

**BINATIONAL PANEL REVIEW**  
**Pursuant to Article 1904 of**  
**NORTH AMERICAN FREE TRADE AGREEMENT**

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**In the Matter of:** )  
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**MAGNESIUM FROM CANADA** )  
**(INJURY)** )  
 )  
**Full Sunset Review of Antidumping Duty** )  
**and Countervailing Duty Orders** )

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**Secretariat File No.:**  
**USA-CDA-00-1904-09**

**DECISION OF THE PANEL**

**July 16, 2002**

**BEFORE:**

**MATTHEW A. GOLD, CHAIRMAN**  
**ALAN S. ALEXANDROFF**  
**W. ROY HINES**  
**E. NEIL MCKELVEY**  
**MORTON POMERANZ**

## **APPEARANCES:**

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## I. INTRODUCTION

This Binational Panel, convened under Chapter 19 of the North American Free Trade Agreement (“NAFTA”), Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605, 682 (entered into force Jan. 1, 1994), deliberates a challenge to the injury determination by the United States International Trade Commission (“Commission”) in the Full Sunset Review of *Magnesium from Canada*. USITC Pub. 3324, Inv. Nos. 701-TA-309-A-B (countervailing duties) and 731-TA-528 (antidumping duties) (July 2000); *see Magnesium From Canada*, 65 Fed. Reg. 47,517 (Aug. 2, 2000) (notice of final results).

## II. BACKGROUND

On September 5, 1991, Magnesium Corporation of America (“Magcorp”) filed a petition with the United States International Trade Administration of the United States Department of Commerce (“Commerce”), *see* 56 Fed. Reg. 49,743 (Oct. 1, 1991) (initiation of antidumping duty investigation); 56 Fed. Reg. 49,747 (Oct. 1, 1991) (initiation of countervailing duty investigation), and with the Commission, *see* 56 Fed. Reg. 46,443 (Sept. 12, 1991) (institution of preliminary antidumping and countervailing duty investigations) alleging that an industry in the United States producing primary magnesium was being materially injured, or was threatened with material injury, by reason of dumped or subsidized magnesium imported from Canada. In July 1992, Commerce found that Canadian pure magnesium was being dumped on the U.S. market, and that Canadian pure and alloy magnesium being imported into the United States had benefited from countervailable subsidies. *See* 57 Fed. Reg. 30,939 (July 13, 1992) (dumping of pure magnesium); 57 Fed. Reg. 30,946 (July 13, 1992) (countervailable subsidies on pure and alloy magnesium). In August 1992, the Commission determined that dumped and subsidized pure magnesium, and subsidized alloy magnesium from Canada were causing material injury to the U.S. industry.<sup>1</sup> *Magnesium from Canada*, USITC Pub. 2550, Inv. Nos. 701-TA-309 and 731-TA-528 (Final) (August 1992); *see* 57 Fed. Reg. 38,696 (Aug. 26, 1992). Thereafter, Commerce issued an antidumping duty order covering the pure magnesium, 57 Fed. Reg. 39,399 (Aug. 31, 1992), and countervailing duty orders covering the pure and alloy magnesium, 57 Fed. Reg. 39,392 (Aug. 31, 1992).

On August 2, 1999, Commerce initiated five-year sunset reviews pursuant to section 751(c) of the Tariff Act of 1930, as amended (“Tariff Act”), 19 U.S.C. § 1675(c), to determine whether revocation of the antidumping order on pure magnesium, or of the countervailing duty orders on pure or alloy magnesium, from Canada, would likely lead to the continuation or recurrence of dumping or countervailable subsidization, respectively. *See* 64 Fed. Reg. 41,915.

On August 2, 1999, the Commission instituted five-year sunset reviews, pursuant to section 751(c) of the Tariff Act, 19 U.S.C. § 1675(c), to determine whether revocation of the antidumping order covering pure magnesium, or the countervailing orders covering pure

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<sup>1</sup> Following an initial investigation of primary magnesium as a single U.S. industry, a NAFTA panel remanded the matter for separate investigations of the two types of primary magnesium, pure and alloy. *In the Matter of Magnesium from Canada*, Case Nos. USA-92-1904-05 and USA 92-1904-06 (Aug. 27, 1993). On remand, the Commission found injury to both the pure and alloy magnesium industries. *See Magnesium from Canada*, USITC Pub. 2696, Inv. Nos. 701-TA-309 and 731-TA-528 (Remand) (November 1993).

