steel,* the CIT reviewed two administrative reviews in a countervailing duty ("CVD") proceeding concurrently, the "fourth review" and the "fifth review."[130] In the fourth review, the CIT remanded the proceedings to the Department; while in the fifth review, the CIT reviewed the Department's application of adverse facts available to an uncooperative

[127] *See Borlem S.A. v. United States*, 913 F.2d 933 (Fed. Cir. 1990).
[128] *Elkem Metals*, 193 F. Supp. 2d 1314, 1320 (CIT 2002).
[129] *Alberta Gas*, 650 F.2d 9, 13 (2nd Cir. 1981).
[130] *See Essar Steel*, 721 F. Supp. 2d 1285 (CIT 2010).

respondent.[131] After reviewing the Department's conclusions made on remand of the fourth review, the CIT ordered the Department to place evidence from that review on the record of the fifth review, and determine whether the evidence of the fourth review impacted the fifth review.[132] On remand, the Department protested, arguing that re-consideration, as ordered by the Court, compromised the Department's ability to administer the CVD laws in an efficient and predictable manner.[133] We note that this case is not yet final, and the Department is appealing. Under the guidance of *Vermont Yankee*, the Department only makes determinations based upon the evidence properly on the record for the respective administrative review. Although USM contends there was a short time to submit rebuttal evidence during the administrative review, on remand, USM was given an additional opportunity to challenge TMI's information as if it was given additional time during the administrative review proceeding. There, USM would not have been able to submit the new factual information, because the information was not yet available.

The Department similarly relies on *Vermont Yankee* in determining that *Green County* is not instructive for this proceeding (*Greene County* involved the Federal Power Act and the Federal Power Commission[134] and is cited by USM for the proposition that a federal agency must make corrections if it has been relying on an erroneous assumption). As stated, *supra*, in *Vermont Yankee* each administrative agency should be allowed to exercise its administrative discretion in determining how to treat new evidence when reconsidering prior decisions.

With respect to USM's reliance on *Union Camp*, the Department notes that the *Union Camp* Court ordered the Department to consider a determination by the Department in a later

[131] *See id.*
[132] *See id*.
[133] *See* Certain Hot-Rolled Carbon Steel Flat Products from India/Final Results of Redetermination Pursuant to Court Remand *Essar Steel Limited v. United States*, CIT No. 09-197, 2010 WL 3359368 (CIT 2010).
[134] *See Greene County*, 59 F.2d 12227 (2nd Cir. 1977).

administrative review of the proceeding, in a remand on a prior review. The Court stated that it did this to "prevent Commerce from relying on what appears to be an erroneous factual assumption."[135] In ruling on whether Commerce must consider other factual information not on the record of the review under remand, however, the Court, citing deference given to Commerce to conduct its proceedings, directed Commerce "to consider, and express its views on, whether it should accept new evidence."[136] The Department finds that the present case is more analogous to the latter situation in *Union Camp* wherein the Court recognized the Department's discretion to consider information obtained in a subsequent segment of the proceeding. Here, the Department is exercising its discretion not to re-open the determination it made, based upon the evidence in the underlying administrative review, that TMI is entitled to a by-product offset.

Fourthly, with respect to USM's argument that the Department's interest in finality is outweighed by the interest in calculating a margin as accurately as possible, the Department notes that the sole issue related to TMI's by-product offset, properly on Remand to the Department, is the issue of valuation. Accordingly, the issue of whether to grant TMI a by-product offset is not properly subject to this redetermination. As we stated, for the Draft Redetermination, the Department determined that it did not have enough information to evaluate the proper surrogate value for TMI's by-product offset. TMI provided documentary evidence supporting the proper categorization of its magnesium by-product. USM now cites evidence from a subsequent proceeding to invalidate all of TMI's evidence submitted in this remand proceeding limited to the proper valuation of the by-product. USM did not challenge and the Court did not remand the Department's determination on the issue of whether to grant TMI a by-product offset to normal value. As such, we determine that TMI's margin calculation, inasmuch

[135] *See Union Camp*, 53 F. Supp.2d 1310, 1326 (CIT 1999).
[136] See id.

as the determination to grant TMI a magnesium by-product offset is concerned, is not at issue in this proceeding. Facts and circumstances change from year to year and thus, the Department reviews the record of each segment of a proceeding at the time it conducts the review. A failed verification in a subsequent segment of the proceeding does not necessarily invalidate all prior segments involving that respondent. Accordingly, the Department considers any reconsideration of whether to grant a by-product offset to be inappropriate in this remand.

