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REMAND DETERMINATION:
MAGNESIUM CORP. OF AMERICA, ET AL. V. UNITED STATES,
94-06-00789

This remand determination is submitted in accordance with the Court's August 27, 1996, decision and order, which granted the Department of Commerce's (Department) request for a voluntary remand with respect to 1) the calculation of SG&A expenses; and 2) the treatment of export taxes. Regarding SG&A expenses, the Department acknowledged that it used the incorrect line item as its source for the surrogate SG&A value. As explained below, this error has now been corrected. Regarding its treatment of export taxes, the Department noted that it was in the process of reevaluating its interpretation of section 772 of the Act as applied to nonmarket economies and wanted to ensure that its treatment of export taxes in this case was consistent with that reevaluation. For the reasons discussed below, the Department has determined that it is not appropriate to deduct export taxes from United States price where that tax is charged by a nonmarket economy government.

A. VALUATION OF SG&A EXPENSES

In its calculation of SG&A, the Department used the general selling expenses ("GNAU") line item in the public submission of a Brazilian silicomanganese producer, as reported in the antidumping investigation of Silicomanganese from Brazil. Prelim. Calc. Memo; P.R. Doc 163 at 4 (Fiche No. 37 at 4); Exhibit 9. Upon review, the Department acknowledged that this field did not include selling expenses. On remand, the Department has used the field entitled "TOTGENU" which reflects the SG&A expenses incurred by the silicomanganese producer. We

note that in reexamining the SG&A calculations, we concluded that it was more accurate to calculate an average percentage using both products listed in the Silicomanganese worksheet. As a result of this correction, the SG&A figure increases from 10.47 percent to 18.95 percent.

B. TREATMENT OF EXPORT TAXES PAID BY NONMARKET ECONOMY PRODUCERS TO A NONMARKET ECONOMY GOVERNMENT

1. Background

Both Russian producers of magnesium, Berezniki Titanium and Magnesium Works (AVISMA) and Solikamsk Magnesium Works (SMW), reported that their export sales were subject to export taxes imposed by the government of the Russian Federation (Russia). The export tax is calculated by applying a fixed ECU (European Currency Unit) rate per ton to the quantity of merchandise. AVISMA Sections C and D Questionnaire Response; P.R. 72 (Fiche #14 at 1); Exhibit 16.[1] The exporting company may choose whether to pay the export tax in dollars or rubles. Id. During the period of investigation, AVISMA reported that it paid export taxes on its export sales both in rubles and dollars. Id. SMW, the other Russian producer, also reported that it paid the export tax on its sales for export, which it chose to pay in dollars. SMW Section C and D Questionnaire Response; P.R. 73 (Fiche #15 at 1); Exhibit 17.

The Final Determination, in explaining the adjustments made to United States Price ("USP") noted that no deduction was made for "export taxes paid by Russian

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[1] References are to public ("P.R.") or non-public ("N.P.R.") documents in the administrative record. Exhibit references are to the appendices filed with the Government's brief on March 22, 1996.

companies to the Russian government because the actual amounts paid are an internal expense within an NME country." 60 Fed. Reg. at 16,442. As the Department explained,

> We [] have not accounted for the export tax in our LTFV [less than fair value] calculations. With respect to the reduction of net receipts to Russian producers, the premise in determining values in NME proceedings is that pecuniary aspects of internal transactions are considered meaningless and thus ignored. The export tax paid to an NME government is an intra-NME transfer of funds between a Russian producer and the Russian government. As such, it is inappropriate to account for such transfers in our LTFV analysis just as it is NME prices and costs.

60 Fed. Reg. at 16,448. The Department further noted that its treatment of a NME export tax was consistent with its interpretation with other sections of the same statutory provision:

> The Department has interpreted section 772(e)(2), another paragraph dealing with the general question of reductions to U.S. price, as not requiring the deduction of selling expenses from [exporter's sales price] when [foreign market value] is based on factors of production. The issue of the export tax is analogous. Similarly, we interpret 772(d)(2)(B) as not requiring the deductions of an intra-NME transfer of funds, even if it is in the form of an export tax.