magnesium or alloy magnesium, would likely lead to continuation or recurrence of material injury to the U.S. industry. *See* 64 Fed. Reg. 41,961. Responding to the notice of institution, in opposition to revocation of the orders, was the original petitioner, Magcorp, a domestic producer of both pure and alloy magnesium. *See* Views of the Commission in the Full Sunset Review of *Magnesium From Canada* contained in USITC Pub. 3324, Inv. Nos. 701-TA-309-A-B and 731-TA-528, at 5 (July 2000) (“Views”). Responding in support of revocation of the orders were the Government of Canada, the Gouvernement du Québec (“Québec”), and Norsk Hydro Canada, Inc. (“NHCI”), a Canadian producer and exporter of pure and alloy magnesium. *See id.* Also responding in support of revocation of the orders were a U.S. alloy magnesium consumer, General Motors Corp. (“General Motors”), and a U.S. pure magnesium consumer, Noranda Aluminum, Inc. (“Noranda”). *See id.* at 5 n.11. Not responding to the notice of institution, but appearing later in support of revocation of the orders, was an additional U.S. alloy magnesium consumer, Northern Diecast Corporation (“Northern Diecast”). *See id.* at 5-6. Pursuant to the responses, the Commission decided that it would conduct full five-year reviews concerning these orders, under section 751(c)(5) of the Tariff Act, 19 U.S.C § 1675(c)(5) (2000). *See* 64 Fed. Reg. 62,690 (Nov. 17, 1999).

On February 29, 2000, Commerce preliminarily found that revocation of the antidumping order on pure magnesium would likely lead to recurrence or continuation of dumping. 65 Fed. Reg. 10,768. In connection therewith, it assigned an antidumping duty rate of 21.00 percent *ad valorem* for NHCI and for all others. *Id.* at 10,769. At the same time, Commerce preliminarily found that revocation of the countervailing duty orders on pure or alloy magnesium would likely lead to recurrence or continuation of countervailable subsidy. 65 Fed. Reg. 10,766 (Feb. 29, 2000). It assigned countervailing duties on pure and alloy magnesium at rates of 1.84 percent *ad valorem* for NHCI, and 4.48 percent *ad valorem* for all others.<sup>2</sup> *Id.* at 10,767. In July 2000, Commerce issued affirmative findings with regard to all three orders. *See Pure Magnesium From Canada*, 65 Fed. Reg. 41,436 (July 5, 2000) (final results of full sunset review of antidumping duty order); *Pure Magnesium and Alloy Magnesium From Canada*, 65 Fed. Reg. 41,444 (July 5, 2000) (final results of full sunset reviews of countervailing duty orders). The final results of the full sunset reviews did not disturb the antidumping duty rates in place, *see* 65 Fed. Reg. 41,436, but they ultimately<sup>3</sup> adjusted the countervailing duty rate on pure and alloy magnesium for “all others” to 7.34<sup>4</sup> percent *ad valorem*. *See* 65 Fed. Reg. 41,444. On remand, Commerce again adjusted this rate to 1.84 percent *ad valorem*. *See Results of Redetermination Pursuant to Panel Remand, Alloy Magnesium and Pure Magnesium From Canada*, NAFTA Article 1904 Panel Review USA-CDA-00-1904-07.

The Commission held a hearing on May 31, 2000. *See Magnesium From Canada*, 65 Fed. Reg. 47,517 (Aug. 2, 2000). Appearing at the hearing were Magcorp, Québec, NHCI, Noranda,

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<sup>2</sup> One Canadian producer, Timminco Limited (“Timminco”), which had been excluded from the original alloy and pure magnesium countervailing duty orders, *see* 57 Fed. Reg. 30,946 (Dep’t Commerce July 13, 1992), and from the original pure magnesium antidumping order, *see* 57 Fed. Reg. 30,939 (Dep’t Commerce July 13, 1992), remained excluded from these orders. *See* 65 Fed. Reg. 10,766 at 10,767 (Dep’t Commerce Feb. 29, 2000).

<sup>3</sup> In its final results, Commerce initially maintained its preliminary 4.48 percent *ad valorem*. *See* 65 Fed. Reg. 41,444 (July 5, 2000). This rate, however, was subsequently adjusted by Commerce to 7.34 percent *ad valorem* in correction of the ministerial error. *See Pure and Alloy Magnesium From Canada*, 65 Fed. Reg. 50,677 (Dep’t Commerce Aug. 21, 2000) (notice of correction of ministerial error in final results).

<sup>4</sup> The “all others” countervailing duty rate of 4.48 percent *ad valorem* was in place at the time of the hearing before the Commission on May 31, 2000.

and Northern Diecast. Views at 5-6. Filing briefs were the same entities, as well as, General Motors. *Id.* at 6.

On August 2, 2000, the Commission published a notice of its final determination that, in the case of each of the three orders, revocation would be likely to lead to continuation or recurrence of material injury to the domestic industries within a reasonably foreseeable time. *Magnesium From Canada*, 65 Fed. Reg. 47,517; *see Magnesium from Canada*, USITC Pub. 3324, Inv. Nos. 701-TA-309-A-B and 731-TA-528 (Review) (July 2000).

