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These consolidated binational panel reviews were initiated by requests for panel review filed by the Gouvernement du Québec ("Québec") and Norsk Hydro Canada, Inc. ("NHCI"). The Government of Canada subsequently filed a notice of appearance in support of Québec and NHCI. These parties challenge the final affirmative injury determinations of the U.S. International Trade Commission ("ITC") in Magnesium From Canada, Inv. Nos. 701-TA-309 and 731-TA-528, USITC Pub. 2550 (Aug. 1992). The ITC and the petitioner in the ITC's administrative proceeding, Magnesium Corporation of America ("Magcorp"), appear in support of the ITC's determinations.

Having carefully reviewed the briefs and the arguments presented by the parties at the hearing conducted on May 27, 1993,¹ the Panel concludes that the ITC's finding that there is only a single like product is not supported by substantial evidence on the record. In addition, the ITC's alternative

¹ At the hearing, the Panel permitted Dr. Kenneth R. Button, who is not an attorney, to appear and present argument on behalf of Magcorp, which appears pro se in this proceeding. Dr. Button had previously appeared on Magcorp's behalf during the ITC's administrative proceeding. As a non-attorney, Dr. Button would apparently not be entitled to represent a corporate party in the U.S. Court of International Trade. See Court of International Trade Rule 75(b). Consequently, he would also not be entitled to appear as "counsel" on behalf of such a party before this Panel. See Article 1904 Panel Rules 3 and 21(1). In exercising its discretion to allow Dr. Button to argue for Magcorp, the Panel was strongly persuaded by the fact that no other party objected to his appearance. The panel does not intend to create a precedent concerning the extent to which a person who does not meet the definition of "counsel" may represent a corporate party before an Article 1904 panel.

conclusion that it would have made affirmative injury determinations even if it had found two like products is not sufficiently explained to permit the Panel to determine whether the ITC's analysis is properly based on the evidence of record. Accordingly, the Panel remands to the ITC for a detailed explanation of the reasons supporting its determinations with respect to whether separate U.S. industries producing pure and alloy magnesium are materially injured or threatened with material injury by reason of dumped and subsidized imports from Canada.²

BACKGROUND

On September 5, 1991, Magcorp filed a petition with the ITC and the U.S. Department of Commerce ("Commerce") alleging that the domestic magnesium industry was materially injured or threatened with material injury by reason of dumped and subsidized imports from Canada and Norway.³ In reaching affirmative preliminary determinations of material injury by reason of the allegedly dumped and subsidized imports of

² The Panel's remand order discusses two industries producing pure and alloy magnesium for the reason that the ITC's majority concluded that it would have reached affirmative injury determinations even if it had found pure magnesium and alloy magnesium to be two like products. The Panel's order is not intended to foreclose any Commissioner from determining on remand that there are more than two products and industries, as long as that determination is based on substantial evidence of record and is adequately explained.

³ The countervailing duty investigation regarding Norway was subsequently terminated. See 56 Fed. Reg. 54,887 (1991).

magnesium, the ITC found that only one product--primary magnesium--was "like . . . the article subject to [the] investigation," USITC Pub. 2550, at 11, and that, therefore, the investigation involved consideration of only one domestic industry, the industry producing all primary magnesium. See 19 U.S.C. § 1677(4)(A) & (10). In so doing, the ITC rejected the Canadian respondents' argument that there were two like products--pure magnesium and alloy magnesium.⁴ The ITC noted, however, that "[t]his was a close determination, and the question of the appropriate like product warrants further examination in any final investigation." Magnesium From Canada And Norway, Inv. Nos. 701-TA-309 and 731-TA-528 and 529 (Preliminary), USITC Pub. 2443 (Oct. 1991), at I-12.

Commerce issued final determinations in its antidumping and countervailing duty investigations on July 13, 1992. In its final antidumping determination with respect to magnesium from Canada,⁵ Commerce found that pure and alloy magnesium were two classes or kinds of merchandise. Commerce reached an affirmative

⁴ One Canadian producer, Timminco, argued before the ITC that pure magnesium should be further sub-divided into two separate like products consisting of commodity grade and ultra-pure magnesium. No party to this binational panel proceeding, however, has argued that commodity-grade pure magnesium and ultra-pure magnesium are different like products. Commerce determined that Timminco had no subsidized sales and no sales at less than fair value, and Timminco is not a party to this proceeding.

