



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

(A-570-832)

A-570-896

A-821-819

Scope Inquiry

IA / Office 8: JHC

Proprietary Document

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DATE:

December 4, 2006

TO:

Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

THROUGH:

Wendy J. Frankel *WJF*
Director
China/NME Group, Office 8

Robert A. Bolling *RB*
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FROM:

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RE:

Pure Magnesium from the People's Republic of China (A-570-832),
Magnesium Metal from the People's Republic of China (A-570-896), and
Magnesium Metal from Russia (A-821-819): Final Ruling in the Scope
Inquiry on Chinese Magnesium Processed in France ("France Inquiry")¹

SUMMARY:

On August 31, 2006, the Department of Commerce ("Department"), applying a substantial transformation analysis, issued its preliminary ruling in this scope inquiry, finding that PEM Marignac's² ("PEM") processing of pure magnesium from the People's Republic of China

¹ For the Final Ruling in the Scope Inquiry on Russian and Chinese Magnesium Processed in Canada ("Canada Inquiry"), see the corresponding decision memorandum from Barbara E. Tillman and Wendy J. Frankel to Stephen J. Claeys, dated November 9, 2006 ("Canada Inquiry Final Ruling Memo").

² Also referred to in submissions and known as Pechiney Electrometallurgie.



("PRC") in France does not substantially transform the pure magnesium and, thus, such magnesium remains a product of the PRC and within the scope of the antidumping duty order on pure magnesium from the PRC.

After consideration of the parties' post-preliminary comments, for the final ruling we recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum, *infra*. Below is the list of the issues for which we received comments and rebuttal comments by parties in these reviews:

1. Choice of Law
2. Substantial Transformation
3. Cash Deposits

BACKGROUND:

On May 12, 1995, the Department published an antidumping duty order on pure magnesium from the PRC and the Russian Federation ("Russia"). *See Notice of Antidumping Duty Orders: Pure Magnesium From the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium From the Russian Federation*, 60 FR 25691 (May 12, 1995) ("Pure Magnesium Order"). On April 15, 2005, the Department published an antidumping duty order on magnesium metal from the PRC. *See Notice of Antidumping Duty Order: Magnesium Metal From the People's Republic of China*, 70 FR 19928 (April 15, 2005).

On July 19, 2005, domestic producer U.S. Magnesium LLC ("Petitioner") filed a request with the Department for a scope ruling, pursuant to 19 C.F.R. 351.225(c), that pure and alloy magnesium (a.k.a. magnesium metal) produced in France, or any other third country, from pure magnesium ingots, crowns and butt-ends imported from the PRC or Russia, and thereafter exported to the United States, are within the scope of the antidumping duty orders on magnesium from the PRC and Russia.

On September 2, 2005, the Department initiated a formal scope inquiry, pursuant to 19 C.F.R. 351.225(k), on pure magnesium from the PRC processed in France.³ On August 31, 2006, the Department issued its preliminary ruling in the scope inquiry. *See "Pure Magnesium from the People's Republic of China (A-570-832), Magnesium Metal from the People's Republic of China (A-570-896), and Magnesium Metal from Russia (A-821-819): Preliminary Decision in the Scope Inquiry on Chinese Magnesium Processed in France"* memorandum, dated August 31, 2006 ("Preliminary Ruling"). After conducting a substantial transformation analysis, taking into consideration criteria that included class or kind of merchandise, extent of processing or

³ Although Petitioner requested the Department also rule on magnesium from the PRC converted in "any other third country," parties provided argument only as to the production process in France and Canada. *See also Canada Inquiry Final Ruling Memo.*

manufacturing, cost, level of investment, physical/chemical/mechanical properties, essential component of the product, and use, the Department preliminarily determined that the processing of pure magnesium from the PRC in France into pure magnesium ingots did not constitute a substantial transformation.⁴

As PEM claimed it used pure magnesium not only from the PRC but also from other countries in its production of pure magnesium ingots, on September 12, 2006, the Department issued PEM a supplementary questionnaire regarding its input ratio of pure magnesium. On September 19, 2006, PEM respectfully declined to respond to the questionnaire, noting it no longer exported pure magnesium ingots to the United States. However, PEM commented that if the Department affirmed its decision at final, and if PEM thereafter resumed exporting pure magnesium ingots to the United States, the Department should allow PEM to certify the PRC-content of its pure magnesium ingots on a shipment-specific basis and instruct U.S. Customs and Border Protection ("CBP") to impose cash deposits only on such PRC-content.

