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Scope Inquiry
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Enforcement Group I
IA/GIO2: MAS

AUG 20 2002

MEMORANDUM FOR: Richard W. Moreland
Deputy Assistant Secretary
Office of AD/CVD Enforcement Group I

THROUGH: Louis Apple *LA*
for Office Director, Office 2
Office of AD/CVD Enforcement Group I

FROM: The Team

SUBJECT: Final Scope Ruling; Antidumping Duty Order on Pure Granular Magnesium from the People's Republic of China; ESM Group Inc.

SUMMARY

On December 3, 2001, the Department of Commerce received a request from ESM Group Inc. (ESM), an interested party in the recent antidumping duty investigation of pure magnesium in granular form from the People's Republic of China (PRC), for a scope ruling on whether pure magnesium in granular form ground in Canada or another third country from pure magnesium ingots produced in the PRC is outside the scope of the antidumping duty order on pure granular magnesium from the PRC. On December 19, 2001, Magnesium Corporation of America (Magcorp), the petitioner in this proceeding, opposed ESM's request, while on January 4, 2002, Reade Manufacturing Company (Reade), a U.S. importer of granular pure magnesium, filed comments supporting it.

On January 17, 2002, the Department initiated a formal scope inquiry and issued its preliminary ruling, pursuant to 19 CFR 351.225(k)(1). The Department found that, based on the description of the merchandise in question contained in ESM's scope application, the description of the subject merchandise in the order, and the determinations of the Department and the International Trade Commission (ITC), pure magnesium in granular form that is ground in Canada or another third country from pure magnesium ingots produced in the PRC and subsequently shipped to the United States is within the scope of the order on pure magnesium in granular form from the PRC. This determination was based on a finding that the process of grinding magnesium ingots does not substantially transform them into a different product, thereby changing the country of origin.



The Department requested that comments be filed with respect to this preliminary finding no later than February 6, 2002, and rebuttal comments be filed no later than February 19, 2002.

On February 6, 2002, we received comments from ESM, Magcorp, and Reade. On February 19, 2002, we received rebuttal comments from these parties.

Pursuant to 19 CFR 351.225(k)(1), we recommend that the Department make a final determination that pure magnesium in granular form ground in Canada or another third country from pure magnesium ingots produced in the PRC be considered within the scope of the order on pure magnesium in granular form from the PRC.

INTERESTED PARTY COMMENTS

A. Substantial Transformation

1. *ESM and Reade's Comments:*

Both ESM and Reade assert that the production of granular magnesium from magnesium ingot produced in the PRC involves a significant manufacturing process, thereby effectively changing the country of origin of the imported granular magnesium from the PRC to Canada. ESM and Reade maintain that granular magnesium produced from such a process is substantially different from magnesium ingots used as the input.¹

Reade contends that the Department determines country of origin for scope purposes by analyzing whether the manufacturing process in a particular country effects a substantial transformation, resulting in a new and different article with distinct uses or a changed essential nature. See Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 18992, 18999; Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 FR 37062, 37065 (Jul. 9, 1993) (Cold-Rolled from Argentina); Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium from France, 66 FR 65877, 65884 (Dec. 21, 2001) (Low Enriched Uranium); and Notice of Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from India, 60 FR 10545, 10546 (Feb. 27, 1995) (Butt-Weld Pipe Fittings from India). Reade argues that the appropriate standard for determining substantial transformation considers whether the manufacturing operations performed in the exporting country are "of such a substantial nature to justify the

¹Documents and parts thereof from the underlying investigation deemed relevant by the Department to this scope ruling were made part of the record of this determination and are referenced herein. Documents that were not presented to the Department, or placed by it on the record, do not constitute part of the administrative record for this scope determination.

conclusion that the resulting product is a manufacture of that country." See Ferrostaal Metals Corp. v. United States, 664 F. Supp. 535, 537 (CIT 1987) (Ferrostaal Metals).

ESM and Reade note that the U.S. Customs Service (Customs) has reviewed an identical fact pattern to the one set forth above, ruling that granular magnesium is a product of the country in which the grinding operations took place because the processing of the magnesium ingot by chipping, hammer milling and shaping to give the granules a geometric configuration results in a substantial transformation. See HQ 561103, dated January 20, 1999; see also HQ 561488, dated October 7, 1999.