### **III. JURISDICTION**

Binational panel review of final antidumping and countervailing duty determinations by the investigating authorities of NAFTA Parties is founded on Chapter 19 of the treaty. Article 1904 of the treaty provides that, pursuant to proper request, “each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.” NAFTA art. 1904(1). NAFTA Annex 1911 specifies that included among such final determinations are the results of five-year reviews by the Commission under section 751(c) of the Tariff Act, 19 U.S.C. § 1675(c) (2000).

### **IV. APPLICABLE LAW**

Under NAFTA Article 1904(2), panels are to determine whether the antidumping or countervailing duty determination under review “was in accordance with . . . the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.”

### **V. STANDARD OF REVIEW**

NAFTA Chapter 19 review panels are directed by Article 1904(3) to “apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.” NAFTA Annex 1911 defines the standard of review to be applied in a panel review, in the case of the United States, as “the standard set out in section 516A(b)(1)(B) of the Tariff Act.” This section requires that a Panel “hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B) (2000). The United States 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.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Subsection 516A(b)(2) of the Tariff Act specifies that “the record,” for this purpose, means information placed on the record during the administrative proceeding. 19 U.S.C. § 1516a(b)(2) (2000). Thus, regarding the Commission’s findings of fact, it is the task of this Panel to determine whether they are supported by substantial evidence existing on the administrative record. Regarding the Commission’s legal conclusions,

this Panel is charged to determine whether they are “in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B) (2000).

## **VI. INCLUSION OF MAGNOLA’S PROSPECTIVE EXPORTS TO THE UNITED STATES**

### **A. Background**

A number of changes have occurred in the magnesium market since the original investigation. First, the largest domestic producer at the time of the petition, Dow Chemical Co. (“Dow”) ceased production of magnesium in November 1998, following extensive weather damage to its 65,000-metric-ton facility in Freeport, Texas. *See* Staff Report to the Commission on Inv. Nos. 701-TA-309-A-B and 731-TA-528 at I-11 (Review) (public version) (June 26, 2000) (“PR”); Staff Report to the Commission on Inv. Nos. 701-TA-309-A-B and 731-TA-528 at I-19 (Review) (confidential version) (June 26, 2000) (“CR” or “Staff Report”). Second, at the time of the original investigation there were only two Canadian magnesium producers, NHCI and Timminco Limited (“Timminco”).<sup>5</sup> *See* PR at IV-1; CR at IV-6. However, by the time of this sunset review, Noranda had plans to establish a new magnesium producer in Canada, Magnola Metallurgy, Inc. (“Magnola”).<sup>6</sup> *See* PR at IV-1, IV-4; CR at IV-6 to -7. Based on figures provided by Magnola’s president, as revised by its counsel, the Commission found that Magnola was likely to produce 63,000 metric tons of primary magnesium annually when it reached full capacity. Views at 19, 35; *see also* PR at IV-4 & n.3-4; CR at IV-7 & n.3-4. Based on the same sources, the Commission also made findings regarding Magnola’s product and likely exportation to the United States of both pure and alloy magnesium during each of the years 2001 and 2002.<sup>7</sup> Views at 20 (pure), 35 (alloy).

### **B. Inclusion of Magnola’s Prospective Exports to the United States**

#### **1. Prospective New Exporter**

Only two Canadian producers were individually examined by Commerce: NHCI, for which individual rates were established, and Timminco, which Commerce excluded from the order.<sup>8</sup> *See* 65 Fed. Reg. 41,444 (July 5, 2000) (countervailing); 65 Fed. Reg. 41,436 (July 5, 2000) (antidumping). Since Magnola was not producing or exporting to the United States at the time Commerce conducted its sunset review, Commerce stated that Magnola was not “subject to this order.” *See Issues and Decision Memo for the Full Sunset Reviews of Pure Magnesium and Alloy Magnesium from Canada* (“*Commerce Decision Memo*”) (from Jeffrey A. May, Director, Office of Policy, Import Administration, to Troy H. Cribb, Acting Assistant Secretary of Import

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<sup>5</sup> *See supra* note 2.

<sup>6</sup> Magnola is eighty percent owned by Noranda and twenty percent owned by Société Générale de Financement du Québec which is owned by Québec. *See* PR at IV-4; CR at IV-7.

<sup>7</sup> The Commission made no finding in its Views regarding the precise period of a “reasonably foreseeable time,” in this matter. However, it is not in dispute that it would run at least through the middle of the year 2002. *See* Transcript of Oral Arguments before the Panel (“Tr. of Panel’s Hearing”) at 111-112 (Commission), 116 (Magcorp), 163-164 (Québec).

<sup>8</sup> *See supra* note 2.

