

NAFTA CHAPTER 19
PURE MAGNESIUM FROM CANADA
FILE USA-CDA-00-1904-06

DECISION OF THE PANEL

Concerning the Results of the Second Redetermination
By the Department of Commerce

I. PROCEDURAL HISTORY

On October 15, 2002, the Panel remanded the First Remand Determination of the Department of Commerce (the "Department" or "Commerce"): (i) for further consideration of the record concerning the "other factors" which are required to be taken into account pursuant to the Panel's conclusion in Section 2 and 3 of its opinion; (ii) for consideration of whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (iii) to reconsider whether the normal preference for the investigation rate should not be followed here. Commerce was instructed to provide a report in 45 days detailing how it would comply with the Panel's instructions and to complete the remand 60 days thereafter.¹

Commerce submitted a report to the Panel on November 29, 2002, describing how it intended to proceed with the remand instructions and, on December 13, 2002, requested interested parties to provide comments as to whether this is an appropriate case in which to supplement the record. On December 20, 2002, Commerce received comments from NORSK Hydro Canada, Inc. ("NHCI"), the Gouvernement du Québec

¹ See Decision of the Panel Concerning the Remand Determination by the Department of Commerce (Oct. 15, 2002) ("Second Remand").

("GOQ"), and US Magnesium LLC ("US Magnesium" formerly Magcorp). On January 14, 2003, Commerce released a draft redetermination to interested parties for comment. Comments were received from interested parties on January 21, 2003. The Department's Second Redetermination on Remand (hereinafter "Second Redetermination") was filed with the NAFTA Secretariat on January 28, 2003.

Subsequently, on February 27, 2003, the GOQ and NHCI filed Rule 73(2)(b) challenges to the Second Redetermination and the Department filed a responsive brief on March 19, 2003. Both the GOQ and NHCI challenge each of the conclusions in the Second Redetermination and request the Panel to remand to Commerce with instructions to sunset the antidumping duty order. They argue that Commerce's refusal to reopen the record is not in accordance with law, that the analysis of the "other factors" supporting revocation of the antidumping order is contrary to law and that the antidumping rate reported to the International Trade Commission ("ITC") is contrary to law. Further, they argue that Commerce's refusal to consider the legality of the "all others" rate is also contrary to law.

The Department responded on March 19, 2003. The response contended that Commerce's Second Redetermination, in which it found that the other factors submitted by NHCI and the evidence supporting those factors was insufficient to reverse its affirmative likelihood determination, is supported by substantial evidence and is otherwise in accordance with the law. Commerce also defended its decision not to reopen the record, argued that the reported investigation rate is in accordance with law, and concluded that it would be improper for the Panel to reconsider the "all others" rate reported to the Commission.

The Panel's authority derives from Chapter 19 of the North America Free Trade Agreement ("NAFTA"). In the conduct of this review, the Panel has applied the law of the United States as required by NAFTA Article 1904.2 and has followed the standard of review set forth in Part III of its decision of March 27, 2002. As therein noted, the Panel will uphold Commerce's Second Redetermination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."²

II. CONSIDERATION OF THE GOQ AND NHCI CHALLENGES TO THE SECOND REDETERMINATION

The Panel finds that certain of these challenges have merit and, therefore, remands this proceeding to the Department for further action consistent with this opinion.

A. The Department's Determination Not to Supplement the Record Was Arbitrary and Contrary to Law

In the Second Remand, this Panel instructed Commerce (i) to obtain the views of the parties concerning whether this is an appropriate case in which to supplement the record pursuant to NAFTA Panel Rule 73(2)(a), and (ii) after due consideration of those views and of the Department's fact gathering obligations in full sunset reviews, to determine whether the record should be supplemented in this case.³ Following the Panel's instructions, the Department solicited the parties' views as to whether it was appropriate in this case to supplement the record. Both NHCI and GOQ provided detailed views explaining why supplementing the record concerning NHCI's long-term

² 19 U.S.C. § 1516a(b)(1)(B) (2003).

³ Second Remand at 11-12.

magnesium contracts and its strategy for the U.S. market would provide probative information on the pivotal issue whether dumping is likely to resume if the order is revoked.

