

68 FR 1817, January 14, 2003

A-122-814
Administrative Review
POR: 8/1/00-7/31/01
Public Document
DAS I/1: SH

January 7, 2003

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary for
Import Administration

FROM: Susan Kuhbach
Acting Deputy Assistant Secretary
Import Administration, Group I

SUBJECT: Issues and Decision Memorandum for the 2000/2001 Administrative Review of Pure Magnesium from Canada; Final Results

SUMMARY

We have analyzed the brief submitted in the 2000/2001 administrative review of pure magnesium from Canada. We have not made any changes to the preliminary results as a result of our analysis. We recommend that you approve the position we have developed in the Discussion of Issues section of this memorandum.

BACKGROUND

On September 9, 2002, the Department of Commerce (“the Department”) published the preliminary results of the administrative review of the antidumping duty order on pure magnesium from Canada. See Pure Magnesium from Canada; Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Intent Not to Revoke Order in Part, 67 FR 57217 (September 9, 2002) (“Preliminary Results”). In the Preliminary Results, we preliminarily determined not to revoke the antidumping duty order with respect to pure magnesium from Canada produced by Norsk Hydro Canada Inc. (“NHCI”).

The period of review (“POR”) is August 1, 2000, through July 31, 2001. We invited parties to comment on the Preliminary Results. On October 9, 2002, U.S. Magnesium LLC (“the petitioner”), filed a case brief. NHCI did not file case or rebuttal briefs.

DISCUSSION OF ISSUES

Comment 1: Commercial Quantities Benchmark

Petitioner's Argument: In the Preliminary Results, the Department used the sales volume from the original period of investigation (i.e., pre-antidumping duty order period) as the benchmark to determine whether NHCI shipped in commercial quantities during the POR. However, the Department adjusted the benchmark volume to reflect the worldwide shift in demand away from pure magnesium toward alloy magnesium. The petitioner argues that the Department erred by adjusting the commercial quantities benchmark volume. According to the petitioner, in determining whether sales have been made in commercial quantities, the Department typically relies on the original period of investigation to determine a company's normal commercial behavior. See Pure Magnesium from Canada: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order in Part, 65 FR 55502 (September 14, 2000). The petitioner asserts that, in the Preliminary Results, the Department erred by departing from this standard without justification.

The petitioner contends that the Department has changed the pre-order benchmark on only two occasions, both of which were based upon evidence of "unusual or significant" circumstances regarding the production of subject merchandise. See Professional Electric Cutting Tools from Japan: Final Results of the Fifth Antidumping Administrative Review and Revocation of the Antidumping Duty Order, in Part, 64 FR 71411 (December 21, 1999) ("PECTs from Japan") and Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order: Brass Sheet and Strip from the Netherlands, 64 FR 48760, 48766 (September 8, 1999) ("Preliminary Results of Brass Sheet and Strip from the Netherlands"). In PECTs from Japan, the Department determined a significant change in business practice had occurred when the respondent closed its home market facilities, invested in a U.S. manufacturing facility, and subsequently shifted production of subject merchandise to the U.S. facility. In the Preliminary Results of Brass Sheet and Strip from the Netherlands, the Department determined a significant change in business practice had occurred when the respondent acquired a U.S. producer of subject merchandise. Consequently, for the preliminary results, the Department changed the benchmark from the pre-antidumping duty order period to the year of acquisition of the U.S. producer. However, the preliminary results were not upheld because the Department determined that the aforementioned change was not intended to be long-term or permanent. See Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands, 65 FR 742, 751 (January 6, 2000) ("Final Results of Brass Sheet and Strip from the Netherlands").

The petitioner objects to the Department's contention that a worldwide shift in demand from pure to alloy magnesium constitutes an analogous "unusual or significant" circumstance because there has not been a significant change in NHCI's business practices. Rather, NHCI's switch from pure to alloy magnesium is merely a change in its mix of products. See Memorandum from the Team to Richard W.

Moreland, “Commercial Quantities,” dated September 3, 2002, at 7 (“Commercial Quantities Memorandum”). Finally, the petitioner asserts that based upon shipment data presented in the Commercial Quantities Memorandum, at 4 and 8, NHCI’s small volume of shipments of pure magnesium to the United States is not reflective of the rising worldwide consumption of pure magnesium.

Respondent’s Argument: The respondent did not submit comments on this issue.

Department’s Position: We disagree with the petitioner that the Department inappropriately adjusted the pre-order sales benchmark volume. We have developed a procedure for revocation that is described in 19 CFR 351.222. This regulation requires that a company requesting revocation must submit a certification that the company sold the subject merchandise in commercial quantities in each of the three years forming the basis of the request. See 19 CFR 351.222(e)(1)(ii). Therefore, we must determine, as a threshold matter, in accordance with our regulations, whether the company requesting revocation sold the subject merchandise in commercial quantities in each of the three years forming the basis of the request. In examining commercial quantities for purposes of revocation, the Department must be able to determine that sales in the years under consideration are reflective of the company’s normal commercial activity. The determination as to whether sales are made in commercial quantities is made on a case-by-case basis, based on the unique facts of each proceeding. Neither the statute nor the Department’s regulations prescribes a specific standard for determining whether sales have been made in commercial quantities. See section 751(d) of the Tariff Act of 1930, as amended (“the Act”) and 19 CFR 351.222.