Administration, (June 27, 2000)), as incorporated by reference into *Pure Magnesium and Alloy Magnesium From Canada*, 65 Fed. Reg. 41,444 (July 5, 2000)). Based upon the Commerce Department's finding that Magnola was not "subject" to the sunset review, Québec argues that the Commission had no authority to consider evidence concerning Magnola. Québec's Brief at 37-40.

In this context, Québec proffers that Commerce stated that it regarded consideration of Magnola "'not appropriate' 'in the course of these sunset reviews.'" *Id.* at 39; *see id.* at 14 (citing *Commerce Decision Memo* at 16). Québec contends that under U.S. statutes, the respective roles of Commerce and the Commission are clearly demarked. *Id.* at 37. It is the Commerce Department's task to determine which producers and which merchandise are subject to a finding of subsidization or dumping. *Id.* Québec argues that under U.S. law, it is the Commission's task to determine whether the imports that Commerce has designated as unfairly traded are causing—or, in the case of sunset reviews, are "likely to lead to continuation or recurrence" of—material injury. *Id.* at 37 (citing 19 U.S.C. §§ 1675a(a)(1) (sunset reviews), 1671(a) (countervailing duties), 1673 (antidumping duties), and 1675(b)(2)(A) (changed circumstances reviews)). Accordingly, argues Québec, Commerce excluded Magnola from its investigation, and the Commission had no lawful basis for building projected Magnola shipments into its injury analysis. *Id.* at 39.

To further its analysis, Québec relies in part on 19 U.S.C. § 1675a(a)(1), which states that "[t]he Commission shall consider the likely volume, price effect, and impact of imports of the *subject merchandise* on the industry if the order is revoked or the suspended investigation is terminated." 19 U.S.C. § 1675a(a)(1) (2000) (emphasis added); *see* Québec's Brief at 37. In 19 U.S.C. § 1677(25) the statute specifies that "'subject merchandise' means the class or kind of merchandise that is within the scope of . . . a review." 19 U.S.C. § 1677(25) (2000).

The Commission responds that the decision not to review Magnola for individual rates is a practice of Commerce when the company is neither producing nor exporting the subject merchandise to the United States, and is therefore not yet subject to the order at the time of investigation. Commission's Brief at 67 n.158 (citing the Commerce Department's brief filed *In the Matter of Pure Magnesium and Alloy Magnesium from Canada*, USA-CDA-00-1904-07). However, argues the Commission, although Magnola had not yet shipped any subject goods to the United States, the future products that the Commission had found Magnola would likely be exporting within a reasonably foreseeable time, would be subject to the orders and dutiable at the "all others" rate when they were ultimately imported into the United States. *Id.* at 67.

The statute requires the Commission in a sunset review to conduct a prospective analysis of what is likely to occur within a reasonably foreseeable time. 19 U.S.C. §§ 1675(c)(1), 1675(d)(2), 1675a(a)(1) (2000). Sunset reviews are "inherently predictive and speculative." Statement of Administrative Action, Uruguay Round Agreements Act ("URAA"), H.R. Doc. No. 103-316 ("SAA"), Vol. I at 883 (1994). Under U.S. legislation, antidumping and countervailing duty orders are country- and product-specific. *See* 19 U.S.C. §§ 1671(a), 1671d(c)(5)(B), 1673 (2002). However, orders are not company-specific. *See id.* The only exception is where an order excludes a particular company based upon a Commerce finding that the company did not dump or benefit from a countervailable subsidy. *See Notice of Final Rule*, 62 Fed. Reg. 27,296 at 27,310-11 (Dep't Commerce May 19, 1997) (discussion of comments relating to regulation

codified at 19 C.F.R. § 351.204). In this matter, regarding the countervailing duty orders on alloy and pure magnesium, Timminco was the only Canadian company excluded from the order. *See* 57 Fed. Reg. 30,946 (Dep't Commerce July 13, 1992) (original investigation); 65 Fed. Reg. 41,444 (Dep't Commerce July 5, 2000) (sunset review). Thus, the orders apply to all other Canadian producers or exporters of primary magnesium.

However, that all producers or exporters, other than Timminco, are “subject” to the orders, does not mean that each such company will be individually investigated for establishment of company-specific rates. Companies not investigated are still subject to the order, and their exports assessable at an “all others” rate. 19 U.S.C. §§ 1671d(c)(1)(B)(i)(I), 1671d(c)(5) (2000). Thus, the fact that a company is not reviewed by Commerce for individual rates, because it is not yet exporting subject goods to the United States, does not exclude the company from the order. *See id.* As noted above, if that company does export subject goods to the United States while the order is still in effect, the order will cover those goods. *See id.* If it is *likely* that such exports will take place within a reasonably foreseeable time following revocation of the orders, then such exports must be considered by the Commission in a sunset review. *See id.* Consequently, the Panel finds that the Commission’s inclusion of Magnola’s likely exports is in accordance with law.