None of the reasons for supplementation of the record advanced by GOQ and NCHI were addressed in the Second Redetermination. Instead, the Department simply concluded that supplementing the record was not appropriate, citing 19 C.F.R. 351.218(d)(4).⁴ According to Commerce, those "sunset regulations clearly indicate that the response to the notice of initiation and rebuttal comments to other parties' rebuttal comments are parties' only opportunity to submit unsolicited factual information in the sunset review process."⁵ This statement, which adds nothing to the Department's previous refusal to consider additional information, is not responsive to the Panel's instructions. While the Panel remanded with specific instructions to determine whether this was an appropriate case in which to supplement the record pursuant to NAFTA Panel Rule 73(2)(a), there is no discussion of why in this case it would not be appropriate to supplement the record pursuant to the NAFTA rule, which is not even mentioned in the Second Redetermination. This refusal to explain the Department's position is an unacceptable disregard of the Panel's instructions.⁶

⁴ 19 C.F.R. §351.218(d)(4) (2003) states: "[T]he Secretary normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired, unless the Secretary requests additional information from parties after determining to proceed to a full sunset review...."

⁵ Second Redetermination at 6 (emphasis added).

⁶ See Hoogovens Staal BV v. United States, 4 F. Supp. 2d 1213, 1219 (CIT 1998) ("As a general rule, an administrative agency must articulate the reasons supporting its decision, enabling the court to review whether the agency acted arbitrarily.") quoting Shieldalloy Metallurgical Corp. v. United States, 947 F. Supp. 525, 529 (CIT 1996).

The Panel notes further that the regulation cited by Commerce states that "normally" the parties' only opportunity to submit rebuttal information will be on or before the time for filing set forth in the regulations. The use of the word "normally" suggests that there will be circumstances when opportunities will be offered to provide additional information outside the time specified. The regulations do not, therefore, preclude Commerce from accepting rebuttal information filed after the deadline. Moreover, the regulation provides that the Secretary may request additional information at any time after beginning a full sunset review. Therefore, based on the language of the regulation itself, the Panel rejects Commerce's conclusion that the "only" opportunity for additional information is that specified in 19 C.F.R. §351.218(d)(4).

Commerce has an obligation to conduct a full investigation in sunset reviews.⁷ This obligation is not satisfied by an inflexible application of the Department's regulations. The Secretary's ability to request information "at any time" provides the authority to implement this obligation, as does NAFTA Rule 73(2)(a). Commerce's obligation is frustrated when information on a critical issue is excluded from the record by an adamant reliance on a regulation that on its face does not require adherence to such formalities.

The Panel is also troubled by the statement in the Second Redetermination that the Department is "convinced that NHCI's long-term contract commitments would not

⁷ AG der Dillinger Huttenwerke v. United States, 193 F. Supp. 2d 1339 (CIT 2002). "The court finds that Commerce did not fulfill its obligations pursuant to a full sunset review because it failed ... to seek additional evidence necessary to make its determination." Id. at 1348.

change the outcome of this sunset review."⁸ This observation indicates a prejudgment of the implications of facts not in the record, and which have not been subjected to Commerce's analysis. The review of long-term contracts could lead an objective factfinder, depending on the nature of the contracts, to conclude that those contracts are either likely or not likely to affect the exporter's ability to reenter the US market for pure magnesium. For the Department to opine that no set of contractual obligations could alter its view with respect to the likely recurrence of dumping is manifestly inconsistent with its statutory obligation to conduct a full sunset review based on the evidence of record.

B. The Department's Characterization of Sworn Statements by NHCI Officials as "Unsubstantiated Assertions" Was Arbitrary and Contrary to Law

The Second Remand also instructed the Department to further consider the record concerning the "other factors" that are required to be taken into account, consistent with the conclusions of the Panel.⁹ Central to this consideration is the question whether NHCI's long-term contract commitments in the United States and the change in the company's marketing strategy to focus on alloy magnesium sales in the U.S. market make the recurrence of dumping unlikely. The Panel notes that sworn statements by company officials concerning those developments are on the record. Commerce now insists that these sworn statements are not evidentiary. For example,

⁸ Second Redetermination at 6.