Both ESM and Reade acknowledge that the Department is not obligated to follow country-of-origin and substantial transformation determinations made by other agencies of the U.S. government, and that customs rulings are not dispositive with respect to the issue before the Department. Moreover, even if the Department were to find that magnesium in both ingot and granular form may be a single class or kind of merchandise, Reade contends that the Department determines country-of-origin for scope purposes not by looking solely to class or kind, but by analyzing whether the manufacturing process in a particular country effects a substantial transformation that results in a new and different article. See Cold Rolled from Argentina, 58 FR at 37065.

In support of this assertion, Reade cites a scope ruling in the antidumping proceeding on stainless steel plate from Sweden, where the Department found that a manufacturing process can effect a substantial transformation where the input and output are within a single class or kind of merchandise. See the Memorandum from Richard Weible for Joseph A. Spetrini entitled "Affirmative Scope Ruling - Stainless Steel Plate from Sweden; Avesta Sheffield," dated December 22, 1997 (Affirmative Scope Ruling - Stainless Steel Plate from Sweden). In that case, Reade notes that the Department stated:

In analyzing the country-of-origin in a situation where either intermediate product would be within the scope of the order or finding, the question is whether the intermediate product is substantially transformed such that the use of one intermediate product would differ from that of the intermediate product to which it is being compared.

Affirmative Scope Ruling - Stainless Steel Plate from Sweden, at page 7.

Reade argues that because magnesium ingot and granular magnesium are both within the scope of an antidumping order, the Department's ruling on country-of-origin cannot turn on whether there is a change in class or kind; instead, the appropriate question is whether the manufacture of granular magnesium from magnesium ingot effects a substantial transformation, as evidenced by differences in physical characteristics and uses between the two products. See Final Determination of Sales at Less Than Fair Value: 3.5" Microdisks and Coated Media Thereof from Japan, 54 FR 6433, 6435 (Feb. 10, 1989) and

Final Determination of Sales at Less Than Fair Value: Uranium from the Republic of Kazakhstan, 64 FR 31179 at 31180 (June 10, 1999).

Reade contends that the applicable legal standard on substantial transformation focuses on whether the manufacturing operations performed in the country of exportation are "of such a substantial nature to justify the conclusion that the resulting product is a manufacture of that country." See Ferrostaal Metals, 664 F. Supp. at 537. Reade notes that, in applying this standard, the Department has looked to whether there is "a degree of processing or manufacturing resulting in a new and different article." See Butt-Weld Pipe Fittings from India, 60 FR at 10546. Reade maintains that the applicable criteria in determining whether a substantial transformation has occurred include whether there is a change in the article's name, character, or use. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Steel Wire Rod From Canada, 62 FR 51572, 51573 (Oct. 1, 1997).

Reade argues that, to resolve the substantial transformation issue presented by ESM's scope ruling request, the Department must consider all evidence on the record, *de novo*, in accordance with 19 CFR 351.225(k). According to Reade, under this section of the regulations, the criteria examined include: (1) physical characteristics, (2) significant manufacturing processes, (3) uses, (4) consumer expectations, (5) channels of trade, and (6) other factors.² Certain of these factors are addressed below.

Physical Characteristics: Reade maintains that granular magnesium is physically different from magnesium ingot because: (1) various forms of granular magnesium differ in terms of reactivity, flowability, density, particle flammability, shape, size, and surface area; (2) granular magnesium is chemically volatile while ingot is not; (3) the shipping and handling of granular magnesium is subject to Department of Transportation hazardous materials regulations; and (4) granular magnesium in sizes smaller than 500 microns is subject to export controls imposed by the Bureau of Export Administration, and at sizes smaller than 60 microns, it is subject to Department of State munitions controls. Reade argues that such differences in physical characteristics establish a clear dividing line between granular and ingot magnesium, as does the existence of two separate antidumping orders for the two forms of magnesium. Reade also notes that substantial transformation may be effected through change in physical form without an accompanying change in chemical composition. See, e.g., Low Enriched Uranium, 66 FR at 65881 and Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From the United Kingdom, 64 FR 30688 (June 8, 1999) (SSSS in Coils from the UK).

²We note that Reade misstated the criteria listed in 19 CFR 351.225(k)(2). These criteria are: (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed.