On September 25, 2006, PEM and Petitioner submitted comments on the Preliminary Ruling. On October 2, 2006, Alcoa Inc. and Northwest Alloys, Inc. (collectively "Alcoa") and Petitioner submitted rebuttal comments. On October 10, 2006, PEM submitted comments on the draft customs instructions for the Preliminary Ruling.

SCOPE:

Pure Magnesium Order (A-570-832):

The product covered by this order is pure primary magnesium regardless of chemistry, form or size, unless expressly excluded from the scope of this order. Primary magnesium is a metal or alloy containing by weight primarily the element magnesium and produced by decomposing raw materials into magnesium metal. Pure primary magnesium is used primarily as a chemical in the aluminum alloying, desulfurization, and chemical reduction industries. In addition, pure primary magnesium is used as an input in producing magnesium alloy.

Pure primary magnesium encompasses:

- (1) Products that contain at least 99.95% primary magnesium, by weight (generally referred to as "ultra-pure" magnesium);
- (2) Products containing less than 99.95% but not less than 99.8% primary magnesium, by weight (generally referred to as "pure" magnesium); and
- (3) Products (generally referred to as "off-specification pure" magnesium) that contain 50% or greater, but less than 99.8% primary magnesium, by weight, and

⁴ The Department terminated its scope inquiry on pure and alloy magnesium produced in France using pure magnesium from Russia, as PEM claimed it does not purchase pure or alloy magnesium from Russia, and parties did not contest this claim. The Department also terminated its scope inquiry on alloy magnesium produced in France using pure magnesium from the PRC or Russia, as the record contains no evidence to support a finding that PEM uses pure magnesium from the PRC or Russia in its production of alloy magnesium.

that do not conform to ASTM specifications for alloy magnesium.

“Off-specification pure” magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8% by weight. It generally does not contain, individually or in combination, 1.5% or more, by weight, of the following alloying elements: aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths.

Excluded from the scope of this order are alloy primary magnesium, primary magnesium anodes, granular primary magnesium (including turnings and powder), and secondary magnesium.

Granular magnesium, turnings, and powder are classifiable under the HTSUS subheading 8104.30.00. Magnesium granules and turnings (also referred to as chips) are produced by grinding and/or crushing primary magnesium and thus have the same chemistry as primary magnesium. Although not susceptible to precise measurement because of their irregular shapes, turnings or chips are typically produced in coarse shapes and have a maximum length of less than 1 inch. Although sometimes produced in larger sizes, granules are more regularly shaped than turnings or chips, and have a typical size of 2 mm in diameter or smaller.

Powders are also produced from grinding and/or crushing primary magnesium and have the same chemistry as primary magnesium, but are even smaller than granules or turnings. Powders are defined by the Section Notes to Section XV, the section of the HTSUS in which subheading 8104.30.00 appears, as products of which 90 percent or more by weight will pass through a sieve having a mesh aperture of 1 mm. *See* HTSUS, Section XV, Base Metals and Articles of Base Metals, Note 6(b). Accordingly, the exclusion of magnesium turnings, granules and powder from the scope includes products having a maximum physical dimension (*i.e.*, length or diameter) of 1 inch or less.

The products subject to this order are classifiable under subheadings 8104.11.00, 8104.19.00 and 8104.20.00 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

DISCUSSION OF THE ISSUES:

Comment 1: Choice of Law

PEM contends that the Department should not have conducted its scope analysis under 19 C.F.R. 301.225(k). PEM disagrees with the Department’s Preliminary Ruling, arguing Petitioner cannot decide the legal analysis for a scope ruling. PEM also argues that because the merchandise produced in the PRC was “completed or assembled” in France, Congress directs that the Department must conduct an anticircumvention scope inquiry under section 781(b) of the Tariff Act of 1930, as amended (“Act”). Alcoa agrees with PEM’s argument that the Department applied the wrong legal analysis and asserts that 19 C.F.R. 351.225(h) “clearly” applies to the

scope inquiry. Petitioner agrees with the Department's Preliminary Ruling for PEM. Petitioner states that the legislative history indicates Congress did not intend to limit the Department's authority to make scope determinations when it enacted section 781 of the Act, and the Department is not required to conduct an anticircumvention inquiry.