⁹ Second Remand at 7-10.

the Department's brief in support of the Second Redetermination states that "unproven assertions cannot be considered factual and cannot be relied upon."¹⁰

As a matter of law, sworn statements, which are made under penalty of perjury, are evidentiary and must be given weight, whether or not substantiated by other information provided in the record. It is well accepted that "evidence" includes the testimony of witnesses, and this includes sworn statements.¹¹ Commerce requires that each filing, including briefs by the parties, include a certification of the accuracy of the factual statements made by the submitter. Specifically, Section 351.303(g) of the Department's regulations provides that "each submission containing factual information" must include a certification by the person responsible that the "information obtained in [the] submission is, to the best of [her/his] knowledge, complete and accurate."¹² In addition, parties and submitters are reminded before hearings and in Departmental requests for information that false statements are a violation of federal criminal law.¹³ Assertions made by officials of a party to the proceeding that are subject to these requirements cannot be dismissed as "unsubstantiated" and must be accorded evidentiary status.

Based on the Panel's conclusion that the sworn statements concerning the existence of long-term contracts and the strategic focus on alloy magnesium sales in

¹⁰ Brief of the Department of Commerce, at 4 (Mar. 19, 2003).

¹¹ Barron's Law Dictionary 169 (3d ed. 1991).

¹² 19 C.F.R. § 351.303(g) (2003).

¹³ See 18 U.S.C. § 1001 (2003).

the United States are evidentiary, the Department should have taken these facts into account as "other factors" when considering the likelihood that NHCI would resume dumping of pure magnesium in the U.S. market if the antidumping order were revoked. Commerce refused to do so, and instead adopted the tactic of "assuming *arguendo* that NHCI had long-term contract commitments in the United States."¹⁴ Given that this information was on the record, it was arbitrary and contrary to law to resort to an *arguendo* assumption. This assumption is further considered in the next section of this Opinion.

C. Substantial Evidence Fails to Support the Department's Conclusion That There Is a Likelihood of Resumption of Dumping

The Department's Second Redetermination concludes that, even "assuming *arguendo* that NHCI had long-term contract commitments in the United States," there is "sufficient additional evidence on the record ... for Commerce to conclude that revocation of the antidumping order on pure magnesium would be likely to lead to the continuation or recurrence of dumping."¹⁵ As noted, an *arguendo* assumption was not necessary because there is evidence on the record concerning the existence of long-term alloy magnesium contracts and the alloy strategy adopted by NHCI. Moreover, an *arguendo* assumption is not a satisfactory substitute for record information concerning these long-term contracts which the Secretary had the authority to request under 19 C.F.R. §351.218(d)(4). Despite the shortcomings of the Department's approach, the

¹⁴ Second Redetermination at 9.

¹⁵ Id.

Panel has carefully reviewed the "assuming *arguendo*" analysis.¹⁶ We determine that Commerce's conclusion that, notwithstanding the existence of long-term contracts, additional evidence shows that there is a likelihood of resumed dumping is not supported by substantial record evidence in this sunset review proceeding.

1. The Department's Analysis

The analysis concerning other factors in the Second Redetermination is largely based on a recitation of conclusions from prior determinations, with little in the way of new analysis taking into account the *arguendo* assumption. Commerce first points out that in the fifth administrative review of the underlying antidumping duty order, it concluded that NHCI has "not completely redirected its market focus toward alloy magnesium" because it "maintains significant pure magnesium sales volumes in other pure magnesium markets, all of which are markedly smaller and more distant than the U.S. market."¹⁷

Second, Commerce cites the 1998 Revocation Review where it was observed that U.S. consumption of pure magnesium was growing and was nearly triple that of alloy magnesium. Commerce also cites a finding in that decision concerning the "mix of magnesium products ... in the United States," and the fact "that the United States is the

¹⁶ The *arguendo* assumption is further flawed because it is limited to the existence of long-term contracts and fails to take into account the evidence of NHCI's decision to concentrate on the alloy market in the United States.