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Manufacturing Process: Reade alleges that the manufacture of granular magnesium is not merely a simple grinding process, but rather a significant manufacturing process that results in an entirely new and different product. Reade asserts that the manufacturing techniques, varying to include atomization as well as mechanical grinding, require significant expertise. Reade cites to ESM's letter of December 4, 2000, in support of its contention that the manufacture of granular magnesium requires significant capital investment in substantial manufacturing facilities as well as a dedicated employee base with hazardous materials training. According to Reade, the ITC acknowledged that "the capital investment for grinding operations is not insignificant, nor were the capital expenditures {by grinders that produce granular magnesium} during the period of investigation." See Pure Magnesium from China and Israel, Inv. Nos. 701-TA-403 and 731-TA-895-896 (Final), USITC Pub. No. 3467 at page 11 (ITC Final). Reade dismisses the Magcorp claim that it could add a grinding operation to its existing production facility for a relatively small expense (see below), as Magcorp did not state the cost of constructing a grinding operation as a new facility, nor did it specify the volume or the specifications of the granular magnesium that could be produced there. Reade asserts that there is no overlap between producers of magnesium ingot and granular magnesium, and reasons that if grinding magnesium were in fact simple and inexpensive, such operations would be completed by producers of magnesium ingot. Reade alleges the value added by grinding can be significant, and in the case of chemical, pharmaceutical or military applications, the value added can be substantial.

Uses: Reade asserts that the primary use for magnesium ingot is as an alloy addition in the aluminum industry, while the primary uses for granular magnesium, given its volatile properties, are: (1) for military applications, (2) in the pyrotechnics and marine safety flare industries, (3) as an oxygen getter in the welding rod industry, (4) as a heat source in flameless food rations, (5) as a component of specialty organics in the chemical and pharmaceutical industries, (6) as a fuel in the aerospace industry, (7) as a reducing agent in the production of specialty metals such as boron, tantalum and depleted uranium, and (8) as an additive for refractories used in steel furnace linings. Reade further asserts that magnesium ingot could not possibly be used in any of the latter contexts and thus magnesium ingot and granular magnesium cannot be used interchangeably. Reade specifically disagrees with the contention in the preliminary scope ruling at page 7 that ingot and granular magnesium used for desulfurization appear to be interchangeable. Although Reade concedes that there may be overlapping sales of granular magnesium and magnesium ingot to desulfurization customers, Reade states that desulfurization customers must first grind purchased magnesium ingot before use.

Consumer Expectations: Beyond differences in physical characteristics and uses, Reade alleges a difference in consumer expectations, specifically a perception that granular magnesium and magnesium ingot are separate products with individual consumer requirements as to the size, density, and shape of granular magnesium particulate. Reade further asserts that magnesium ingot is generally sold directly to the end-user, while granular magnesium may be either internally consumed to produce desulfurization agents or sold directly to end-users.

2. *Magcorp's Rebuttal*:

Magcorp argues that the Department should reject ESM's and Reade's request and determine that the magnesium ingot imported from the PRC which is ground in Canada is covered by the order on granular pure magnesium from the PRC. According to Magcorp, ESM's and Reade's reliance on two country-of-origin rulings issued by Customs is misplaced. Magcorp contends that U.S. antidumping law holds that the Department, not Customs, is responsible for clarifying the scope of dumping findings and antidumping duty orders.

Magcorp contends that an earlier decision by the Court of International Trade (CIT) describes Customs' subservient role with respect to the scope of the orders issued by the Department.³ Magcorp notes that this ruling was reiterated in the Department's proposed regulations: "The Department agrees that a customs ruling may provide guidance; however, as recognized by the CIT, the Department is not required to follow customs rulings in making its own scope rulings." See Antidumping Duties; Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment, 61 FR 7308, 7322 (Feb. 26, 1996). See also Royal Business Machines v. United States, 507 F.Supp. 1007, 1014, n.18 (CIT 1980), aff'd, 669 F.2d 692 (Fed. Cir. 1982) (Royal Business Machines).

Further, Magcorp states that the threat of an order's being circumvented exists if unwarranted deference to Customs' country-of-origin rulings is allowed. According to Magcorp, this issue has been squarely addressed by the Department. For example, in Cold-Rolled from Argentina, the Department addressed country-of-origin determinations for scope purposes. Specifically, the Department stated that:

³See Diversified Products Corp. v. United States, 572 F.Supp. 883, 887 (CIT 1983) (Diversified Products) where the CIT stated that the Department is not obligated to follow nor is it bound by the classification determinations of Customs.

The Department's authority to make its own country-of-origin determinations is inherent in its independent authority to determine the scope of AD/CVD investigations. The Department's country-of-origin determinations, which have not always been consistent with Customs, reflect concerns specific to enforcement of the AD/CVD laws, such as the potential for circumvention of orders.

Cold-Rolled from Argentina, 58 FR at 37066.

Magcorp notes that the Department came to a similar conclusion in the Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China, 66 FR 22183, 22816 (May 3, 2001) (Hot-Rolled from China). Thus, according to Magcorp, it is clear that customs rulings are not dispositive with respect to the determination of origin for antidumping scope purposes.