⁵ Commerce made a negative final antidumping determination with regard to imports from Norway. 57 Fed. Reg. 30,942 (1992).

antidumping determination with respect to pure magnesium, but rescinded its antidumping investigation with respect to alloy magnesium. 57 Fed. Reg. 30,939 (1992). Thus, Commerce's subsequent antidumping order covered only pure magnesium. 57 Fed. Reg. 39,390 (1992). Commerce's final countervailing duty determination also found two classes or kinds of magnesium and resulted in affirmative determinations for both pure and alloy magnesium. 56 Fed. Reg. 30,946 (1992).

In making final affirmative determinations of injury by reason of dumped and subsidized magnesium from Canada, the majority of the ITC (Chairman Newquist, Vice Chairman Watson, and Commissioners Crawford and Nuzum) again found that there was one like product--primary magnesium. The majority also noted its view that the ITC "is not bound in its like product determination by Commerce's class or kind determinations." USITC Pub. 2550, at 7.

The ITC reviewed the six factors that it normally considers in defining the like product: "(1) physical characteristics and uses, (2) interchangeability of the products, (3) channels of distribution, (4) customer and producer perceptions of the products, (5) the use of common manufacturing facilities and production employees and, where appropriate, (6) price." Id. at 7 n.10. It concluded "that the commonality of production facilities, machinery, processes and employees, and the close similarity in channels of distribution, and the sharing

of the same predominant component and its essential physical characteristics outweigh other factors and support one like product." Id. at 11. It reached this conclusion despite finding "that pure and alloy magnesium are not generally interchangeable or employed for common uses, and that these factors reflect the customers' perception of the products." Id. at 10.

Commissioner Rohr filed separate views concurring in the majority's affirmative injury determinations. He found that there were two like products--pure magnesium and alloy magnesium. Like the majority, however, he rejected the argument that he was bound by Commerce's class or kind determination. Id. at 26-27. He determined that the two U.S. industries producing pure magnesium and alloy magnesium were both materially injured by reason of dumped and subsidized Canadian imports. Id. at 37.

In her concurring and dissenting views, Commissioner Brunsdale found that there were three like products--commodity-grade pure magnesium, ultra-pure magnesium, and alloy magnesium. Id. at 43. She concluded that the domestic industries producing commodity-grade pure magnesium and alloy magnesium were materially injured, but that the industry producing ultra-pure magnesium was not materially injured. Id. at 43-45.

CONTENTIONS OF THE PARTIES

Complainants argue that the ITC's majority erred in conducting a single analysis of the injurious effects of all

types of primary magnesium.⁶ According to Complainants, the ITC's finding of one like product was contrary to the evidence of record, and the ITC should have found that there were two distinct like products--pure magnesium and alloy magnesium.⁷ Specifically, Complainants claim that the ITC erred in finding that pure and alloy magnesium share essential physical characteristics; have similar channels of distribution; and share common production facilities, processes, machinery, and employees. Complainants further contend that the ITC erred in determining that other factors outweighed its finding that pure and alloy magnesium are not generally interchangeable or employed for common uses and that it erred in ignoring the differing price

⁶ Of the parties appearing in support of the complaints in this proceeding, only Québec submitted a brief addressing Complainants' arguments in detail. NHCI and the Government of Canada filed briefs that essentially incorporated Québec's arguments by reference.

⁷ Citing Hosiden Corp. v. United States, 810 F. Supp. 322 (Ct. Int'l Trade 1992), appeal pending (Fed. Cir.), Complainants also argue that Commerce's finding that pure magnesium and alloy magnesium were different classes or kinds of merchandise required the ITC, as a matter of law, to make separate injury determinations with respect to pure and alloy magnesium. Hosiden was recently quoted with approval by the binational panel in Softwood Lumber From Canada, USA-92-1904-02 (July 26, 1993), at 58-59 n.189. In this proceeding, the Panel finds that substantial evidence does not support the ITC's finding of one like product. Accordingly, it is unnecessary to reach the issue of whether the ITC was required to make two injury determinations as a matter of law.

trends of pure and alloy magnesium.⁸ Finally, Complainants attack as unsupported by substantial evidence the majority's conclusion that it would have reached affirmative injury determinations even if it had found pure and alloy magnesium to be two different like products.⁹

The ITC and Magcorp counter that the majority's finding of one like product is fully supported by the factors analyzed by the majority and by substantial evidence in the record. Noting that the like product determination is fact-based and is performed on a case-by-case basis, the ITC argues that the

⁸ Complainants also contend that the ITC erred in determining that the domestic industry was materially injured by reason of imports of primary magnesium from Canada. Because the Panel concludes that this case should be remanded to the ITC for a more detailed explanation of its reasoning with respect to whether separate industries producing pure and alloy magnesium are materially injured or threatened with material injury, it is unnecessary for the Panel to consider this argument. In addition, the Panel defers consideration of Complainants' allegations of errors in the separate views of Commissioners Rohr and Brunsdale pending the results of the remand.