¹⁷ Second Redetermination at 10 (emphasis deleted), citing Pure Magnesium From Canada, 64 Fed Reg. 12977, 12980 (Mar. 16, 1999) (admin. rev., final).

largest market in the world for pure magnesium."¹⁸ These factors led Commerce in the Review to conclude that NHCI has a "distinct interest" in the U.S. pure magnesium market.¹⁹

Third, Commerce notes that in arguments during the Final Results of the Fifth Review, NHCI "actually admitted" that it redirected its marketing strategy after imposition of the dumping order.²⁰ Commerce also cites its previous finding that it is "extremely difficult to conclude that NHCI's abrupt abandonment of the U.S. market for pure magnesium was unrelated to the dumping proceedings."²¹

Fourth, Commerce cites the Magcorp rebuttal brief which argues that even though the United States is a predominantly pure magnesium market, NHCI has not meaningfully reentered that market (even with a zero deposit rate) and instead exports pure magnesium to more distant markets. The Department also cites the Magcorp claim that NHCI ignores how easy it is to switch production from alloy magnesium to pure magnesium.²²

Fifth, Commerce refers to the 1997 press release submitted by Magcorp which states that NHCI "planned to increase its production capacity from the current 43,000

¹⁸ Id. at 11 (emphasis deleted), citing Pure Magnesium From Canada, 63 Fed. Reg. 26147, 26149 (May 12, 1998) (admin. rev., prelim.).

¹⁹ Id.

²⁰ Id., citing Pure Magnesium From Canada, 64 Fed. Reg. 12977, 12980 (Mar. 16, 1999) (admin. rev., final).

²¹ Id. at 10.

²² Id. at 11, citing Magcorp's Rebuttal Brief, at 12 (Apr. 12, 2000).

metric tons to 86,000 metric tons."²³ Commerce also states that in "fact," NHCI had already invested in two projects at its Beacancour plant "related to its intended capacity expansion," and which were "required to support NHCI's expansion of primary magnesium production...."²⁴ Thus, Commerce concludes, "if NHCI were to increase production, it is logical to assume that NHCI would have to dump its pure magnesium in the U.S. market in order to gain market share, if the order were revoked."²⁵

Finally, Commerce notes that NHCI's exports to the United States dropped to zero after the antidumping order was entered and have remained at less than ten percent of pre-order levels.²⁶ U.S. imports of pure magnesium have remained steady or have increased over the life of the order, indicating that foreign suppliers have replaced Canadian imports displaced by the order. Thus, Commerce concludes that the Canadian producers were only able to sustain pre-order import levels by dumping.²⁷ Commerce stated that it considered this activity prior to the order to be "highly probative" of NHCI's activity if the order were revoked. Therefore, Commerce found it "likely that, in order for NHCI to regain its pre-order level of imports, NHCI would have to resume dumping."²⁸

²³ Id. at 11-12, citing Magcorps's Substantive Response, at 23-25 (Sept. 1, 1999).

²⁴ Id. at 12.

²⁵ Id.

²⁶ Id.

²⁷ Id. at 12-13.

²⁸ Id. at 13.

2. Evaluation by the Panel

The Second Redetermination does not analyze the "additional evidence" recited by the Department in the context of the existence of long-term alloy magnesium contracts in the United States which Commerce indicated that it would assume *arguendo*. Indeed, most of the findings and conclusions recited by Commerce in the Second Redetermination were reached at prior stages of the investigation where evidence of the long-term contracts was excluded from consideration. Thus, it is telling that nowhere in the Department's recitation of this "additional evidence" is there any assessment of how the conclusions that were previously reached were affected by the long term contracts (let alone the change in market strategy) ostensibly taken into account by the *arguendo* assumption. As a result, Commerce's conclusion that, even assuming *arguendo* the existence of the long-term contracts, the additional evidence was sufficient to conclude that revocation of the order would likely lead to recurrence of dumping, was arbitrary.