As for the proper standard of analysis, Magcorp alleges that the standard for analysis outlined in Diversified Products should only be applied when: (1) determining whether separate classes or kinds of merchandise exist, or (2) a scope inquiry cannot be resolved solely by reference to descriptions of the merchandise contained in the petition, the initial investigation, and the Department's and the ITC's determinations. See 19 CFR 351.225(k)(2); see also Notice of Preliminary Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 21325, 21326 (Pure Magnesium from Israel Prelim) and SSSS in Coils from the UK, 64 FR at 30706.

Magcorp notes that, rather than conduct a Diversified Products analysis, the Department applies its own substantial transformation test to determine whether imports from third countries are subject to an order. As support for this assertion, Magcorp cites Hot-Rolled from China in which the Department stated:

In determining whether substantial transformation has occurred for the purposes of establishing the country-of-origin, we examine whether the degree of processing or manufacturing in {the third country} resulted in a new and distinct or different article . . . The Department has also stated in prior determinations that it is not bound by the country-of-origin and substantial transformation determinations made by other agencies of the U.S. government. . . . Rather, our determination{s are} made on the basis of reviewing the totality of the circumstances presented to the Department solely for the purpose of the antidumping duty proceeding. When an input from country A is further processed in country B, without any change in the class or kind of merchandise taking place, the Department normally will consider the product exported to the United States as originating in country A.

Hot-Rolled from China, 66 FR at 22186.

Notwithstanding the Department's preference for applying this general rule, noted above, Magcorp argues that the Department would reach the same conclusion by conducting an alternative analysis, namely examining whether the degree of processing or manufacturing results in a new, distinct, or different article. See, e.g., Hot Rolled from China, 66 FR at 22186; Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Taiwan, 65 FR 34658 (May 31, 2000) and accompanying decision memorandum at Comment 1; and Butt-Weld Pipe Fittings from India, 60 FR at 10546.

Magcorp maintains that, in order to reach an affirmative substantial transformation finding, there must be a substantial transformation in at least one of the following four factors: (1) significant changes in the physical, chemical, and/or strength characteristics of the material; (2) substantial value added; (3) changes in the relevant industries; and (4) changes in end uses. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value – Stainless Steel Round Wire from Canada, 64 FR 17324, 17327 (Apr. 9, 1999); Affirmative Scope Ruling - Stainless Steel Plate from Sweden; Cold-Rolled from Argentina, 58 FR at 37066; and Final Determination of Sales at Less Than Fair Value: Limousines from Canada, 55 FR 11036 (Mar. 26, 1990).

Magcorp contends that, according to the factors set forth above, conducting this analysis leads to a finding that a substantial transformation has not taken place. Specifically, Magcorp asserts that: (1) the grinding process adds minimal value to a unit of pure magnesium ingot; (2) granular and ingot pure magnesium are interchangeable for several uses; (3) there are no clear dividing lines between the different forms and sizes of granular and ingot pure magnesium; (4) the price differential between the two forms is minimal; (5) granular and ingot pure magnesium are sold through similar channels of distribution; and (6) granular and ingot pure magnesium have the same chemical composition.

In support of its contention that the grinding process adds minimal value, Magcorp notes that the capital outlay required to undertake grinding operations is significantly lower than the capital outlay required for production of pure magnesium ingot. Magcorp concludes that because the grinding process is not complex and the investment required to produce granular magnesium is comparatively lower than that of pure magnesium ingot, a substantial transformation has not occurred. See Exhibit 6 of the transcript of the October 11, 2001, ITC hearing testimony of Mr. Mike Legge, President and CEO of Magcorp, at page 19.

Magcorp further maintains that magnesium ingot and granular magnesium are interchangeable. Magcorp notes that Reade selected insignificant niche markets - chemical and pyrotechnical - to illustrate its claim to the contrary. However, Magcorp asserts that a significant percentage of imported pure magnesium in 2000 was used in desulfurization, and that the ITC found that both products were interchangeable for this use. See the ITC Final, at page 8.

Magcorp notes that pure magnesium may be cast in molds to produce ingots of varying size, and such ingots may be machined, chipped or ground into a multitude of sizes and shapes, including powder. Granular magnesium may be compressed into briquettes, which, it maintains, are identical in use to ingots. As such, Magcorp contends that there is no clear dividing line between forms, as ingot and granule sizes range widely and may overlap. See the ITC Final, at page 7.