Department Position:

We agree with Petitioner that the Department properly conducted the scope inquiry pursuant to 19 C.F.R. 351.225(k). We note that, contrary to PEM's argument, the Department did not allow Petitioner to determine the legal analysis for this scope ruling, but rather the Petitioner's initial request for a scope ruling was made pursuant to 19 C.F.R. 351.225(k), which the Department determined to be proper for the scope inquiry at hand. Had the Department determined the scope inquiry should not be conducted pursuant to 19 C.F.R. 351.225(k), we would not have conducted such a scope inquiry. We disagree with PEM that the pure magnesium from the PRC was "completed or assembled" in France, such that it requires an anticircumvention scope inquiry. The Department has commonly applied a substantial transformation analysis to determine country of origin in similar scope inquiries involving a third country. *See Notice of Final Determination of Sales at Not Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea*, 69 FR 17645 (April 5, 2004); "Memorandum to Richard W. Moreland, Deputy Assistant Secretary, Final Scope Ruling; Antidumping Duty Order on Pure Granular Magnesium from the People's Republic of China; ESM Group Inc.," dated August 20, 2002 (pure magnesium ingots from the PRC ground into granular form in Canada are not substantially transformed and, thus, fall within the scope of the order on pure granular magnesium from the PRC); *Certain Cold-Rolled, Flat-Rolled Carbon Quality Steel Flat Products From Taiwan: Preliminary Determination of Sales at Less Than Fair Value*, 65 FR 1095 (2000). This analysis has been upheld by the Court of International Trade. *See E.I. DuPont de Nemours & Company v. United States*, 8 F. Supp. 2d 854 (Ct. Intl. Trade 1998). The involvement of a third country does not mandate an anticircumvention scope inquiry. Nor has Congress mandated, in implementing section 781 of the Act, that the Department must conduct an anticircumvention scope inquiry in such situations. Rather, the implementation of section 781 of the Act was intended as a means for the Department to address circumvention of the antidumping duty laws. The Department's focus in this instance is on whether the subject merchandise, pure magnesium from the PRC, has been substantially transformed in France, thus determining the country of origin and the applicability of an existing antidumping duty order. Accordingly, we find that application of a substantial transformation analysis is appropriate for this scope inquiry.

Comment 2: Substantial Transformation

PEM continues to assert that there is substantial transformation, incorporating by reference its arguments provided in its previous submissions. Alcoa agrees with PEM that even under a 19 C.F.R. 351.225(k) analysis, the Department should find that there was substantial transformation of the PRC pure magnesium in France. As PEM did not challenge any specific points in the

substantial transformation analysis in the Preliminary Ruling, but rather incorporated its arguments for substantial transformation by reference, Petitioner rebuts PEM's arguments and argues against substantial transformation by incorporating its own prior comments by reference.

Department Position:

Both PEM and Petitioner adopt their previous arguments from before the Preliminary Ruling regarding substantial transformation. Neither party provided comments regarding the Department's substantial transformation analysis as set forth in the Preliminary Ruling. Accordingly, as no parties have raised new arguments regarding substantial transformation, in applying the criteria of: 1) whether the processed downstream product falls into a different class or kind of product when compared to the original upstream product; 2) the extent of processing or manufacturing, the added cost for the processing in France, and the level of investment in the French facility; and 3) whether the physical, chemical and mechanical properties, and the essential component of the product, are changed as a result of the processing, and whether there are different uses or channels of trade for the resulting product, the Department continues to find that the processing of pure magnesium from the PRC in France, as set forth in our analysis in the Preliminary Ruling, does not constitute substantial transformation and thus does not convey country of origin. See Preliminary Ruling at 8-17.