Examination of each of the components of the additional evidence cited by Commerce in the context of the evidence on record concerning long-term contracts and the change in NHCI's U.S. marketing strategy to focus on alloy magnesium leads to the conclusion that the Department's finding that resumption of dumping is likely if the order were revoked is not supported by substantial evidence. Specifically, as to each component, the Panel finds as follows:

(i) NHCI's "interest" in the U.S. pure magnesium market: As noted previously, Commerce points to NHCI's sales of pure magnesium in other distant

markets as supporting its conclusion that NHCI has “not completely redirected its market focus toward alloy magnesium.”²⁹ First, the Panel notes that whether NHCI “completely” redirected its worldwide marketing focus toward alloy magnesium is not the question that the statute requires Commerce to answer. Rather, the pertinent question is whether it is likely that NHCI would resume sales of pure magnesium in the U.S. market at dumped prices if the antidumping duty order were revoked. Commerce’s analysis on remand looked not at what the likely result of NHCI’s changed marketing focus would be, but rather in effect required NHCI to prove that it had “completely” redirected its marketing effort in order to overcome DOC’s presumption that resumed dumping of pure magnesium in the U.S. was “likely.” A less-than-“complete” redirection of NHCI’s worldwide marketing focus toward alloy magnesium does not by itself provide substantial evidence that NHCI was likely to resume sales of pure magnesium in the U.S. market at dumped prices.

Furthermore, the evidence that NHCI has maintained pure magnesium sales in other, much smaller markets than the United States does support Commerce’s conclusion that “NHCI had not completely redirected its market focus toward the alloy magnesium market.”³⁰ But the Department does not explain how these sales are evidence that NHCI would likely abandon its marketing strategy of focusing on sales of alloy magnesium in the United States or that it would terminate long-term alloy magnesium supply contracts if the dumping order were revoked. There is no evidence,

²⁹ Second Redetermination at 10.

³⁰ Id. Indeed, NHCI still sells small quantities of pure magnesium in the U.S. market. Id. at 12.

for example, that U.S. pure magnesium prices are more profitable or otherwise more attractive than those NHCI receives from its current alloy magnesium customers.

In that connection, the Panel recalls that NHCI does continue to sell pure magnesium in the United States. In the four most recent administrative reviews, the Department has found zero margins of dumping on those sales. If those sales are at prices that are not remunerative to NHCI, an assumption underlying the Department's finding that larger sales penetration could only be accomplished by dumping, it seems all the more improbable that NHCI would be likely to abandon its alloy strategy and resume dumping of pure magnesium at prices that would presumably be unremunerative. It is implausible that a company would make such an uneconomic choice.

The Commerce conclusion also assumes that sales in more distant markets would be abandoned if the order were revoked in favor of sales at dumped prices in the United States. This assumption is not sustainable based on the record evidence since there are alternative reasons that could equally persuade NHCI to continue those sales. For example, any freight disadvantage could be offset by higher distant market prices. Absent any record information on those sales -- other than their existence -- a conclusion that they are "additional evidence" that makes it likely that NHCI would resume dumping if the order were revoked is not supported by evidence of record.

(ii) The size of the U.S. pure magnesium market: The Department cites the fact that the U.S. pure magnesium market is larger than the alloy market and that the United States is the largest market for pure magnesium and, on this basis, concludes

that "it appears likely that NHCI, in the absence of the antidumping order, would seek to reestablish itself in the U.S. pure magnesium market."³¹ The facts cited by Commerce do not support its conclusion, particularly when the existence of long-term alloy magnesium contracts and a U.S. market focus on alloy magnesium sales are taken into account, as they must be. Commerce fails to evaluate how the size and product mix of the U.S. magnesium market indicate that NHCI would be likely to abandon its strategy and revoke long-term alloy magnesium contracts. Indeed, the fact (acknowledged by Commerce) that, after the antidumping order, numerous new foreign suppliers replaced NHCI's sales is consistent with the conclusion that NHCI would likely not try to dislodge those new entrants by changing its strategy and its long-term alloy magnesium contracts and selling pure magnesium at dumped prices.

There is another reason why the size of the U. S. pure magnesium market is not an indication that NHCI would be likely to change its strategy if the order is revoked. The quotation from the 1998 Revocation Review cited in the Second Redetermination begins by stating that "we [Commerce] recognize the recent and projected rapid growth rates for alloy magnesium...."³² This rapid growth rate for alloy magnesium is consistent with the conclusion that NHCI would not be likely to change its strategy or long-term contracts if the pure magnesium antidumping order were revoked.

(iii) Change in NHCI strategy: Noting that NHCI redirected its U.S. marketing strategy after the imposition of the antidumping duty order, Commerce concludes that

³¹ Second Redetermination at 11.