Magcorp also claims that consumers have identical expectations of pure magnesium in all forms since there are numerous customers who use both ingot magnesium and granular magnesium in their operations. See the Antidumping Duty Petitions on Pure Magnesium From China, Israel, and Russia, dated October 17, 2000 (the Petition), at page 44.

Finally, Magcorp states that regardless of its shape, form, or size, all pure magnesium is identical in chemical composition and that the grinding of magnesium ingot into granular magnesium does not result in an altered chemical composition. See the Petition at pages 26-29; see also the ITC Final, at pages 6-7.

B. *Class or Kind*

1. *Reade's Comments:*

Reade claims that the issue of whether magnesium ingot and granular magnesium constitute a single class or kind has never been resolved. Reade states that the Department ruled in the 1992 investigations of magnesium from Canada and Norway that magnesium ingot and granular magnesium are "two distinct products appealing to completely different markets." See the memorandum to Richard W. Moreland from the Team entitled "Like Product and Industry Support Determinations in the Antidumping Duty Investigations of Pure Magnesium from Israel, the People's Republic of China, and the Russian Federation and Countervailing Duty Investigation of Pure Magnesium from Israel," dated November 6, 2000 (Attachment I at 2-3) (Like Product Memo). Reade also states that in the 1995 investigation of magnesium ingot from the PRC, the Department specifically excluded granular magnesium from its scope. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the People's Republic of China, 60 FR 16437 (Mar. 30, 1995). Reade notes that, consistent with this decision, the Department ruled in its investigation of pure magnesium in granular form from the PRC that the scope includes only granular magnesium. See

Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form from the People's Republic of China, 66 FR 49345 (Sept. 27, 2001) and accompanying decision memorandum at Comment 15 (Pure Magnesium in Granular Form from the PRC Final).

Reade maintains that the Department's preliminary scope ruling characterizes ESM's scope ruling request as a variation of an issue it has raised throughout the course of this proceeding, and one that the Department has previously addressed. However, Reade argues that the Department has never properly addressed comments made by ESM in its December 4, 2000, letter or comments made by Thompson, Hine & Flory (THF) in its November 6, 2000, letter concerning their belief that granular magnesium and magnesium ingot represent two classes or kinds of merchandise.

2. *Magcorp's Rebuttal:*

Magcorp argues that, in its October 17, 2000, petition on granular pure magnesium from the PRC (as well as the petitions in the companion cases in pure magnesium from Israel and the Russian Federation), it presented information demonstrating that all forms of pure magnesium fall within a single class or kind of merchandise and comprise a single like product. Magcorp states that both the Department and the ITC found that granular pure magnesium and pure magnesium ingot constituted a single domestic like product, and in the companion cases from Israel and the Russian Federation, the Department found that granular and ingot magnesium constituted a single class or kind of merchandise.⁴

Magcorp disputes Reade's contention that the existence of two separate antidumping orders for granular and ingot magnesium evidences a clear dividing line between these products. Instead, Magcorp contends that the existence of two orders stems from historical trends in the pure magnesium marketplace and do not reflect the conclusions of the Department or ITC with respect to classes or kinds of merchandise or like product determinations.

Magcorp argues that, contrary to Reade's claims, the Department properly addressed all scope-related comments submitted during the investigation. Specifically, Magcorp notes that, because of the then-existing order on pure magnesium ingot from the PRC, the Department provided a detailed discussion of ESM's comments in the preliminary determination of the investigation of imports from Israel. See Pure Magnesium from Israel Prelim, 66 FR at 21326. Magcorp also notes that the Department notified ESM that it had failed to address the relevant factors specified in 19 CFR 351.225(k)(2) and instead, addressed the factors relevant to a like product analysis which had already been

⁴The Department was unable to reach a similar conclusion in this case due to the existence of an existing order on pure magnesium in ingot form from the PRC. See Pure Magnesium in Granular Form from the PRC Final.

resolved in the like product memorandum. Thus, Magcorp maintains that the Department appropriately considered ESM's December 4, 2000, scope comments.

With regard to the THF letter, Magcorp contends that this letter was submitted prior to publication of the notice of initiation and raised objections to the petitioner's standing to file an antidumping petition covering granular pure magnesium. Magcorp notes that, pursuant to section 732(c)(4)(E) of the Tariff Act of 1930, as amended, the question of industry support is closed once the investigation is initiated; therefore, this objection required no additional response.