## 2. Nature of Subsidy

Québec also argues that the Commission violated its statutory duty to consider the nature of the subsidy with respect to Magnola’s prospective imports. Québec’s Brief at 40-44. Québec argues that the U.S. sunset statute mandates that “[i]f a countervailable subsidy is involved [in a sunset proceeding], the Commission shall consider information regarding the nature of the countervailable subsidy.” Québec’s Brief at 41 (citing to 19 U.S.C. § 1675a(a)(6)) (Québec’s emphasis omitted).

The Commerce Department’s affirmative subsidy determination in the sunset investigation rested on a single 1988 industrial development grant by Québec to NHCI, which Commerce amortized several years forward. *See* 65 Fed. Reg. 41,444 (July 5, 2000) (sunset review). Québec contends that, had the Commission considered the nature of the subsidy, it would have concluded that future Magnola imports could not benefit from the sole relevant subsidy. Québec’s Brief at 40-41. Thus, argues Québec, the Commission failed to fulfill its statutory mandate to consider “information regarding the nature of the countervailable subsidy.” *Id.* at 44.

The SAA cautions, however, that the Commission may not ignore the Commerce Department’s subsidy determination. *See* SAA at 887. The Commission is not at liberty to recalculate the subsidy under the statutory framework, notwithstanding that the subsidy in this case was provided only to NHCI. The Commission, in this sunset review, is required to rely on the Commerce determination, which subjects future exports by Magnola to the order. Accordingly, the Panel finds that the Commission considered the nature of the subsidy in accordance with law.

## VII. CONSTRUCTION OF “LIKELY”

With regard to each of the three orders, the statute requires the Commission to determine “whether revocation of an order . . . would be *likely* to lead to continuation or recurrence of material injury within a reasonably foreseeable time.” 19 U.S.C. § 1675a(a)(1) (2000) (emphasis added); *see also* 19 U.S.C. § 1675(c) (2000). Subsequent to the Panel’s April 17, 2002 hearing, pursuant to Rule 68(1)(b) of the Rules of Procedure for Article 1904, counsel for Québec submitted the April 29, 2002 decision of the U.S. Court of International Trade in *Usinor Industeel, S.A. v. United States*, No. 01-00006, slip op. 2002-39 (Ct. Int’l Trade). *See* Rule 68 Submission by Québec (May 22, 2002). Québec asked the Panel to consider, in light of *Usinor*, whether the Commission had correctly applied the statutory term “likely.” *See id.*

The word “likely” plainly refers to a probability of at least slightly more than fifty percent—a condition also referred to as “probable.” In *Usinor*, the court merely recognized that, for this statute, “[l]ikely’ means ‘likely’ – that is, probable.” *Usinor*, No. 01-00006, slip op. at 13. Thus, regarding the meaning of the statutory term “likely,” *Usinor* offers nothing new. The issue in *Usinor* did not exist because of a need to clarify the meaning of “likely.” *See id.* The issue arose because certain language within the Commission’s *Usinor* views suggested that, in one part of the Commission’s analysis, “likely” might not have been given its plain meaning. Québec’s counsel points to no similarly problematic language in the Commission’s Views on the present matter, and this Panel can find no language that suggests anything other than that “likely” was given its plain meaning.

Furthermore, even if the vague assertions that counsel included in its Rule 68 submission had constituted such an argument, that rule permits the submission only of subsequent authority that relates to arguments previously raised during the appropriate time periods. *See* NAFTA Art. 1904 Binational Panel Rule 68(1)(b). For example, under rule 68(1)(b), a participant is required to set out, *inter alia*, “the page reference of the brief of the participant to which the decision or judgment relates.” *Id.* Examination of the pages identified in Québec’s Brief pursuant to Rule 68(1)(b), reveals that it failed to raise any argument relating to the meaning of the term “likely” during the appropriate periods. It is not open to counsel to raise such an argument now.

## VIII. ATTRIBUTION

For the three orders under review, the statute requires that the Commission determine “whether revocation of an order . . . would be likely to *lead to* continuation or recurrence of material injury within a reasonably foreseeable time.” 19 U.S.C. § 1675a(a)(1) (2000) (emphasis added). Québec asserts that, in order to satisfy the statute’s “lead to” requirement, the Commission must consider the extent to which likely post-revocation injury would be attributable to the revocation. Québec’s Reply Brief at 5-6, 8; Québec’s Brief at 51. Québec further contends that, in a case where substitutable nonsubject imports affect the U.S. market, the Commission must provide analysis establishing the degree to which likely post-revocation injury is attributable to the nonsubject imports. Québec’s Brief at 51, Québec’s Reply Brief at 5-19.