³² Second Redetermination at 10, citing Pure Magnesium, 63 Fed. Reg. at 26149.

this demonstrates that NHCI maintained its share prior to the order by dumping.³³ Commerce states that "NHCI actually admitted that it redirected its U.S. marketing strategy after the imposition of the antidumping duty order."³⁴ Commerce concludes that this change is "highly probative" of what NHCI activity would be should the antidumping duty order be revoked. However, nowhere does Commerce evaluate what record evidence makes it likely that NHCI would abandon a major shift in U.S. marketing strategy and walk away from long-term contract commitments for alloy magnesium in the United States. Indeed, the fact that NHCI changed its U.S. marketing strategy to focus on alloy magnesium sales and engaged in long term alloy magnesium contracts supports the conclusion that NHCI would be likely to resume dumping of pure magnesium in the absence of a dumping order only if that change in strategy would be more profitable than the strategy NHCI adopted ten years ago. But there is no evidence on the record that would support such a finding. Indeed, the Panel fails to see how a low price strategy, which is what dumping involves, would persuade NHCI to retreat from the alloy market, which the Department expressly found is experiencing a high rate of growth.

(iv) The ease of switching: Commerce again cites Magcorp's argument that it is technically easy to switch from alloy to pure magnesium manufacturing. In the Second Remand decision, the Panel reviewed this same argument and specifically directed Commerce to evaluate this assertion in light of NHCI's sworn certification that

³³ Id. at 12-13.

³⁴ Id. at 11.

NHCI's contractual customer commitments and current business strategy would preclude such a production shift.³⁵ As noted earlier, the Panel finds that Commerce failed to engage in such an evaluation. Furthermore as the Panel previously found, Magcorp's claim that NHCI could easily shift production to pure magnesium says nothing about whether it is probable that NHCI would switch from its current business strategy if the order were revoked.³⁶ Standing alone, therefore, Magcorp's claim is legally insufficient to constitute evidence of likelihood of the resumption of dumping.³⁷

(v) NHCI production capacity: Commerce devotes two paragraphs of the Second Redetermination to a discussion of the press release by NHCI that it planned "to double its production capacity."³⁸ Commerce also states that NHCI did not refute its own announced plant expansion at Becancour.³⁹ Finally, Commerce notes that NHCI disputed the press release in a pleading that was certified by company officials.⁴⁰ Commerce then concludes that "this" expansion is only one factor which "when combined with other information" led Commerce to "conclude that there is sufficient evidence that dumping is likely to continue or recur if the antidumping order is revoked."⁴¹

³⁵ Second Remand at 9-10.

³⁶ Id. at 10.

³⁷ Id.

³⁸ Second Redetermination at 11-12.

³⁹ Id. at 12.

⁴⁰ Id. referencing the Panel's Second Remand at 9.

⁴¹ Id. at 12.

With respect to the reference to the expansion at Beacancour, the Panel notes that the evidence relied on – an article submitted by Magcorp – discusses two investments. The first is a "new alloy ingot casting line" and the second deals with "recycling of production residues." Commerce does not, however, mention that the article further states that "the decision to build the new casting line reflects the changes in the company's product mix, particularly the expanding need for alloy ingot in the automotive industry."⁴² If anything, this evidence confirms the NHCI strategy of focusing on the alloy market in the United States and supports a finding that it is unlikely that NHCI would refocus on pure magnesium if the order were revoked. The record does not indicate whether the recycling facility is pertinent to alloy or pure magnesium, or both, and thus this cannot be considered evidence of a "likely" increase in the production of either.

With regard to the proposed investment, the record shows only a press release dated June 11, 1997, which states that the plans "would be presented for final Board approval in due time."⁴³ NHCI disputes this press release. The most that can be derived from it is the conclusion that magnesium production by NHCI would increase if final board approval were obtained. The Department fails to explain, however, why this possibility of increased capacity relates to production of pure magnesium as opposed to alloy magnesium, which according to even Magcorp's exhibit (cited previously) is the primary focus of the NHCI's product mix. As noted previously, even the Department

⁴² See Rule 73(b)(2) Challenge of NHCI at 16, Fn. 9.