Thus, Magcorp maintains that the preliminary determinations in the original investigations provided a full discussion of the only objection to the Department's initial adoption of a single class or kind of merchandise, and indicated that there would be no change to the petitioner's request for a single class or kind. Magcorp further notes that no objection to the definition of class or kind was raised by any party for consideration in the final determination of the investigation involving imports from the PRC, and only one party raised an objection to class or kind in the companion investigations. According to Magcorp, that objection was raised by Rossborough Manufacturing Co., L.P. (Rossborough), a U.S. producer of magnesium-based reagents. As was the case with ESM's December 4, 2000, submission, however, Magcorp contends that Rossborough failed to support its objections with a discussion appropriate to the issue (*i.e.*, an analysis of the 19 CFR section 225(k)(2) factors). Accordingly, Magcorp argues that the Department appropriately made no changes to its determination that a single class or kind existed for its investigation. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (Sept. 27, 2001) (Pure Magnesium from Israel Final).

Magcorp points out that the Department has stated:

[u]nlike in an original investigation, once an antidumping duty order is issued we have no statutory or regulatory authority to redefine the classes or kinds of merchandise covered by an order; although we can clarify the scope of an order, as we regularly do in scope rulings, we cannot alter or amend the scope of an order.

See Certain Forged Steel Crankshafts from Germany; Final Results of Changed Circumstances Antidumping Duty and Determination Not to Revoke Antidumping Duty Order, 57 FR 20463, 20464 (May 13, 1992) citing Royal Business Machines, 507 F. Supp. at 1007.

ANALYSIS

The first question presented to the Department is whether the process of creating granular magnesium in Canada or another third country from Chinese magnesium ingots creates a substantial transformation, thereby changing the country-of-origin of the magnesium. The CIT, in Ferrostaal Metals, 664 F. Supp. at 537, described the issues involved in determining substantial transformation as follows:

A product cannot be said to originate in the country of exportation if it is not manufactured there. The question, therefore, is whether operations performed on products in the country of exportation are of such a substantial nature to justify the conclusion that the resulting product is a manufacture of that country The criteria of name, character and use continue to determine when substantial transformation has occurred.

Id.; also see Torrington Co. v. United States, 741 F.2d 1368 (Fed. Cir. 1984). In making a scope ruling, the CIT held that “the ITA, not the Customs Service, is responsible for clarifying, where necessary, the scope of dumping findings and antidumping orders.” See Diversified Products, 572 F. Supp. at 887. Accordingly, the Department is not bound by any customs determinations. Id.

Moreover, in Royal Business Machines, the CIT held that “the determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service.” See Royal Business Machines, 507 F. Supp. at 1014. Furthermore, in American NTN v. United States, the CIT ruled that “{T}he authority of ITA, and ITA alone, to clarify scope determinations appears to be absolute.” See American NTN v. United States, 739 F. Supp. 1555, n.1 (CIT 1990).

We note that the issue raised by both ESM and Reade in this scope request is a variation of an issue that has been raised throughout the course of this proceeding: that magnesium ingots and granular magnesium constitute separate classes or kinds based on their differing physical characteristics and uses.⁵ As a rule of thumb, changes in class or kind have often delineated

⁵For example, on December 4, 2000, ESM submitted comments requesting the Department find that pure magnesium ingot and granular magnesium constitute separate classes or kinds of merchandise. However, the Department stated in its Notice of Preliminary Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People’s Republic of China, 66 FR 21314 (April 30, 2001) (Preliminary Determination) that the scope of the investigation included only granular magnesium, and, as a consequence, ESM’s comments provided no basis for altering the scope. See Preliminary Determination, 66 FR at 21315.

substantial transformations.⁶ Although for historical reasons the Department has separate orders on ingots and granular magnesium from the PRC, the Department and the ITC consider these products to be a single product as indicated by the coverage of recent investigations on pure magnesium in all forms from Israel and Russia.⁷ Moreover, the Department and the ITC have both rejected the argument that the physical characteristics and uses of ingots and granular magnesium differ in any commercially meaningful way. See ITC Final, at pages 9 and 10.⁸

In analyzing whether a substantial transformation has occurred, we examine whether the degree of processing or manufacturing of pure magnesium ingots from the PRC in Canada into pure granular magnesium resulted in a new and distinct or different article. Our determination is made on the basis of the totality of the circumstances presented to the Department solely for the purpose of the antidumping proceeding. See Hot-Rolled from China, 66 FR at 22186; and Cold-Rolled from Taiwan, 65 FR 34658 at Comment 1. To perform this analysis, we looked to the Affirmative Scope Ruling - Stainless Steel Plate from Sweden for guidance. In that case, the Department considered the following factors in determining whether the production process results in a new and different article: (1) the physical and mechanical changes, (2) the nature of

⁶Similarly, where further processing does not change the class or kind of merchandise in question, the Department has generally found that there has been no substantial transformation. See Hot-Rolled from China, 66 FR at 22186.