As stated in prior cases, we have determined that pre-order sales volumes of subject merchandise provide the most relevant benchmark and only in unusual or significant circumstances will we depart from this benchmark to ascertain a company’s normal commercial behavior. In PECTs from Japan, we found that a “significant change in business practices” that explains the decline in an individual company’s exports of subject merchandise may render a pre-order benchmark inappropriate for purposes of determining whether U.S. sales were made in commercial quantities.

In the Preliminary Results of Brass Sheet and Strip from the Netherlands, we evaluated whether pre-order sales volumes were the proper benchmark to use where an individual respondent acquired a U.S. manufacturing facility in 1991 (subsequent to the imposition of the order) and had shifted a substantial portion of its production of subject merchandise to the United States. The Department preliminarily found that this “unusual occurrence” explained the subsequent decline of U.S. sales and, therefore, provided sufficient reason to change the benchmark. However, in the Final Results of Brass Sheet and Strip from the Netherlands, we found that, because the acquisition and subsequent production shift to the U.S. market was temporary in nature, it was not reasonable to conclude that the respondent’s commercial practices were permanently changed or its current selling experience was reflective of the company’s normal commercial behavior. As a result, the Department concluded that the pre-order benchmark was more appropriate.

The circumstances of this case are distinguishable from the aforementioned cases. In both PECTS from Japan and the Preliminary Results of Brass Sheet and Strip from the Netherlands, we found that a long-term, significant change in the business practice of an individual company provided a logical commercial explanation for the subsequent decline in subject merchandise sales and, therefore, we relied on (or considered relying on) a different benchmark period that better reflected the company's normal commercial experience. In this case, however, the Department has determined that long-term and significant changes in the worldwide pure magnesium industry warrant an adjustment of the NHCI's pre-order benchmark volume. See Commercial Quantities Memorandum, at 7. We disagree with the petitioner that this approach is incorrect, and we continue to find the pre-order period appropriate as the starting point of our analysis subject to the revisions discussed in the Commercial Quantities Memorandum. As we stated in the Commercial Quantities Memorandum:

We believe that there is a basis for moving away from using the pre-order period as our benchmark of commercial normalcy. While a company's individual decision to change its business focus is not persuasive, in determining whether a company's exports to the United States constitutes "normal" commercial behavior for that company the Department may weigh other factors. One such factor is whether a company's commercial behavior is reflective of the commercial behavior of other companies in the same industry. In this case, there has been a significant and long-term change in the magnesium industry's business practices resulting from worldwide market forces, which may explain the decrease in NHCI's exports of subject merchandise to the United States.

See Commercial Quantities Memorandum, at 7. Based on the evidence on the record and the arguments presented, we disagree with the petitioner regarding the relative importance of pure magnesium in NHCI's business practice. NHCI has demonstrated that total shipments of pure magnesium to all markets has changed substantially since 1991 and its experience is similar to other companies in the industry. See Commercial Quantities Memorandum at 4. Similarly, we find that, based on the facts in this case, NHCI's worldwide shipments of alloy magnesium have changed substantially in relation to shipments of pure magnesium since 1991, and these circumstances together may explain NHCI's commercial behavior in the United States.

We recognize that, in most cases, sales of subject merchandise sold prior to the imposition of the order will provide the most relevant benchmark. However, in unusual instances, such as those evident in this case, flexibility may be warranted in order to evaluate properly a company's normal commercial practice. We find that the unique circumstances in the magnesium industry are a significant factor that has affected the business practices of NHCI. See Commercial Quantities Memorandum at 8. In particular, there has been a long-term, consistent, and significant shift in worldwide consumption since the imposition of the antidumping duty order away from pure magnesium and toward alloy magnesium. Similarly, we acknowledge that since the imposition of the order in 1991, NHCI's total shipments of

pure magnesium have decreased. Thus, we find that NHCI's commercial behavior is consistent with the long-term market shift in the magnesium industry. We also find that NHCI has demonstrated that the shift away from pure magnesium toward alloy magnesium qualifies as a long-term and significant change in the company's commercial practice.

Therefore, consistent with our prior determination to adjust the commercial quantities benchmark, we find that it is reasonable to conclude that NHCI's commercial practice has changed sufficiently to warrant an adjustment to the pre-order benchmark used in the commercial quantities benchmark analysis. However, for the reasons explained in the Commercial Quantities Memorandum, we continue to find that NHCI did not make sales in commercial quantities in the current review period and, therefore, does not qualify for revocation.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above position. If this recommendation is accepted, we will publish the final results of this review and the final weighted-average dumping margin for NHCI in the Federal Register.

AGREE _____ DISAGREE _____

Faryar Shirzad
Assistant Secretary for
Import Administration

Date