Lastly, the Department disagrees with USM's argument that the alleged fact that TMI was ineligible for a by-product offset was available during the relevant 2006-2007 administrative review. USM's argument that the Department or USM could have found evidence that TMI was ineligible for by-product offsets is based solely on conjecture, and is belied by the fact that neither the Department nor USM actually found such evidence at the time. Further, this was not an issue on remand, and USM never challenged the granting of a by-product offset in its brief before the Department or the Court. The evidence submitted by USM to support its current contention that TMI is not eligible for a by-product offset is based solely on evidence obtained after the completion of the 2006-2007 administrative review, and consisting of incidents that took place after the 2006-2007 review, evidence which it did not have during the underlying administrative review.[137]

[137] Recently, in *Home Products Int'l v. United States*, 2010-1184 * 22 (Feb. 7, 2011) ("*Home Products 2*"), the CAFC ordered the CIT to remand the case to the Department because the Petitioners provided clear and convincing evidence of a *prima facie* case of fraud. However, the question of whether the Department will open the record is a matter for that remand. Thus, *Home Products 2* does not dictate that we examine the new evidence put forward by USM.

B. Valuation of TMI's Magnesium By-Product

1. TMI's Comments

TMI argues that the Department did not explain why HTS category 2620.40 is the proper classification for TMI's magnesium by-product,[138] and why TMI's magnesium by-product was not valued as "pure magnesium" or valued under HTS category 8104.20. Furthermore, according to TMI, the Department misstated the facts relating to its magnesium by-product.[139] TMI posits that the pure magnesium balls contained in the matrix of flux, which constitute one to five per cent of the total flux, are 99.8% pure magnesium.[140] TMI adds that, while the flux matrix itself is of little or no value, the pure magnesium balls are of significant value and are both distinct and removable from the flux matrix.[141] Accordingly, TMI concludes that the Department failed to account for these alleged facts and further failed to explain how the "pure magnesium" could be classified as a type of aluminum waste (*i.e.*, classified under HTS category 2620.40). USM did not comment on the valuation of TMI's magnesium by-product in its Comments.

2. Department's Position

We disagree with TMI that we misstated the facts as to its magnesium by-product. We clearly acknowledged that the "pure magnesium balls constituted 1-5 percent of the total flux matrix and that the magnesium balls are ultimately removable from the flux," *see supra* 18-20. However, notwithstanding these acknowledgements, we disagree with TMI regarding the conclusions that should be drawn from these facts.

First, we note that:

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[138] *See* TMI's Comments at 2.
[139] *See id*.
[140] *See id.* at 2 and 3.
[141] *See id.* at 3.

- the overwhelming majority of TMI's by-product is not unwrought magnesium balls (*i.e.*, pure magnesium balls) as initially claimed by TMI, but rather a mixture (or matrix) of used flux (*i.e.*, ash) and magnesium balls, of which the magnesium balls constitute somewhere between 1-5 percent of the total mixture;[142] and
- as explained by TMI, it sells this used flux(ash)/magnesium mixture to the customer who then separates the pure magnesium from the mixture after purchase.[143]

Second, TMI did not report the weight of the pure magnesium balls contained within the mixture, rather it reported the weight of the flux/magnesium mixture it reportedly sold and asked us to value that weight with a value for magnesium waste.