⁷Pure magnesium in all forms was covered under the scope of the investigations of pure magnesium from both Russia and Israel. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from the Russian Federation, 66 FR 49347, 49348 (Sep. 27, 2001) (Pure Magnesium from Russia); Pure Magnesium from Israel Final, 66 FR at 49359. The Department determined that magnesium from Russia was not being sold at less than fair value. See Pure Magnesium from Russia, 66 FR at 49349. The ITC determined that no material injury or threat of material injury existed with respect to magnesium from Israel. See ITC Final, at page 2. Thus, the Department did not issue orders with respect to these cases.

⁸In discussing the definitions of the "like product" subject to its determinations, the ITC concluded that

... on balance, the record collected during the final phase of these investigations supports a finding of a single domestic like product, although there is some support for finding two domestic like products. Granular magnesium and magnesium ingot are produced in a continuum of forms and sizes, without any clear dividing line, they share the same chemical properties, and they were sold through similar channels of distribution. They are interchangeable at least for significant end uses, particularly in the desulfurization segment. Although the grinding operations took place in separate facilities using separate workers, the same production facilities, processes, and workers are used to produce magnesium ingot and granular magnesium up to the grinding stage. We accordingly define one domestic like product in these investigations - pure magnesium that includes both granular magnesium and magnesium ingot.

the processing, (3) the possible uses, (4) the cost of the processing, and (5) the value-added. Each of these factors is considered below:

Physical and Mechanical Changes: In the ITC Final at page 8⁹, the ITC noted:

Pure magnesium is widely used in commercial applications because it is easily machined and lightweight, has a high strength-to-weight ratio, and has special chemical and electrical properties that allow it to alloy well with metals such as aluminum. Granular magnesium and magnesium ingot are produced in a continuum of forms and sizes, without any clear dividing line between magnesium ingot and granular magnesium. Granular magnesium is more volatile in that it has a high reactivity when exposed to water, sparks, or flame, but otherwise granular magnesium and magnesium ingot have the same chemical composition.

In addition, the ITC also stated that “it is worth noting that the same production facilities, processes, and workers were used during the period of investigation to produce magnesium ingot and granular magnesium at least up to the grinding stage.” See ITC Final, at page 9. Therefore, it is clear that there can be no substantial transformation into a new and different article if both products are: (1) physically similar and (2) possess the same chemical characteristics before and after undergoing further processing. Consequently, the grinding process could not be significant enough to effect a substantial transformation, creating a new and different article.

Nature of the Processing: The ITC Final noted that, “Grinding {magnesium ingot into granular magnesium} is not a particularly complex process . . .” See ITC Final, at page 12. In addition, as noted above, the grinding of magnesium ingot into granular magnesium does not result in different physical or chemical properties. As such, the ITC found that ingot and granular magnesium constituted a single like product; and we treated ingot and granular magnesium as a single class or kind of merchandise. Thus, based on the ITC’s finding that the grinding operation is not a significant manufacturing process, we find that grinding ingots into granular form does not constitute a substantial transformation.

Possible Uses: As part of the Like Product Memo, the Department determined that, based on petitioner’s descriptions of pure magnesium in both ingot and granular form, magnesium ingots and granular magnesium appear to have similar relevant physical characteristics. Moreover, for some segments of the market, particularly magnesium for desulfurization, the two forms of the product appear to be interchangeable. See the public version of the Like Product Memo, at page 6. Similarly, the ITC Final also noted:

⁹The petitioner argued that magnesium ingot may be ground into granular form, and granular magnesium may be remelted into ingots or compressed into briquettes. Additionally, the ITC noted that the record does not support Rossborough’s argument of a one-inch thick dividing line between granular magnesium and magnesium ingot. See the ITC Final, at page 8, footnotes 23 and 24.

The record indicates that magnesium ingot and granular magnesium are interchangeable, particularly in the desulfurization segment and other segments where there were overlapping sales. There is evidence that over the period of the investigation, grinders, in particular, who use either magnesium ingot (once ground) or granular magnesium in their production processes, displaced purchases of domestic and imported magnesium ingot with purchases of granular magnesium from China.