Id. Finally, the Department determined that the "export taxes" were not a significant aspect of the margin calculations:

> in these proceedings, even if a reduction to [United States Price] to account for the export tax had been deemed appropriate, it would not have resulted in a positive margin for any company receiving a calculated rate.

Id.

In their complaint, plaintiffs challenged the Department's treatment of export taxes imposed by the Russian government. In addition, plaintiffs asserted for the first time that Russia's exchange rate balancing requirements constitute an export tax. In its August 27, 1996, decision, the Court ruled that plaintiffs' failure to raise the exchange rate balancing issue at the administrative level barred plaintiffs from raising this issue before the Court. As a result, the Department's remand determination will not address plaintiffs' exchange rate balancing requirements claim.

1. Statutory Treatment of Nonmarket Economy Countries

The Department's treatment of Russia as a "nonmarket economy country"[2] has not been challenged. In such a country, the presumption under U.S. law is that a NME producer's prices are set in a manner that has little relation to real costs. While government control of price and cost structures may vary in degree among nonmarket economy countries -- many of which are making a transition towards a more market-oriented system -- this statutory presumption regarding NME prices remains until the NME country designation is removed.

Given the presumed absence of market-based pricing in nonmarket economy countries, it is not possible for the Department to utilize its standard methodology for

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2 Section 771(18) of the Act defines a nonmarket economy country as

> any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

19 U.S.C. § 1677(18) (1994).

determining whether dumping exists (i.e., by comparing home market and U.S. prices of the subject merchandise). Indeed, application of the traditional antidumping duty methodology would not only produce distorted results but would permit the government of the NME country to manipulate the cost and price structures of that country's industries in order to protect those industries from antidumping duty liability.

Starting in 1974, Congress set special rules for the treatment of NMEs under the antidumping laws.[3] The legislative history of these rules make clear that Congress was

> concerned that the technical rules contained in the Act are insufficient to counteract dumping from State-controlled-economy countries where the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes.

S. Rep. No. 1298, 93rd Cong., 2d Sess. (reprinted in 1974 U.S.C.C.A.N. 7186, 7311). Thus, the entire premise of the NME provision of the statute is that prices (and costs) in a NME country are meaningless measures of value. As a result, the Act requires that the Department substitute NME country prices with "surrogate" factor prices identified in comparable market economy countries. 19 U.S.C. § 1677b(c).

In this instance, the Russian magnesium producers reported that their export sales were subject to export taxes imposed by the Russian government, which the exporting company could choose to pay in dollars or rubles. But regardless of the manner in which the export taxes are paid, the Department is directed to ignore

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[3] Trade Act of 1974, Pub. L. No. 93-618, § 312, 88 Stat. 1978, 2047 (1975) (codified as amended at 19 U.S.C. § 1677b(c)).

economic transactions between the government and producers in a nonmarket economy.

2. The Express Language of Section 772 Is No Bar To The Department's Treatment of Export Taxes

Section 772(c)(2)(B) provides that United States price will be reduced by

> the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States....

19 U.C.S. § 1677a(c)(2)(B). The language of the statute is not absolute; export taxes are to be deducted only if they 1) are paid on exports to the United States and 2) included in the export price of the merchandise under investigation. Of course, in a market economy country, a producer subject to a government-imposed export tax can be expected to actually incur the tax liability and to incorporate the tax amount into its cost and pricing structure. In such a case, the conditions of section 772 (payment of the export tax and inclusion in price) are satisfied.

No such presumption can be made, however, in the context of a nonmarket economy. The nonmarket economy is governed by a presumption of widespread intervention and influence in the economic activities of enterprises. An export tax charged for one purpose may be offset by government transfers provided for another purpose. In such circumstances, the Department has no basis for determining whether and to what extent a tax might be reflected in a price. This is the very type of internal NME transfer that the statute directs the Department to reject.

Statutory interpretations which conflict with the overall statutory purpose

should be rejected. See, e.g., Lasko Metal Products, Inc. v. United States, 810 F.Supp. 314, 317-18 (CIT 1992), aff'd 43 F.3d 1442 ("Lasko"). In Lasko, this court rejected plaintiff's argument that the plain language of the Act required rigid application of the factors of production test. While the Act states that the Department "shall determine" foreign market value using the factors of production, the overall purpose of the statute to determine margins as accurately as possible permitted the agency to "mix and match" approaches when import prices from market economy countries would be more accurate. 43 F.3d at 1445-46. Similarly, plaintiffs' interpretation of section 772 as requiring deduction of the export tax is inconsistent with the overall statutory directive to reject intra-NME transactions. Where such an interpretation would conflict with the overall statutory purpose, it should be rejected.