⁹ In their reply brief, Complainants also assert that a recent decision of the U.S. Court of International Trade, Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348 (Ct. Int'l Trade 1993), requires a remand so that the ITC may consider, as part of its material injury analysis, the alleged lack of support for the petition by members of the domestic industry other than Magcorp. The ITC and Magcorp object to Complainants' raising this argument for the first time in their reply brief and have moved to strike that part of the reply brief or, in the alternative, for leave to file a supplemental brief in response. The parties were given the opportunity to be heard on this issue during oral argument. Consequently, the Panel does not believe that any further briefing is necessary. Decision on the motion to strike or on the merits of Complainants' argument is deferred pending remand.

majority correctly balanced the factors. The findings that pure and alloy magnesium are generally not interchangeable and are not used for common purposes and that customers perceive the two as not being interchangeable were outweighed by other factors that supported the conclusion that pure and alloy magnesium are a single like product. Finally, the ITC claims that even if there were two like products, the separate industries producing those products experienced similar conditions and were affected by imports in similar ways. Thus, the ITC argues that substantial evidence supports the majority's finding that the outcome would not have changed even if it had found two like products.

DISCUSSION

I. STANDARD OF REVIEW

Under Article 1904.3 of the U.S.-Canada Free Trade Agreement, this Panel is required to apply the standard of review and the general legal principles that a court of the United States would apply to a review of the ITC's determination. The Panel is obliged by Article 1904.2 to rely on "the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing party [the United States] would rely on such materials in reviewing a final determination of the competent investigating authority [the ITC]." An ITC determination is

presumed to be correct, and the burden of demonstrating otherwise is on the party challenging the determination. 28 U.S.C. § 2639(a)(1).

The appropriate standard of review, specified in Article 1911, is that set forth in 19 U.S.C. § 1516a(b)(1)(B). Accordingly, the Panel is charged with deciding whether the ITC's final affirmative material injury determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." The U.S. Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). "It is not the function of a [panel] to decide that, were it the Commission, it would have made the same decision on the basis of the evidence." Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). Nevertheless, an agency determination must be supported by the administrative record as a whole, including evidence that detracts from the substantiality of the evidence relied upon by

the agency. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

II. THE ITC'S FINDING THAT PURE AND ALLOY MAGNESIUM CONSTITUTE A SINGLE LIKE PRODUCT

The ITC's responsibility in antidumping and countervailing duty investigations is to determine whether imports of dumped or subsidized merchandise materially injure, or threaten to materially injure, "an industry in the United States."¹⁰ The term "industry" is defined to mean the domestic producers of a "like product." 19 U.S.C. § 1677(4). "Like product," in turn, is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to" an antidumping or countervailing duty investigation. 19 U.S.C. § 1677(10). A like product determination is in essence a determination as to the domestic

¹⁰ The applicable statutes, 19 U.S.C. § 1671 and 19 U.S.C. § 1673, provide that countervailing and antidumping duties may be imposed only where:

- (2) the Commission determines that--
 - (A) an industry in the United States--
 - (i) is materially injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded . . .
by reason of imports [determined by the Department of Commerce to have been dumped or subsidized].

industry or industries that are the subject of an injury investigation. Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 (Ct. Int'l Trade 1988).

In making its determination as to what domestic products constituted products "like" the imported magnesium, the ITC considered the following factors: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer perceptions; (5) common production processes, facilities, equipment, and employees; and (6) price.¹¹ USITC Pub. 2550, at 8-11. Based upon this analysis, the ITC concluded that pure and alloy magnesium shared common production facilities, machinery, processes, and employees; moved in similar channels of distribution; and had similar physical characteristics. Id. at 11. The ITC also found, however, that pure and alloy magnesium were not generally interchangeable or employed for common uses, nor were they perceived by customers as interchangeable. Id. at 10. On balance, the ITC determined:

[T]he commonality of production facilities, machinery, processes and employees, the close similarity in channels of distribution, and the sharing of the same predominant component and its essential physical characteristics outweigh other factors and support one like product. Accordingly, we find that there is one like product consisting of all primary magnesium. Concomitantly, we define the

¹¹ The ITC's use of similar factors for determining the like product has been upheld by the courts. See, e.g., Torrington Co. v. United States, 747 F. Supp. 744, 749 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991).

domestic industry to consist of all primary magnesium producers.