## A. Requirement of Attribution Analysis

In *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), the Commission had conducted an initial investigation wherein it was required, under 19 U.S.C. § 1673d(b)(1), to determine whether a U.S. industry had been materially injured “by reason of” unfairly traded pure magnesium imports from Russia, Ukraine and China. Gerald Metals appealed the determination regarding the Ukrainian product, arguing, *inter alia*, that the Commission failed to consider adequately the extent to which the injury to the U.S. industry was attributable to certain substitutable, fairly traded imports from Russia. 132 F.3d at 719. The court concluded that:

[A] showing that economic harm to domestic industry occurred when [unfairly traded] imports are also on the market is not enough to show that the imports caused a material injury. *See United States Steel Group v. United States*, 96 F.3d 1352, 1358 (Fed. Cir. 1996) (“[T]o claim that the temporal link between these events proves that they are causally related is ... fallacy ...”). An affirmative injury determination requires both (1) present material injury and (2) a finding that the material injury is “by reason of” the subject imports.

132 F.3d at 719.

The Commission and Magcorp both argue that *Gerald Metals* does not apply to sunset investigations because it construes statutory language that relates only to original investigations. *See* Transcript of Panel Hearing (Apr. 17, 2002) (“Tr. of Panel Hearing”) at 193-94, 198; Magcorp’s Brief at 47, 49-51. The Commission suggests that the principle enunciated in *Gerald Metals* is inapplicable to the present matter because it has found herein that the subject and nonsubject imports are not substitutable. *See* Commission’s Brief at 100. Finally, the Commission and Magcorp further assert that the “unique circumstances” of *Gerald Metals* preclude its general applicability to other material injury determinations. *See* Commission’s Brief at 102; Tr. of Panel Hearing at 98, 193-97; Magcorp’s Brief at 50-51.

### 1. Attribution in Sunset Reviews

The original investigation conducted in *Gerald Metals* was governed, *inter alia*, by 19 U.S.C. § 1673 which directs the Commission to determine whether a material injury, threat of material injury, or material retardation have occurred “by reason of” unfairly traded goods. 19 U.S.C. § 1673(2) (2000).<sup>9</sup> The sunset review herein is governed, *inter alia*, by 19 U.S.C. § 1675a, which directs the Commission to determine whether revocation of an order would be likely to “lead to” continuation or recurrence of material injury. 19 U.S.C. § 1675a(a)(1) (2000). Though these are distinct statutes with differing language, the principle underlying the court’s

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<sup>9</sup> *Gerald Metals* was governed by the Tariff Act of 1930, as it existed prior to amendment by the URAA. *See* 132 F.3d at 718 note. However, the SAA affirms that the URAA did not revise the causation standard of the pre-existing statute. SAA at 851. Although the SAA cautions that the Commission is not required to go so far as to “isolate” injury caused by other factors, consistent with *Gerald Metals*, the SAA confirms that “the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports.” *Id.* at 851-52.

construction of 19 U.S.C. § 1673 in *Gerald Metals*, is applicable to interpretation of 19 U.S.C. § 1675a in the present case.

In the original investigation reviewed in *Gerald Metals*, there were substitutable nonsubject imports on the domestic market during the relevant period whose impact on the U.S. industry had to be considered in order to establish what injury, if any, was attributable to the subject goods. See 132 F.3d at 719-23. In the present sunset review, there is a likelihood of nonsubject imports being present in the U.S. market during the relevant period whose impact on the U.S. industry has to be examined in order to establish what likely injury, if any, is attributable to revocation of the duties being imposed on the subject goods.

It is true that, under the sunset statute, it is *revocation of the duties* on the subject goods, not the subject goods themselves, that must give rise to the relevant injurious condition. See 19 U.S.C. § 1675a(a)(1). It is also true that, under the sunset statute, it is “likely” impact, not actual or threatened impact, that is considered. See 19 U.S.C. §§ 1675a(a), 1675(d)(2)(B) (2000). However, these distinctions are not material to the basic principle.<sup>10</sup> Of both statutes, the plain language mandates that the Commission determine the impact that is attributable to the subject imports, which necessarily means considering the impact of any substitutable nonsubject imports that are on the domestic market during the relevant period.

## 2. Non-Substitutability Finding

As noted above, the Commission found that the subject and the nonsubject imports are not substitutable in the present case. See Views at 18-19, 33-34. Therefore, suggests the Commission, *Gerald Metals* is inapplicable. See Commission’s Brief at 100. This contention necessitates review of whether there is substantial evidence on the record to support the Commission’s finding of non-substitutability. In determining whether there is substantial evidence on the record to support a finding of fact, the Panel must look at both the supporting and the detracting evidence on the record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-488 (1951); *Gerald Metals*, 132 F.3d at 720.