The Department's interpretation not to include intra-NME transfers in its analysis is consistent with the statutory guidance provided by Congress. To do otherwise would permit the government of the NME country to manipulate the cost and price structures of that country's industries in order to protect those industries from liability under the unfair trade laws. To make a deduction for export taxes imposed by a NME government would unreasonably isolate one part of the web of transactions between government and producer.

The Department's uniform approach to intra-NME transfers can be seen in its policy regarding transfers (or "subsidies") paid by a NME government to a NME producer. The Department -- with the approval of the Court of Appeals -- has declined to find such transfers to be subsidies given the nature of a nonmarket economy. Such

an economy is riddled with distortions, with the government influencing price and cost structures, regulating investment, wages and private ownership, and allocating credit.[4] Attempts to isolate individual government interventions in this setting -- whether they be transfers from the government to exporters or from exporters to the government -- make no sense.

3. The Department's Treatment of Export Taxes Is Consistent With the Department's Practice In NME Cases

As the Department noted in its request for remand, the agency was in the process of reevaluating its interpretation of section 772 of the Act as applied to nonmarket economies. In its final determination in Bicycles from the People's Republic of China, 61 Fed. Reg. 19,026 (April 30, 1996), the Department reviewed its treatment of export taxes and selling expenses incurred by a NME producer. Ultimately, the Department determined that an alleged export tax was, in fact, "more analogous to a business license fee or an income tax, rather than a tax levied solely on exports." 61 Fed. Reg. at 19,038. Consistent with its treatment of such exchanges, the Department declined to make a deduction for the intra-NME transfer.[5]

The Department did revise its treatment of U.S. selling expenses incurred by the

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4 Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 19,370 (1984); Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

5 It is worth noting that an NME government's ability to label a transfer between itself and its producers (as a "business license fee," "income tax," or "export tax") further complicates the Department's ability to meaningfully evaluate -- never mind value -- such a transfer.

NME producer. 61 Fed. Reg. at 19031. Nevertheless, in making the adjustment to United States price as required by section 772(d)(1), the Department was deducting selling expenses incurred in the United States by a company affiliated with the NME producer. As such, one party to the transactions giving rise to these expenses was a market economy supplier. Consistent with the position approved by this Court and the Federal Circuit in Lasko, payments to a market economy supplier are meaningful and, hence, provide a basis for making an adjustment to United States price for the selling expenses incurred in the United States. That situation differs markedly, however, from the situation before this Court, where the export tax is a transfer between the NME enterprise and its government. As noted above, this transfer -- though related to export sales to the United States -- takes place within the nonmarket economy. And the statute is clear in directing the Department to reject such an intra-NME transfer.

Contrary to plaintiffs' assertion, our finding that one magnesium producer, SMW, was entitled to a separate rate in no way undermines this reasoning. The separate rate determination focuses only on the degree to which an individual producer is entitled to individual duty rates for its merchandise, separate and apart from the single country-wide rate applied to all other exporters. A separate rate determination indicates that a particular producer has a degree of autonomy in carrying out export transactions. The separate rate determination largely ignores other governmental influences which could be exerted in the NME setting over such areas as prices of inputs, wages, and taxes. Moreover, that determination does not go as far as, for example, a market-oriented industry determination, in which a particular industry (and,

by extension, its producers) is found to be operating in accord with market principles. No such determination was made in this case. In the absence of such a finding, and where Russia's status as a "nonmarket economy country" is uncontradicted, the Department was correct to dismiss the price and cost structures of the Russian magnesium producers.