Id. at 11.

In the discussion below, the Panel examines in turn each of the six like product factors the ITC relied upon in making its determinations. For ease of discussion, the Panel separately discusses the two elements of the ITC's first like product factor--physical characteristics and uses.

A. Physical Characteristics

The ITC determined that "[p]ure and alloy magnesium share a number of essential physical characteristics." Id. at 8. The characteristics common to both products, according to the ITC, are (1) that each contains at least 90 percent magnesium, which "imparts to both pure and alloy products its essential characteristics as a lightweight, low density, and strong metal," and (2) that both are "packaged, handled and shipped following the same regulations and requirements." Id.¹² The ITC acknowledged, however, that the products differ in that alloy magnesium contains metals not present in pure magnesium that "enhance the desirable properties of pure magnesium." Id. The

¹² In its brief, the ITC states that "[t]he only distinguishing physical characteristic between pure magnesium and magnesium alloy is the substitution of between 6 and 10 percent of other metals for a similar percentage of magnesium." ITC Br. at 43.

ITC cited to the Report prepared by its staff as support for these findings. Id. at I-6-7.

The administrative record does not contain substantial evidence to support the ITC's finding that pure and alloy magnesium share numerous physical characteristics. That alloy and pure magnesium are composed mostly of the same element (magnesium) is not necessarily probative with respect to the like product determination--an ingot of alloy magnesium would not be considered "like" a bicycle frame made of the same magnesium, although both would be composed largely of the same material. The record, in fact, is noteworthy for its descriptions of the ways in which pure and alloy magnesium differ. The Report concludes that "pure magnesium and alloy magnesium differ in a number of physical characteristics and properties." Id. at I-7. For example, while pure magnesium contains at least 99.8 percent magnesium by weight, alloy magnesium contains lower concentrations, with the most common commercial grade of alloy containing approximately 90 percent magnesium and 10 percent other metals. Id. Further, the reason for producing alloy magnesium is to obtain a metal that has physical characteristics different from those of pure magnesium. According to the record, the properties imbued by alloying magnesium include additional strength, ductility, workability, corrosion resistance, low density, and castability. Id. Such enhancement of pure magnesium by means of alloying defines the commercial identity of

alloy, as opposed to pure, magnesium. These differences in physical characteristics and properties are particularly significant in affecting the uses, interchangeability, and customer perceptions of the two products, as discussed below.

The ITC's finding that pure and alloy magnesium are subject to common packaging, handling, and shipping regulations does not, strictly speaking, address the physical characteristics of the products. In addition, the nature of these regulations is not identified on the record. The regulatory regimes applicable to pure and alloy magnesium referred to by the ITC, *id.* at 8 & I-7, might also apply to a variety of products that would not be considered sufficiently similar to magnesium to warrant a finding that they constitute products "like" magnesium.

It is apparent from the record that pure and alloy magnesium are significantly different in terms of physical characteristics and properties. The ITC failed, however, to take these differences into account in its determinations. An agency determination must be supported by the administrative record as a whole, including evidence that detracts from the substantiality of the evidence relied upon by the agency. See SSIH Equip., S.A. v. U.S. Int'l Trade Comm'n, 718 F.2d 365, 382 (Fed. Cir. 1983), quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). In light of such contradictory evidence in the record of this case, the Panel concludes that the ITC's finding that pure and

alloy magnesium are "like" in physical characteristics is not supported by substantial evidence.

B. Uses

The ITC's final determination recognized that pure and alloy magnesium are not generally employed for common uses.

USITC Pub. 2550, at 10. The Report found as follows:

Pure magnesium and alloy magnesium essentially serve separate end-use markets. Pure magnesium is typically used in the production of aluminum alloys, in iron and steel desulfurization, as a reducing agent for various nonferrous metals . . . and as anodes. Alloy magnesium is principally used in structural applications, primarily in castings . . . and extrusions for the automotive industry. (Pure magnesium is seldom used for structural applications, because its specific tensile and yield strengths are low.)

Id. at I-7. Pure magnesium is used primarily to alloy other metals, to process other metals, and in cathodic applications.