Third, it is impossible to discern, with any reasonable confidence, how much of TMI's by-product in fact consisted of pure magnesium (*i.e.*, range of 1-5 percent out of the 100 percent of flux/magnesium mixture). In fact, it appears that TMI was unable to discern this as well. Specifically, TMI reported that the by-product was weighed at the time of sale[144] and we know from TMI's submissions that the product weighed was the used flux/magnesium mixture because the magnesium balls were not separated from the mixture by the customer until after the time of sale. [145] Thus, the only weight available to the Department for purposes of valuation is the weight of the used flux/magnesium mixture, not the weight of the magnesium contained within that mixture. Accordingly, attempting to discern the weight of the pure magnesium contained within the by-product, if any, would be speculative at best and would be contrary to our practice, as TMI's byproduct was not the magnesium balls, but rather the entire flux/magnesium mixture. Additionally, valuing the full weight of the flux/magnesium mixture with a value for pure

[142] *See* TMI's Rebuttal at 3.
[143] *See id*.
[144] *Id* at 4.
[145] *See* TMI SQR at 2.

magnesium scrap or waste would be equally inappropriate because it would ignore the fact that the byproduct TMI reported selling, *i.e.*, the flux/magnesium mixture, does not have the same market value as the pure magnesium waste or scrap because the customer has to incur a cost associated with extracting the pure magnesium balls from the mixture.

The Department also disagrees with TMI's argument that we failed to explain why we determined to value TMI's magnesium by-product under HTS category 2620.40. In our Draft Remand Redetermination, we explained *supra* at 18-20, how and why the Department determined that HTS category 2620.40 was most specific to TMI's by-product. Nevertheless, we reiterate our explanation below. In valuing the by-product at issue (*i.e.*, the flux/magnesium mixture), we identified the HTS data available on the record of this remand determination and reviewed the relevant HTS categories, descriptions and explanatory notes. Based on the explanatory notes, we determined that the category identified by TMI as covering magnesium waste (HTS category 8104) does not in fact refer to waste from the production of magnesium, but rather to magnesium scrap. Specifically, the HTS category 8104.20, "Magnesium and articles thereof, including waste and scrap: Unwrought magnesium: Waste and scrap," accounts for scraps of magnesium, not waste products from the production of magnesium. As explained in the Draft Remand, the notes to HTS category 8104 clearly state that this category specifically excludes "slag, ash and residues from the manufacture of magnesium."[146] The same Explanatory Note also states that HTS category 2620 is the proper category for these materials. Given the above, and TMI's description of its by-product as consisting of 95 to 99 percent incinerated flux (*i.e.*, used flux or ash) we found that HTS category 2620.40 is the most specific information on the record to TMI's magnesium by-product because it was the only record information that covers, slag, ash and residue.

[146] Remand Order at 21.

Regarding TMI's contention that HTS 2620.40 applies to "mainly aluminum," we disagree. The reference to "mainly aluminum" only modifies the metal compounds within the mixture which means that the metal that may be present in the ash, slag or residue, is mostly aluminum. Notwithstanding that, we find this category more representative of the byproduct at issue here, than magnesium scrap and waste, which are in essence closer to pure magnesium products than to the flux/magnesium mixture that is the byproduct in this case, as explained in the Draft Remand Redetermination.

Thus, we continue to determine that the Department properly valued TMI's used flux/magnesium mixture byproduct using HTS category 2620.40.

C. Surrogate Financial Ratios

1. USM Comments

With respect to the surrogate financial ratios, USM argues in its Comments that the Department erred in its Draft Redetermination by continuing to use MALCO's financial statements and because NALCO's financial statements, despite evidence of "*de minimis*" subsides, should be used instead.[147] USM argues that the Department has not complied with the Court's instruction to explain why MALCO's financial statements are appropriate in light of the shortened fiscal year.[148] First, according to USM, the Department's comparison of the nine versus twelve-month fiscal year in its Draft Redetermination does not sufficiently address the statement in MALCO's financial statements that the figures are not comparable to the previous year.[149] USM adds that the Department's own determination that a relative correlation exists

[147] *See* USM Comments at 13. In footnote 37, USM agrees with the Department that the financial statements of HINDALCO should no longer be considered in light of *Pure Magnesium From the People's Republic of China*, 75 FR 80791 (December 23, 2010), and accompanying Issues and Decision Memorandum at Comment 2, where the Department determined that HINDALCO was not a comparable surrogate producer.