Comment 3: Cash Deposits

PEM agrees with the Department's Preliminary Ruling to collect cash deposits only on the PRC-content of PEM's pure magnesium ingots, but disagrees with the Department's suggestion of collecting on PEM's reported average ratios of [* * *] percent PRC-content, [* * *] percent [* * *] content. PEM argues that because its reported input ratio is proprietary information, and because the input ratio will vary in the future, it cannot serve as the basis for cash deposit instructions. PEM argues that if it resumes exporting pure magnesium ingots to the United States, it could develop a tracking system for its feedstock to allow imposition of cash deposits on actual PRC-content. Accordingly, PEM argues the Department should allow it to certify, on a shipment-specific basis, the PRC-content of its pure magnesium ingot exports and instruct CBP to collect cash deposits only on such certified PRC-content. In addition, PEM requested that the Department edit the draft customs instructions for the Preliminary Ruling to state it has no application to magnesium produced in France using magnesium scrap.

If the Department affirms its Preliminary Ruling, Alcoa supports PEM's proposal regarding entry-specific certification, arguing the Department has no legal basis to impose cash deposits on 100 percent of the pure magnesium ingots, which would apply antidumping duties on magnesium not subject to the pure magnesium order.

Petitioner argues that because PEM did not provide the additional information as requested by the Department, the Department is unable to verify PEM's estimated ratio and must resort to facts available. Petitioner further argues that the Department should find that PEM failed to act

to the best of its ability by refusing to provide the information, and apply adverse facts available by determining that the pure magnesium ratio is 100 percent PRC-origin. Petitioner notes that if PEM resumes exports of pure magnesium ingots to the United States, it can request an administrative review of such entries to demonstrate the actual PRC-content.

Department Position:

The Department has declined to edit the customs instructions for the Preliminary Ruling to include PEM's suggested language stating the instructions have no application to magnesium produced in France using magnesium scrap. PEM reported that all of its purchased scrap was used in the production of alloy magnesium. *See* PEM Comments at 2-3 (November 21, 2005). The Department terminated its scope inquiry with regard to alloy magnesium produced in France, as the record evidence indicated that PEM does not use any pure magnesium from the PRC in producing alloy magnesium. *See* Preliminary Ruling at 2 and 17. Thus, there is no need to edit the customs instructions with regard to alloy magnesium produced in France using magnesium scrap. As for pure magnesium produced in France, the Department's Preliminary Ruling covers pure magnesium from the PRC processed in France into pure magnesium ingots. We do not believe it necessary to include a specific exception for pure magnesium ingots made from magnesium scrap, as our ruling pertains only to what was examined in the course of this scope inquiry (*i.e.*, pure magnesium processed into pure magnesium ingots). Moreover, PEM reported that it does not produce pure magnesium ingots using magnesium scrap. *See* PEM Comments at 2-3. As for PEM's concern regarding its proprietary information, the Department notes that in order to protect such proprietary information, the cash deposit instructions were drafted and issued with specific instructions to CBP that they were not to be disclosed to the public.

Since the issuance of our Preliminary Ruling, PEM declined to respond to our questionnaire seeking more detailed information concerning the inputs. While the information on the record demonstrates that PEM uses PRC-origin pure magnesium to produce its pure magnesium ingots, the Department was unable to collect the additional information necessary to determine an accurate ratio of PRC and non-PRC origin pure magnesium in PEM's final product. Moreover, because PEM failed to respond to our questionnaire and failed to clarify the information on the record, the information on the record consists of unsubstantiated average ratios. Accordingly, without any verifiable information with regard to PEM's pure magnesium exports and source inputs, we have no accurate means of determining the ratio of PRC inputs to other country inputs. As a result, we will instruct CBP to collect cash deposits and suspend liquidation on the full value of imports of pure magnesium ingots produced by PEM Marignac using inputs of PRC pure magnesium. PEM will have the opportunity to have any future imports of such merchandise reviewed, including the percentage of PRC-origin content, if appropriate, through the administrative review process.

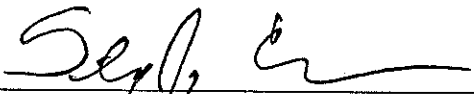
RECOMMENDATION:

Based on the above analysis, we recommend that the Department continue to find that pure

magnesium from the PRC, processed in France by PEM into pure magnesium ingots, is not substantially transformed as a result of such processing and, thus, is within the scope of the Pure Magnesium Order. We also recommend instructing CBP to collect antidumping duties on the full value of imports of pure magnesium ingots produced by PEM using inputs of PRC pure magnesium subject to this scope inquiry.

If you agree, we will issue a letter to all interested parties informing them of this ruling.

Agree Disagree



Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

12/4/06

Date