Id. at 10 n.28. Magnesium alloys are used principally by diecasters to produce structural products such as automobile components, bicycles, power tools, computer chassis, and other products. Id. The record amply illustrates the differences between uses of pure and alloy magnesium. Id. at I-7, I-69.

The ITC's finding that pure and alloy magnesium are not put to common uses is supported by substantial evidence in the administrative record. As the ITC recognized, however, this

finding does not support its determination that pure and alloy magnesium constitute a single like product.

C. Interchangeability

The ITC also found that pure and alloy magnesium are not generally interchangeable. Id. at 10. As noted above, pure and alloy magnesium have different physical characteristics and are used for different purposes. Record data supports the ITC's findings that pure magnesium is generally purchased by aluminum producers and metal processors and that alloy magnesium is generally purchased by diecasters. Report at I-69, ITC Conf. Report at I-34.

The ITC also observed, however, that there is limited interchangeability between different products within each of the product categories. USITC Pub. 2550, at 10. For example, while ultra-pure magnesium can be substituted for commodity-grade pure magnesium, such substitution is unlikely because ultra-pure magnesium is sold at higher prices than commodity-grade pure magnesium. Commodity-grade pure magnesium, because it contains more impurities, cannot be interchanged with ultra-pure. Id. at I-7. The ITC also found that "variations in the amounts of additional metals contained in alloy magnesium result in different magnesium products among which interchangeability is limited." Id. at 10, citing Report at I-8 n.18 (quoting statements in posthearing briefs of Magcorp and NHCI).

Citing Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea, Inv. Nos. 731-TA-458 and 459 (Final), USITC Pub. 2383 (May 1991) ("PET Film"), the ITC suggested that the "difficulty of finding multiple like products based upon various distinctive end uses for a myriad of products" supported finding a single like product. USITC Pub. 2550, at 10. In PET Film, however, the ITC was faced with a situation in which there were as many as 150 different end uses for the different PET film products and potentially as many different like products. PET Film at 11. In this case, no party suggested to the ITC that there were more than three like products--commodity-grade pure magnesium, ultra-pure magnesium, and alloy magnesium. Moreover, unlike PET Film, there is no evidence that magnesium is "a continuum product without clear dividing lines" among the potential like products. Id. at 8. While some differences in uses are apparent within the different categories of magnesium products, the record indicates clear dividing lines in uses between the categories. Pure and alloy magnesium are not used for the same purposes.

The ITC's finding that pure and alloy magnesium are generally not interchangeable is supported by substantial evidence. This factor also does not support the ITC's conclusion that pure and alloy magnesium constitute a single like product.

D. Channels Of Distribution

The ITC found that pure and alloy magnesium were distributed through similar channels, in that "[b]oth are mainly sold by the primary magnesium producers directly to end-users." USITC Pub. 2550, at 9, citing Report at I-31. The record further indicates, however, that "[t]he customers who purchase pure magnesium are almost always different from those who purchase alloy magnesium." Id. at I-9.

While the record supports the ITC's factual finding that pure and alloy magnesium are purchased by end users, the ITC has provided no explanation why this finding is significant. That two products are sold by manufacturers directly to end users, rather than through distributors, does not, of itself, indicate that those products should be considered like products, particularly where the products are sold to different categories of end users. As Complainants observe, the fact that books and televisions are both typically distributed to end users through retailers does not make them a single like product. Québec's Reply Br., at 13.

E. Customer Perceptions

The Commission stated that the lack of interchangeability between, and absence of common uses for, pure and alloy magnesium reflects customers' perceptions of the two

products. USITC Pub. 2550, at 10. In support of this finding, the Commission cited record evidence indicating that pure and alloy magnesium are sold to different customers for different end uses (e.g., aluminum alloyers buy pure magnesium; diecasters buy alloy magnesium). Id. at 10 n.28 and I-6-7. Although the ITC did not further explain this reference to the record, it may reasonably be inferred that evidence of the purchasing patterns of the different end users of magnesium reflects those customers' perceptions of whether one or the other type of magnesium meets their needs.

The Panel has not identified any record evidence contradicting the ITC's finding that customer perceptions of the two products are different. The Panel finds that substantial evidence supports the ITC's finding that customer perceptions of pure and alloy magnesium are different. This factor, once again, does not support the ITC's finding of a single like product.