⁴³ Magcorp's Substantive Response, at Exhibit 10.

concedes that the U.S. alloy magnesium market is growing rapidly. In these circumstances, the possible expansion of capacity, even if approved, could well be construed as further evidence of NHCI's focus on alloy magnesium. This evidence is no indication of the probability of resumed dumping of pure magnesium.

(vi) Low exports after the order: Commerce again refers to evidence that imports of pure magnesium from Canada declined to near zero after the antidumping order and have remained at low levels since.⁴⁴ Commerce describes this factor as "highly probative" of NHCI's activity if the order were revoked and that to "regain" its pre-order level of pure magnesium exports, "NHCI would have to resume dumping."⁴⁵

As the Panel emphasized in its initial remand decision in this proceeding, Panel Determination, Pure Magnesium From Canada, USA-CDA-00-1904-06 (Mar. 27, 2002) ("First Remand"), Commerce's "normal" presumption that cessation of imports after imposition of an antidumping duty order is "highly probative" of the likelihood of resumed dumping may be rebutted by evidence indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping.⁴⁶ In the instant case, there is evidence on the record of a change in NHCI's U.S. marketing strategy to focus on the alloy market and the existence of long-term alloy magnesium supply contracts between NHCI and U.S. purchasers. Yet Commerce utterly fails to take into account such evidence while continuing to refer to the post-order

⁴⁴ Second Redetermination at 12.

⁴⁵ Id. at 12-13.

⁴⁶ First Remand at 27.

decline in imports of pure magnesium as “highly probative” of NHCI’s post-revocation conduct.

The existence of the long-term alloy contracts and NHCI’s change in marketing strategy, even if prompted by the antidumping order, render the Department’s conclusion that NHCI would seek to regain its former pure magnesium market share highly questionable. Here again, the Panel questions why is it logical to conclude that NHCI is likely to change its alloy magnesium strategy and abandon long-term alloy magnesium contracts in order to regain its former pure magnesium market share. There is no evidence – the Panel reiterates – that pure magnesium sales at dumped prices would be more desirable to NHCI than alloy sales. Yet, without such evidence, the conclusion that NHCI would seek to regain its former share of the U.S. pure magnesium market by a low price dumping strategy has no support in the record and cannot be sustained.

3. The Panel's Conclusion

The Panel concludes that there is evidence of record that NHCI changed its marketing strategy after the original antidumping order. The new strategy was to focus on sales of alloy magnesium in the United States and to direct pure magnesium sales to other markets. Pursuant to that strategy, NHCI entered into long-term alloy magnesium contracts with U.S. customers and installed a new alloy ingot casting line at Becancour. While the long-term contracts were excluded from the record, their existence was confirmed by the sworn statements of company officials. When Commerce assumed *arguendo* the existence of long-term contracts (but not the changed NHCI business strategy), it made no effort to analyze why revocation of the order would probably cause

NHCI to abandon this new strategy and its long-term contracts and resume dumping. As a result, the Panel has determined that Commerce's conclusion that NHCI is likely to resume dumping of pure magnesium upon revocation of the order is not supported by substantial evidence on the record.

Inasmuch as the evidence of record leads inexorably to the conclusion that the record does not support a finding that resumption of dumping of pure magnesium is probable if the order were revoked, the Panel remands with instructions to revoke the antidumping order. The Panel has authority to issue such instructions,⁴⁷ and concludes that a remand for further consideration is unnecessary here since Commerce has displayed an unwillingness to satisfactorily undertake its obligations to conduct a full and complete review.⁴⁸

D. The Rate to be Reported to the ITC

This Panel's second remand further instructed Commerce to reconsider whether the normal preference for the investigation rate should not be followed here. The Department's response to this instruction was as follows:

We have considered additional information with respect to the other factors alleged by NHCI. In doing so we continue to conclude upon remand, that the rate calculated during the investigation is the only calculated rate that reflects the behavior of NHCI absent an order. As noted above, Commerce is not convinced that NHCI is no longer interested in the pure magnesium market . . .

⁴⁷ See, e.g. Nippon Steel Corp. v. United States, 223 F. Supp. 2d 1349 (CIT 2002).

⁴⁸ Usinor v. United States, Consol. Ct. No. 01-00010, Slip Op. 02-70 (CIT July 19, 2002).