ITC Final, at page 8. Therefore, the record indicates that magnesium ingot and granular magnesium are interchangeable, particularly in the desulfurization segment and other segments where there were overlapping sales. See the ITC Final, at page 8. Consequently, there can be no substantial transformation into a new and different article if both products are interchangeable in significant segments of the marketplace.

Cost of the Processing and Value-Added: While there is no specific information on the cost of the processing, the ITC noted in its final determination that, "Historically, granular magnesium had been higher priced than magnesium ingot to reflect additional grinding costs. This pricing relationship changed, however, and by the end of the period of investigation, granular magnesium was selling for lower prices than magnesium ingot." See the ITC Final, at page 12. Moreover, the ITC Final indicates that the value-added by grinding operations was approximately 6 to 15 cents per pound. See ITC Final, at page 11. The ITC, in its dissenting views of Commissioner Okun, noted that the value-added by grinding was "... minor relative to the cost of producing magnesium ingot." See ITC Final, at page 31. The ITC also noted that the value-added data are of limited use, given the fact that they also include reagent activities.¹⁰ See ITC Final, at page 12. Because the value-added data on grinding magnesium ingot into granular magnesium is unclear, it is impossible to rely on such data in conferring substantial transformation into a new and different product. Consequently, we find that there is no specific evidence that the value-added is significant enough to effect a substantial transformation, creating a new and different article.

Therefore, based on the findings of the Department and the ITC, we find that the grinding operation is not a significant manufacturing process. Accordingly, we find that grinding ingots into granular form does not constitute a substantial transformation, and, we determine that the country of origin for antidumping purposes remains the PRC.

The next question is whether granular magnesium falls within the scope of the antidumping duty order. The Department's regulations make clear that, in scope rulings made pursuant to 19 CFR 225(k)(1), we rely on the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Department (including prior scope determinations) and the ITC. When the above criteria are not dispositive, will the Department will further

¹⁰The ITC Final notes that, "The Commission asked the grinders to report their data corresponding to granular magnesium, but they reported that they were unable to do so, and their reported information includes some reagent activities." See ITC Final, at page 12, footnote 53.

consider (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed, pursuant to 19 CFR 351.225(k)(2).

In the Antidumping Duty Order: Pure Magnesium in Granular Form from the People's Republic of China, 66 FR 57936 (Nov. 19, 2001), the Department defined the scope to consist of:

. . . (1) products that contain at least 99.95 percent primary magnesium, by weight (generally referred to as "ultra- pure" magnesium); (2) products that contain less than 99.95 percent but not less than 99.8 percent primary magnesium, by weight (generally referred to as "pure" magnesium); (3) chemical combinations of pure magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight, that do not conform to an 'ASTM Specification for Magnesium Alloy' (generally referred to as 'off-specification pure' magnesium); and (4) physical mixtures of pure magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight. Excluded from this order are mixtures containing 90 percent or less pure magnesium by weight and one or more of certain non-magnesium granular materials to make magnesium-based reagent mixtures. The non-magnesium granular materials of which the Department is aware used to make such excluded reagents are: Lime, calcium metal, calcium silicon, calcium carbide, calcium carbonate, carbon, slag coagulants, fluorspar, nepheline syenite, feldspar, aluminum, alumina (Al_2O_3), calcium aluminate, soda ash, hydrocarbons, graphite, coke, silicon, rare earth metals/mischmetal, cryolite, silica/fly ash, magnesium oxide, periclase, ferroalloys, dolomitic lime, and colemanite. A party importing a magnesium-based reagent which includes one or more materials not on this list is required to seek a scope clarification from the Department before such a mixture may be imported free of antidumping duties.

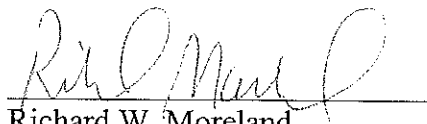
Based on the description of the merchandise in question contained in ESM's scope application, the description of the subject merchandise in the order, and the determinations of the Department and the ITC, the granular magnesium in question is clearly covered by the scope of the order. As such, we continue to find that it is subject to the antidumping duty order covering pure magnesium in granular form from the PRC.

RECOMMENDATION

Because the product descriptions contained in the application, the petition, the initial investigation, and the determinations of the Department and the ITC are sufficient to decide this issue, we recommend determining that pure magnesium in granular form that is ground in Canada or another third country from pure magnesium ingots produced in the PRC is within the scope of the order on granular pure magnesium from the PRC, pursuant to 19 CFR 351.225(k)(1).

Agree

Disagree


Richard W. Moreland
Deputy Assistant Secretary
Import Administration, Group I

August 20, 2002