F. Production Processes, Facilities, And Employees

The manufacture of all the magnesium products under investigation involves three processing steps: (1) production of the "feed" material, (2) magnesium-chlorine separation, and (3) foundry casting. Id. at I-8. The particular processing steps used by each manufacturer may vary, but the end products within the pure and alloy magnesium categories are virtually identical. Id. Until the second processing step is completed,

the processes used to produce both pure and alloy magnesium are identical. Id. at 8-9, I-12. Most manufacturers then use separate casting lines to produce pure and alloy magnesium, although some manufacturers produce both pure and alloy magnesium on the same equipment and machinery (albeit not at the same time). Id. at 9, I-12. Manufacturers that use the same facilities to produce both pure and alloy magnesium commonly use the same employees on the casting lines for both products. Id.

The ITC found that the core production processes for both pure and alloy magnesium are the same and that companies that produce both pure and alloy magnesium generally use the same machinery, equipment, and employees for both products. Id. at 9. These findings generally support the ITC's determination that there was a single like product and are supported by substantial evidence to the extent noted above.

G. Price

The ITC determined that price was a relevant factor in this case and that the relationship between the prices of pure and alloy magnesium suggested that they constituted one like product. Id. at 9. While acknowledging that "prices for the two products differ based on differences in costs and market demand," the ITC found that prices to end users reflected the cost of magnesium, the primary component common to both products. Id. This finding is supported by a citation to the ITC's Report,

which concluded that "[a]lthough no specific price relationship between the two products has been exhibited, the final price of both products reflects changes in those raw material costs that are common to both products." Id. at I-14. The Report, however, fails to cite any evidence to support this statement. Even Petitioner Magcorp acknowledged "that in the past, there may have been some relationship between prices of pure and alloy magnesium; however, during 1989-91, prices for these two products did not exhibit a specific relationship." Id. at I-70.

Contrary to the ITC's finding, the record indicates a rather attenuated price relationship between pure and alloy magnesium. The Report found that "price differences between pure magnesium and alloy magnesium exist due to differences in costs and in end-use market demand for each product." Id. at I-14. Costs of alloy magnesium are generally higher, reflecting the costs of aluminum ingot for alloying and any extra processing. Id. Because pure and alloy magnesium are sold to different end use markets, the demand for the two products has followed different trends. Id. at I-69. Indeed, "the demand for pure magnesium declined steadily from 1989 to 1991, [while] the demand for alloy magnesium fluctuated but was higher in 1991 than it was in 1989." Id. Historically, prices for alloy magnesium have been "much more stable than those for commodity-grade pure magnesium." Id. at I-70.

The record indicates that prices for both domestic pure magnesium and domestic alloy magnesium declined during the period of investigation; however, the ITC points to no statistical evidence supporting its conclusion that a material price relationship between the two products existed. The record, in fact, indicates that prices for commodity-grade pure magnesium and prices for alloy magnesium fell at very different rates. ITC Conf. Report at I-120 to I-125. The Panel finds that substantial evidence on the record, taken as a whole, does not support the ITC's finding that the price relationship between pure and alloy magnesium bolsters the determination of a single like product.

H. Summary With Respect To The ITC's Like Product Determination

In sum, the Panel finds that the ITC examined appropriate factors in making its like product determination. See Torrington Co. v. United States, 747 F. Supp. 744, 749 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991). In addition, the Panel finds that substantial evidence supports the ITC's determinations that pure and alloy magnesium have different uses, are not generally interchangeable, and engender different customer perceptions. On the other hand, the Panel concludes that the ITC's findings that pure and alloy magnesium have similar characteristics, move in similar channels of distribution, and share a price relationship are not supported by substantial evidence on the record. The only factor supporting

the ITC's finding that all primary magnesium constitutes a single like product is that pure and alloy magnesium are produced in the same facilities, using much of the same equipment and often the same workers.

The conclusion by this Panel that one or more of the six like product factors do not support the ITC's determination is not dispositive. As long as the determination is otherwise supported by substantial evidence, then it must be affirmed. Torrington, 747 F. Supp. at 751. While substantial evidence does not require that the "overwhelming weight of the evidence" support the ITC's conclusions, Torrington, 747 F. Supp. at 753, citing Atlantic Sugar Ltd. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984), the Panel finds that the mere coincidence of facilities, equipment, and employees used to produce pure and alloy magnesium is not, by itself, sufficient evidence upon which a reasonable mind might conclude that pure and alloy magnesium are a single like product. Thus, the Panel does not find substantial evidence to sustain the ITC's determination that a single like product exists in this case.