[148] *See id.* at 14.

[149] *See id*.

between the 2006-2007 and 2005-2006 fiscal years identifies significant differences in interest expense and per-unit cost of production.[150] Secondly, USM adds that the Department's analysis of "erratic production levels" also does not address the Court's concern that the financial statements address only nine rather than the usual twelve-months.[151] USM adds that the Department's analysis does not account for the shortened fiscal year's higher production volumes, sales realization, and improved operating efficiencies.[152] Thirdly, USM argues the commissioned dry scrubbing must have impacted production regardless of the Department's determination that there was no indication of this.[153] Lastly, USM argues that contrary to the Department's determination that raw material costs remained stable during the shortened fiscal year, the costs actually increased by six per cent.[154] TMI did not comment on the issue of surrogate financial ratios.

2. Department's Position

The Department continues to determine that MALCO's financial statements constitute the best available information on the record of this segment of the proceeding. First, the Department notes that USM's expectations that MALCO's fiscal year figures in one year should necessarily be comparable to the previous fiscal year is a fundamentally unwarranted expectation. An individual firm's figures may change from fiscal year to fiscal year for a multitude of reasons, such as internal restructuring, diversification of production, purchase of updated equipment or technologies, or as a result of outside influences such as a recession, a worldwide increase in energy prices, or increased/decreased demand for a certain portion of its product mix. Thus, for the reasons explained in the Draft Redetermination and again below,

[150] *See id* and at 15.
[151] *See id*.
[152] *See id* and at 16.
[153] *See id*.
[154] *See id*.

MALCO's fiscal year "changes" do not render MALCO's financial statements unreliable for the purposes of calculating surrogate financial ratios.

We disagree with USM's contention that the Department did not address the statement in the MALCO financial statements that the present financial statements were not comparable to the previous year. As stated in our draft Redetermination, Indian GAAP requires a company that changes its fiscal year to state that the figures shown for the changed fiscal year are not directly "comparable" to the figures for the prior year. The impetus behind this requirement is to avoid comparison of the figures at face value. For example, the requirement attempts to prevent the reader of the financial statements from concluding that a company might be experiencing a relative loss in sales if the sales figure for the 12 month period is greater than that of the nine-month period. The GAAP requirement does not preclude the comparison or analysis of the relationship between the figures (*e.g.*, cost of sales as it relates to sales revenues) in the shortened period to the relationship of these same figures in the prior or subsequent period.

The Department's comparison of the nine-month fiscal year to the 12-month fiscal year, above, indicates that MALCO's interest expense is zero for the nine-month period while 8.6 percent during the previous 12 month period and that the COP is higher in the nine-month period. While arguing that no such comparison should have been made, USM concludes that these changes demonstrate that inconsistent cost fluctuations result from using the nine-month period and that these distortions impact the financial ratios. We do not agree. For example, as stated in our Draft Redetermination, the drop in percentage of interest expenses in the shorter period (from 8.6 percent to zero percent) was due to the pay-off of short-term loans and MALCO's efforts to become debt-free. USM's argument that the exclusion of the "missing three months" results in distortions to the financial expense ratio is unsupported. As MALCO

strived to become debt-free,[155] it would not be un-reasonable to conclude that MALCO would not incur additional debt in the "missing three months" (April 1 through June 30, 2007) and therefore would not incur additional interest expenses. As such, the financial expense ratio for the 12-month period would remain consistent with that of the nine-month period (*i.e.*, at zero) and would not fluctuate as argued by the petitioners.