Finally, plaintiffs improperly compare the Department's treatment of export taxes with its approach to by-product offsets. Plaintiffs' December 19, 1995, Brief ("Pl. Brief") at 56-57. According to plaintiffs, the Department does adjust for the value of intra-NME transfers when analyzing by-products. However, the two situations are not analogous. In a by-product situation, the NME producer is essentially producing two products from the reported factors of production. It only makes sense that the production of the second product be accounted for, to reflect the real (i.e., input and raw material) cost of producing the subject merchandise. The Department does this by separating out real and price components and requesting from the NME producer data on the real component (i.e., the volume of the by-product). For the price component, the Department uses surrogate country prices. In no case would the by-product be valued in the NME because, as stated above, prices in NMEs do not have economic meaning. The Department's treatment of by-products can in no way be compared to a tax payment between a NME enterprise and its government. The tax payment involves no real cost element (in the sense described above) -- it is nothing more than a transfer between the producer and the NME government. For this reason, such a transfer -- unlike the by-product situation -- is precisely the type of intra-NME

"transaction" the Department is directed to ignore.

C. Interested Parties Comments and Department Response

1. Correction of Russian Producers' SG&A Expenses

a. Summary of Interested Parties Comments

Petitioners—Magcorp, Dow Chemical et al—and respondents—Avisma Titanium-Magnesium Works, Solikamsk Magnesium Works, Interlink, Razno Alloys, Gerald Metals, Hochschild Partners, and Greenwich Metals—agree with the Department's recalculation of SG&A.

Respondents—Avisma Titanium-Magnesium Works, Solikamsk Magnesium Works, Interlink, and Razno Alloys—do not dispute the Department's recalculation of the SG&A. However, respondents argue that the Department has SG&A data on record that better reflects the expenses of a magnesium producer in Brazil. Respondents feel the Department should choose to use more appropriate SG&A ratios, derived from two Brazilian aluminum producers ranging from 11.5 to 12.5 percent. The fact that these ratios are within the same range suggest that the ratio that the Department used in the remand is too high and would distort a fair value calculation.

b. Department Response

In its calculation of SG&A, the Department used the general selling expenses ("GNAU") line item in the public submission of a Brazilian silicomanganese producer. The Department acknowledged that this field did not include selling expenses. On remand, the Department used the field entitled "TOTGENU" which reflects the SG&A expenses incurred by the silicomanganese producer. We note that in reexamining the

SG&A calculations it was more accurate to calculate an average percentage using both products listed in the Silicomanganese worksheet. As a result of this correction, the SG&A figure increases from 10.47 percent to 18.95 percent.

We disagree with respondents that the Department should choose SG&A ratios derived from Brazilian aluminum producers. The respondents did not bring challenge to our use of the public SG&A data from the Silicomanganese from Brazil case. The Department's request for a remand on this issue was based on its agreement with the petitioners' complaint that the "GNAU" line item in that public submission did not include selling expenses. By using the field entitled "TOTGENU" -- which reflects selling expenses -- the Department has responded to this complaint. Thus, regardless of whether the use of SG&A ratios derived from different metal producers may have been appropriate in the initial investigation, respondents' proposal is outside the scope of the remand.

2. Treatment of Export Taxes

a. Summary of Interested Parties Comments

Petitioners argue that the Department's failure to deduct export taxes from United States price (USP) is inconsistent with the statute. Petitioners state that the plain and unambiguous language of section 772 requires the deduction and that no exception is made for transactions involving a NME. According to petitioners, the Department improperly relies in the special rules for NMEs found in section 773, which prohibits the foreign market value (FMV) of the merchandise from being determined on the basis of actual prices and costs within the NME. Petitioners state that even if the

provision dealing with the calculation of FMV in NME cases were relevant to the calculation of USP -- and they assert that it is not -- there is no directive in the FMV section of the statute that the Department reject or ignore all internal transactions within a NME. In fact, petitioners argue that the Department's rationale is inconsistent with its practice of allowing by-product offsets based on transactions within the NME. Moreover, petitioners claim that record evidence demonstrates that the export tax imposed by the Russian government is included in the USP and that the Department's treatment of transportation expenses incurred within a NME for U.S. sales shows that such intra-NME expenses can be accounted for and deducted from USP. Petitioners argue that the Department's remand determination is inconsistent with its determination in PRC Bicycles, where the agency stated that the plain language of section 772 required selling expenses associated with economic activity in the United States to be deducted from USP.

Respondents Avisma and SMW agree with the Department's determination not to deduct export taxes. Respondents contend the underlying assumption that a producer is responsive to market forces and will account for an export tax in the selling price is refuted by the NME determination, *i.e.*, that Russian producers and exporters do not respond to market forces.