III. THE ITC'S ALTERNATIVE CONCLUSION THAT SEPARATE INDUSTRIES PRODUCING PURE AND ALLOY MAGNESIUM WERE MATERIALLY INJURED BY REASON OF DUMPED AND SUBSIDIZED IMPORTS FROM CANADA

The ITC contends that its finding of one like product did not affect its determinations that U.S. producers of pure and alloy magnesium were materially injured by reason of dumped and

subsidized imports from Canada. Thus, argues the ITC, the Panel should affirm its injury determinations without remanding this case for reconsideration based on separate domestic industries producing pure and alloy magnesium. As discussed below, however, the ITC has insufficiently explained the reasons why it would have reached an affirmative material injury determination with respect to each of these industries based on the evidence of record. Consequently, the Panel remands for a detailed explanation of whether the domestic industries producing pure and alloy magnesium are materially injured or threatened with material injury by reason of imports of those products from Canada.

In considering whether the domestic industry is materially injured by reason of the dumped or subsidized imports, the ITC is required to consider the following:

(I) the volume of imports of the merchandise which is the subject of the investigation,

(II) the effect of imports of that merchandise on prices in the United States for like products, and

(III) the impact of imports of such merchandise on domestic producers of like products

19 U.S.C. § 1677(7)(B)(i). In addition, the ITC is permitted to consider "such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii). The ITC is

required to "explain its analysis of each factor considered under [19 U.S.C. § 1677(7)(B)(i)] and identify each factor considered under [19 U.S.C. § 1677(7)(B)(ii)] and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).

Thus, at a minimum, the statute requires the ITC to address in every injury determination the volume of imports, the effect of imports on prices in the United States of the like product, and the impact of imports upon the domestic industry producing the like product. In reviewing the ITC's compliance with this requirement, the Panel is guided by the U.S. Supreme Court's admonition that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). While the Panel may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, Bowman Trans., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974), and the ITC need not respond to every piece of evidence presented by the parties, Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (Ct. Int'l Trade 1989), the Panel should review the ITC's determination to ensure that it is based on adequate analysis or reasoning, USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987). "The ITC must not only state its determinations, but must also explain those determinations."

Feldspar Corp. v. United States, Slip Op. 93-116, 27 Customs B. & Dec. 52 (Ct. Int'l Trade 1993) (emphasis in original).

The ITC concluded in this case "that, even if we had found two like products, and therefore, two domestic industries, it would not have changed our determinations in these investigations." USITC Pub. 2550, at 11 n.33. The reasoning supporting this statement is contained in isolated statements scattered throughout the majority's determination,¹³ which otherwise deals entirely with the condition of the industry producing all primary magnesium and the effects on that industry of imports of primary magnesium from Canada.

Initially, the Panel notes that the ITC's discussion of the conditions of competition that are distinctive to the industry and its analysis of the condition of the industry wholly relate to the primary magnesium industry. USITC Pub. 2550, at 11-14. No discussion or analysis is devoted to the conditions of competition affecting the separate industries producing pure and alloy magnesium or to the economic performance of those industries. This lack of analysis is not cured by the ITC's conclusory statement "that, even if we had found two separate industries as proposed by respondents, the conditions in the individual industries comprised of pure magnesium and alloy magnesium producers are nearly the same as those for the industry

¹³ See USITC Pub. 2550, at 14 n.53, 16-17, and 18.

comprised of all primary magnesium producers. See Report at Appendix C." USITC Pub. 2550, at 14 n.53.

The ITC's general reference to Appendix C requires the reader to independently determine the significance of the information in that appendix. If the Panel were to review Appendix C for the purpose of deciding whether it supports determinations of injury to the pure and alloy magnesium industries, it would inappropriately trespass upon the decision making authority that the U.S. antidumping and countervailing duty statutes give to the ITC alone. The Panel cannot supply reasons for the ITC's conclusions that the ITC itself has not provided. SEC v. Chenery Corp., 332 U.S. at 196. Upon remand, the ITC should explain in detail the conditions of competition affecting the pure magnesium and alloy magnesium industries that it considers significant to its injury determinations with respect to those industries. It should also review the economic condition of each industry separately and provide a detailed explanation of its findings.¹⁴

With respect to the volume of imports, the first of the three mandatory factors that the ITC must consider under 19 U.S.C. § 1677(7)(B)(i), the ITC stated:

¹⁴ If the more detailed discussion required by this remand requires the ITC to analyze business proprietary information, the ITC should provide the Panel both proprietary and public versions of its remand determinations.