Similarly, the resulting COP is not directly related to the nature of the statement covering only nine months, but is due to external influences. Specifically, the COP is higher for the shortened period than the 12 month period primarily as a result of increases in raw material prices. As shown on page 45 of MALCO's financial statements, the raw material prices as per the London Metal Exchange increased during the months between August and December 2006, but then remained relatively stable during the months of December 2006, through March 2007. This provides a clear explanation why COP would be higher in MALCO's subsequent financial statements, and there is no reason to think this increase would not have been evidenced in a statement consisting of a 12-month fiscal year covering these months.

USM also concludes that there was an erratic change in production levels.[156] Here, the Department notes that the percentages used by USM to support its conclusion were calculated based on the number of tons of raw materials consumed rather than consumption of raw materials *relative* to production of each product group as discussed below. Regarding the claim of "erratic" production levels (*i.e.*, 98 percent rods in the prior year and 89 percent rods during the nine-month period), we conclude that this difference is most likely due to a planned production shift as discussed at page 78 of MALCO's financial statements, *i.e.*, alum ingots production increased from 1.7 percent to 9.0 percent of total production; rolled product increased

[155] S*ee* MALCO's financial statements at 44 where the company states that the external commercial borrowing should be repaid by June 2007.

[156] *See* USM Comments at footnote 49.

from 0.1 percent to 1.6 percent of total production; and properzi rods decreased from 98.2 percent to 89.37 percent. MALCO states that its increased production of aluminum ingots and rolled products increased from 1.7 percent to 9.0 percent of total production due to asset optimization and improved production efficiencies. MALCO also states that its plans are to continue to increase hot-rolled production in the subsequent financial year. Accordingly, this shift in production does not equate to "erratic" production behavior in a shortened fiscal period, but rather a long-term operational goal of the company, that would have been equally evidenced in a 12-month fiscal period. Further, although there are increases in aluminum ingot and hot-rolled production, the proprerzi rods clearly remained MALCO's most significant production, *i.e.,* 89.37 percent of total production. Indeed, MALCO's own management considers the increased production of the aluminum ingot and hot-rolled products to be "marginal."[157]

Finally, with respect to the installation of the dry scrubbing unit which USM argues must have affected production, we continue to determine that there is no evidence supporting Petitioners' contentions. USM argues that the installation must have affected production but provides no basis for that argument other than speculation. There is no evidence of interrupted production or of assets being idle while the project was being completed.[158] Again, as the Department noted in the Draft Redetermination, MALCO states that the dry scrubbing unit installation was made in a timely manner.[159] The Department must make its determination based upon substantial evidence on the record and in this case finds no evidence that production was disrupted, but, rather, that as a result of a long-term effort to increase efficiencies production increased over the fiscal year in question.

[157] S*ee* MALCO's financial statements at 11.

[158] *See id.* at footnote 4 on page 68 (schedule of fixed assets and explanations) and footnote 16 on page 72 (G&A expenses where expenses related to idled asset normally appear).

[159] *See id* at 16.

In sum, the Department maintains that the differences in the MALCO nine-month financial statement from the 12-month statement are normal differences expected to be found resulting from natural changes in business cycles and the effect of outside economic forces. While, USM argues that every difference between the statements is due to a distortion it has provided no affirmative evidence of distortions, nor explained why it should be expected that any business would have an identical financial statement from one year to the next. Nevertheless, the Department has analyzed the statements and the differences as raised by USM and finds that all indications point to their being the result of economic forces and the long-term growth strategy of the respondent, all of which would have been captured just as much in a 12-month statement as they were in the nine-month statement. Accordingly, the Department finds no evidence that the nine month period led to any distortion in the MALCO financial statements. Thus, the Department continues to find that MALCO's financial statements are reliable, not distorted by the nine-month fiscal year, and the best available information to calculate an accurate margin.

Accordingly, pursuant to the Department's policy, we do not find it is proper to use NALCO's financial statements, which indicate receipt of countervailable subsidies, the effects of which the Department has no means of measuring based on the data contained within the NALCO financial statements.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

February 11, 2011