Additionally, respondents point out, the sales data does not support a determination that export taxes were included in the selling price. Respondents cite to the fact that during the investigation the export taxes dropped while the selling prices increased. Respondents contend that if an export tax were included in the selling

price, the opposite would occur, i.e., the selling price would decrease as the export tax decreased. Further, respondents argue that the export taxes were instituted for reasons of internal policy, supporting their claim that the prices Russian exporters command for their products in world markets are independent of export taxes. Finally, respondents argue that neither Avisma nor SMW (except for one small sale) exported directly to the United States. Therefore, it is impossible to argue that export taxes were imposed on sales to the United States.

b. Department Response

We disagree with petitioners. As noted above, the language of section 772(d)(2) is not absolute; export taxes are to be deducted only if they are 1) paid on exports to the United States; and 2) included in the export price of the merchandise under investigation. As respondents point out, where a NME producer (in this case, Avisma) does not export directly to the United States, it is difficult to determine what impact an export tax imposed on the NME producer by its government will have on the eventual U.S. transaction. In any event, in the Department's view, the more fundamental point is that the Department cannot determine whether an export tax imposed by the NME government is included in the export price to the United States.

Since the language of section 772(d)(2) is not absolute, the Department is obliged to interpret that provision in a manner which does not conflict with the overall statutory purpose. See, e.g., Lasko.[6] And the overall statutory purpose with respect

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[6] While petitioners seek to distinguish Lasko, they do so on the basis that we have no discretion to interpret section 772(d)(2). This point, of course, is the central

to the treatment of NMEs -- articulated in sections 771(18), 773(c) and the legislative history -- is that cost and pricing structures in a NME are inherently unreliable. Russia's NME designation obligates the Department to reject NME values, substituting instead the "surrogate" factor prices and costs identified in comparable market economy countries.

In the Department's view, the NME designation must have some relevance to costs incurred by the NME producer on its U.S. sales. How can the Department determine that such costs are included in the export price of the merchandise under investigation, as required by section 772(d)(2)? At best, where the expenses represent a tangible good or service, the Department can value that good or service in a surrogate country. Petitioners' argument with respect to intra-NME transportation expenses is relevant here. As petitioners point out, the Department will deduct from USP the cost of transportation from the NME producer's plant to the port. But this transportation expense differs significantly from a export tax imposed by the NME government. The Department is able to value transportation expenses in a surrogate country using the rate that would apply to the physical movement of comparable materials over comparable distances.

The NME-imposed export tax cannot be valued in a similar fashion. Petitioners would have us rely on the export tax amounts reported by the NME producers while it is asserted that all other NME values are suspect. But as we noted above, to deduct

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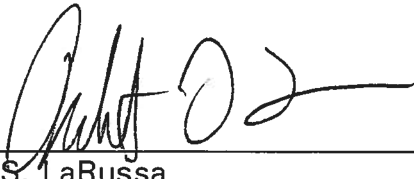
disagreement between petitioners and the Department.

these export tax amounts reported as paid to the NME government would unreasonably isolate one part of the web of transactions between government and producer. Moreover, despite the fact that -- in some instances -- Russian producers paid their export taxes in dollars rather than rubles, we believe the better view is that this economic transaction between the NME producer and its government cannot be meaningfully valued, regardless of the manner in which the export taxes are paid.

Petitioners' argument regarding the Department's treatment of by-product offsets fails to detract from the Department's rationale. As described in the Final Determination, the Department offsets the cost of manufacture (COM) to reflect by-products used or sold within the NME country. 60 Fed. Reg. at 16,446 (comment 5). But the by-product offsets were not valued within the NME; rather, the quantity of the by-product was valued in the surrogate country. Again, the export tax is not subject to this type of valuation. This distinguishes this case from PRC Bicycles where the Department focused on actual selling expenses associated with U.S. economic activity which could be quantified.

D. Conclusion

For the reasons stated above, we have determined that it is not appropriate to deduct export taxes from United States price where that tax is paid by a nonmarket economy producer to a nonmarket economy government.



Robert S. LaRussa
Acting Assistant Secretary
for Import Administration

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(Date)