The volume of LTFV and subsidized imports, measured by both quantity and value, increased manyfold during the period of investigation. Although the largest increase occurred from 1989 to 1990, the volume of subject imports increased significantly from 1990 to 1991. Market penetration of subject imports, by both quantity and value, also increased dramatically during the period of investigation. These increases in volume and market share occurred with respect to all primary magnesium and with respect to pure and alloy magnesium individually.

USITC Pub. 2550, at 16-17. In support of these findings, the ITC cited Table 39 in its Report ("Pure and alloy magnesium: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, by sources, 1989-91"). In this instance, the Panel finds that the ITC's analysis of the absolute increase in the volume of Canadian imports and the increase in those imports relative to consumption is adequately stated and is supported by the evidence of record cited by the ITC.

Regarding the effect of imports on prices, the ITC found that, "[a]t the same time that volume and market share of subject imports increased, prices for both U.S.- and Canadian-produced commodity-grade pure and alloy magnesium steadily declined." Id. at 18, citing Tables 43-45 and 47-48 of the ITC's Report. Like the ITC's conclusions with respect to the volume of imports, this statement with respect to prices is adequately stated and supported by the record. The majority went on, however, to note that the high substitutability of U.S. and Canadian magnesium results in "U.S. and Canadian products

sell[ing] at similar prices" and that "[p]rice changes by one firm are often followed by equivalent changes by other producers, in some instances due to contractual meet-or-release clauses."

Id. It is unclear from the context whether these conclusions are intended to apply to pure and alloy magnesium separately, as well as to all primary magnesium. On remand, the ITC should clarify these points and provide any further details that it considers appropriate.

With respect to the third statutory factor that the ITC must consider--the impact of Canadian imports on the domestic industry--the ITC's discussion does not contain a separate analysis concerning the pure magnesium and alloy magnesium industries. The Panel simply has no way of discerning whether the ITC's analysis of the impact of all primary magnesium imports from Canada is different from the analysis it would make of the separate effects of pure magnesium imports and alloy magnesium imports. An explanation on the record analyzing this significant element of the ITC's determination is necessary if the Panel is to conduct a proper review. See Toho Titanium Co. v. United States, 657 F. Supp. 1280, 1286 (Ct. Int'l Trade 1987).

CONCLUSION AND ORDER

As detailed above, the Panel concludes that substantial evidence to support the ITC's determination of one like product

is lacking in the record of this case. Consequently, the ITC should determine whether separate industries producing pure magnesium and alloy magnesium are materially injured or threatened with material injury by reason of Canadian imports.

The Panel does not accept the ITC's argument that it is unnecessary to remand this case for the purpose of considering the issue of material injury separately with respect to the industry producing pure magnesium and the industry producing alloy magnesium. Although the ITC has adequately discussed certain elements of its alternative conclusion that separate industries producing pure and alloy magnesium were injured, in other respects its analysis is plainly insufficient. Moreover, the Panel notes that if the ITC had actually found two like products and two industries, the terse and often uninformative analysis with respect to those industries that is scattered throughout the majority's views, considered as a whole, would have been inadequate to satisfy the ITC's obligation to provide a reasoned explanation. The ITC must explain its determinations in a sufficiently detailed fashion that the Panel can properly review whether the determinations are supported by the evidence of record.

Accordingly, we remand the determinations of the U.S. International Trade Commission in investigations 701-TA-309 (Final) and 731-TA-528 (Final) for a detailed explanation as to (1) whether the U.S. industry producing pure magnesium is

materially injured or threatened with material injury by reason of dumped and subsidized imports of pure magnesium from Canada and (2) whether the U.S. industry producing alloy magnesium is materially injured or threatened with material injury by reason of subsidized imports of alloy magnesium from Canada. The ITC should provide a complete analysis of all factors it considers relevant to its determinations. As discussed in note 1 supra, the ITC may also analyze injury with respect to more than two domestic industries, as long as its determination of additional like products is supported by the evidence of record and adequately explained.

The ITC shall have 60 days from the date of this order in which to report its remand determinations to this Panel. Written submissions challenging the ITC's determinations on remand and submissions by the ITC or any other party in response thereto shall be filed in accordance with Article 1904 Panel Rule 75.

SO ORDERED.

SIGNED IN THE ORIGINAL BY:

Michael P. Mabile, Chairman

Robert E. Lutz, II

John M. Peterson

R.J. Ross Stinson

Wilhelmina K. Tyler