In finding non-substitutability, the Commission concluded that “factors such as price, quality, availability of scrap recycling programs, and the desire to have a North American supplier may limit the full extent to which nonsubject imports are substitutable for U.S. or Canadian products.” Views at 33-34 (relating to alloy), 19 (relating to pure, but omitting the word “full”).

Before looking at the evidence on the record supporting and detracting from the Commission’s non-substitutability finding, it must be clarified that price is not relevant to this substitutability analysis. This analysis is to determine whether third-country nonsubject goods are substitutable with subject goods for the purpose of establishing whether, among other things,

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<sup>10</sup> This is the only step of the majority’s legal analysis with which the dissent expressly disagrees. See Dissent at 3 (asserting, without explanation, that the principle announced in *Gerald Metals* is inapplicable in a sunset review). The dissent also includes several pages of statements relating to fact, law and record evidence, which do not directly relate to any part of the majority’s analysis. Although the majority does not necessarily agree with the accuracy or applicability of these additional statements, they need not be addressed herein.

the price effects of nonsubject imports must be analyzed separately from the price effects of the subject imports. For this purpose, therefore, it is necessary to determine whether the U.S. market considers nonsubject imports substitutable with subject imports, without regard to price.

#### **a. Evidence Supporting Non-Substitutability**

The predominant evidence on the record supporting the finding of non-substitutability is contained in purchasers' responses to questionnaires prepared by the Commission. *See* Purchasers' Questionnaires, Confidential Document ("CD") 52-67, at IV-10. The purchasers' questionnaires requested product comparisons based on a series of criteria, nine of which are significantly indicative of substitutability.<sup>11</sup> *See id.* Each purchaser was asked to specify pairs of countries whose products it could compare on the basis of the above mentioned-criteria. *See id.* at IV-1, IV-10. Regarding each country-pair, purchasers specified, for each criterion, whether or not the products were "comparable."<sup>12</sup> *See id.* at IV-10. In addition to direct comparisons of third-country nonsubject goods to Canadian subject goods, the responses also contain comparisons of nonsubject goods to U.S. domestic like product.<sup>13</sup> *See id.* The responses included scattered claims of superiority of U.S. or Canadian product over third-country goods under individual criteria. *See id.* In particular, as the Commission notes in the Views, a few purchasers stated that scrap recycling programs of Canadian producers impact substitutability. Views at 19, 33-34. Some responses also include occasional assertions of superiority of third-country product over U.S. or Canadian goods. *See* CD at IV-10. A few purchasers' questionnaires also include assertions of tangential reasons to prefer North American suppliers. Views at 19, 33-34. However, although the responses included scattered references to distinctions material to substitutability, taken as a whole, the responses manifest that purchasers saw third-country nonsubject goods as substitutable with subject goods. *See* CD 52-67.

#### **b. Evidence Detracting from Non-Substitutability**

Testimony on the record clearly indicates that the quality distinctions referenced in the questionnaires are not significant enough to impact the market's treatment of the nonsubject and subject imports as substitutable. An example includes an exchange that occurred when Commissioner Hillman attempted at the hearing to clarify the role of third-country product in filling the demand left when Dow closed. Transcript of Commission's Hearing ("Tr. of Commission's Hearing") at 213-19. In response to questions by Commissioner Hillman, Sanford Yosowitz, Vice President of U.S. purchaser Alcan Aluminum Corp., ("Alcan") confirmed that when Dow closed, Alcan "scramble[d] to qualify lots of other suppliers" from Israel, Russia and Ukraine. *Id.* at 213. In response to further questions by Commissioner Hillman, Daniel E. Hoggard, President of U.S. purchaser Northern Diecast, clarified that, once a third-country producer is "qualified," its product is considered substitutable for product from qualified U.S.

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<sup>11</sup> Delivery time, minimum quantity requirements, product consistency, product format/shape/size, product quality, reliability of supply, scrap recycling programs, technical support/service, and transportation network. *See* CD 52-67, at IV-10.

<sup>12</sup> Non-comparable products were described as either "superior" or "inferior." *See id.*

<sup>13</sup> That Canadian subject-goods and U.S. domestic like product are substitutable is overwhelmingly confirmed by the same questionnaires. *See id.*

and Canadian sources. *See id.* at 213-19. With regard to nonsubject pure magnesium meeting qualification standards, Mr. Hoggard acknowledged that “everybody can get the chemistry right.” *Id.* at 219.