We have analyzed the facts in the sunset review again upon remand, and conclude that the margins from the original investigation are probative of the behavior of Canadian producers and exports of pure magnesium if the order were to be revoked.

This conclusion is inconsistent with the Panel's findings and conclusions in Part C of this opinion. However, it is not necessary to reach this issue because of our decision to order that this proceeding be sunsetted.

III. CONCLUSION AND DETERMINATION BY THE PANEL

Substantial evidence on record does not support the Department's conclusion that resumption of dumping is likely if the antidumping order on pure magnesium were revoked. The record reflects evidence that after the antidumping order was issued, NHCI changed its strategy to focus on alloy magnesium and entered into long-term alloy magnesium contracts. The one investment by NHCI, completed subsequent to the order date, was for production of alloy magnesium and was said to be consistent with its long-term alloy magnesium strategy. (A companion investment for a recycling facility could equally be for pure or alloy magnesium.) There was no evidence that sales of pure magnesium at dumped prices would be more attractive to NHCI than continuing sales of alloy magnesium to the U.S. market, a market which Commerce found to be growing. Without such evidence, it is arbitrary to conclude that NHCI would abandon its alloy magnesium business plan in favor of a strategy of dumping pure magnesium to regain market share. For these reasons, we conclude that the record does not contain sufficient evidence to support the conclusion that resumption of dumping of pure magnesium is likely if

the order were revoked. The Panel remands with instructions to revoke the antidumping order.

BY THE PANEL,

Charles Owen Verrill, Jr.
Charles Owen Verrill, Jr., Chairman

Donald Brown, Q.C.
Donald Brown, Q.C.

Edward Chiasson, Q.C.
Edward Chiasson, Q.C.

Edward J. Farrell
Edward J. Farrell

Michael House
Michael House

April 28, 2003

**ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT**

IN THE MATTER OF:)	
)	
PURE AND ALLOY MAGNESIUM)	SECRETARIAT FILE NO.
FROM CANADA)	USA-CDA-00-1904-06
FULL SUNSET REVIEW – ANTIDUMPING)	

ORDER OF THE PANEL

Pursuant to the Panel decision on April 28, 2003, it is ORDERED that the Department of Commerce revoke the antidumping order concerning pure and alloy magnesium from Canada.

ISSUED ON April 28, 2003

SIGNED IN THE ORIGINAL BY:

Charles Owen Verrill, Jr.
Charles Owen Verrill, Jr., Chair

Donald Brown, Q.C.
Donald Brown, Q.C.

Edward Chiasson, Q.C.
Edward Chiasson, Q.C.

Edward Farrell
Edward Farrell

Michael House
Michael House

**ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT**

IN THE MATTER OF:)	
)	
PURE MAGNESIUM FROM CANADA)	SECRETARIAT FILE NO.
FULL SUNSET REVIEW – ANTIDUMPING)	USA-CDA-00-1904-06

ORDER OF THE PANEL

Pursuant to Section 75 of the NAFTA Rules, the Panel has determined that a modification of the Decision and Order of April 28, 2003, is warranted to correct an error arising from an accidental oversight, inaccuracy or omission. Accordingly, the Panel hereby modifies the Panel's Decision and Order issued April 28, 2003 as follows:

1. The last sentence of Section III of the Panel's Decision is hereby deleted. The following sentence shall be substituted in place of the deleted sentence:

"The Panel remands with instructions to take action consistent with the Decision, including the Conclusion and Determination by the Panel, within 15 days of the date of this order."

2. The Panel's Order of April 28, 2003, is revoked and replaced by the following ORDER:

"Pursuant to the Panel Decision on April 28, 2003, it is ORDERED that this matter is remanded to the Department of Commerce with instructions to take action consistent with the Decision, including the Conclusion and Determination, within fifteen (15) days of the date of this Order."

ISSUED ON JUNE 24, 2003

SIGNED IN THE ORIGINAL BY:

Charles Owen Verrill, Chair
Charles Owen Verrill, Jr., Chair

Donald Brown, Q.C.
Donald Brown, Q.C.

Edward Chiasson, Q.C.
Edward Chiasson, Q.C.

Edward Farrell
Edward Farrell

Michael House
Michael House