Even testimony on behalf of the major U.S. magnesium producer, Magcorp, endorsed the substitutability of these products. At the Commission’s hearing, a Magcorp Senior Vice President testified: “As someone who markets magnesium and talks to customers and potential customers on a daily basis, I can tell you there is *no commercially significant difference* between magnesium imported from China or Russia and the magnesium from the United States or Canada. As long as the product meets specifications, the market considers them to be commercially equivalent.” *Id.* at 24 (testimony of Howard Kaplan) (emphasis added). Additionally, an outside expert presented by Magcorp stated that “imported pure and alloy magnesium products from non-subject suppliers such as Russia, China and Israel are . . . essentially *interchangeable* with U.S. and Canadian magnesium.” *Id.* at 39 (testimony of Kenneth R. Button, Economic Consultant, Economic Consulting Services, Inc.) (emphasis added).

Regarding the purchasers’ questionnaires, as noted above, although the responses included scattered references to distinctions material to substitutability, taken as a whole, the responses manifest that purchasers saw third-country nonsubject goods as substitutable with subject goods. *See* CD 52-67.

In the importers’ questionnaires, an overwhelming majority of responses reported that domestic like product, subject goods and nonsubject goods are used interchangeably and that there are no differences in product characteristics or sales conditions among them. *See* Importers’ Questionnaires, CD 71-92, at III-B-31, III-B-32. The few contrary comments on the importers’ questionnaires are similar to those on the purchasers’ questionnaires, citing differences relating to quality, scrap recycling and the desire to have a North American supplier. *See id.*

Taking into consideration the scant evidence on the record supporting non-substitutability, together with the extensive evidence on the record detracting therefrom, the Panel concludes that the record lacks substantial evidence to support the Commission’s finding of non-substitutability.

### **3. Facts of *Gerald Metals***

Finally, as also noted above, both the Commission and Magcorp contend that the “unique circumstances” of *Gerald Metals* preclude its general applicability to other material injury determinations. *See* Commission’s Brief at 102; Tr. of Panel’s Hearing at 98, 193-97; Magcorp’s Brief at 50-51. In its decision, the court of appeals does make reference to the “unique circumstances” of that case. 132 F.3d at 722-23. Although the transactional scenario in *Gerald Metals* is somewhat unusual, careful distillation of those circumstances reveals that the core facts relevant to the rule enunciated, are both common and present in the case at bar. Those essential facts are that, with substitutable subject and nonsubject goods being simultaneously imported into the United States, the Commission failed adequately to consider the respective impact of the subject and the nonsubject goods in its analysis. Thus, the Panel finds that the principle enunciated in *Gerald Metals* requires that the Commission consider the impact of other

factors, such as the substitutable nonsubject imports, sufficiently to establish the extent to which likely injury will be attributable to revocation of the orders.

### **B. Absence of Attribution Analysis**

In its Views, the Commission seems to have attributed the likelihood of continuance or recurrence of material injury to the U.S. industry, if the orders are revoked, to Canadian product. Although the Commission made passing references to nonsubject imports, Views at 18-19, 33-34, it did not examine the impact of nonsubject imports on the domestic market and, did not consider the likelihood of all or part of the likely injury being attributable to nonsubject goods.

The Commission acknowledged that there is a presence of generally low-priced, nonsubject imports of both pure and alloy magnesium from third countries. Views at 18, 33. The Commission further noted that imports of pure magnesium from third countries had been increasing. *Id.* at 18. In its Views, the Commission postulated that, to the extent Canadian producers compete with third-country producers, increased imports from Canada would likely force down prices of the nonsubject imports which, in turn, would reinforce the price depression cycle. *Id.* at 26-27, 39. However, as discussed above, its finding of non-substitutability led the Commission to refrain from examining the effects of subject and nonsubject imports. The Commission made no attempt to determine to what extent likely injury to the domestic industry is attributable to revocation of the orders as distinct from that attributable to nonsubject imports. Merely referencing the impact of other factors, such as nonsubject imports, does not constitute considering those factors sufficiently to establish the extent to which the likely injury will be attributable to revocation of the orders, as required by the principle established in *Gerald Metals*.

Accordingly, the Panel remands this matter for the Commission to examine the likely impact of substitutable nonsubject imports sufficiently to establish the extent to which material injury that might be likely to occur within a reasonably foreseeable time following revocation of any of the orders, would be attributable to revocation of the orders.

## **IX. VOLUME AND PRICE EFFECTS**

### **A. Alloy Magnesium**

In its original investigation, the Commission found that as volume and market share of subject imports increased, prices for both U.S.- and Canadian-produced alloy magnesium steadily declined. *Magnesium From Canada*, USITC Pub. No. 2550, Inv. Nos. 701-TA-309 & 731-TA-528, at 21 (Final) (August 1992). In particular, the Commission found that the effect of subject imports on U.S. prices was significant. *Id.* In this sunset review, the Commission came to the same conclusion, noting that the revocation of the countervailing duty alloy order “would be likely to lead to significant underselling by the subject imports of the domestic like product, as well as significant price depression and suppression, within a reasonably foreseeable time.” Views at 40. In support of its conclusion, the Commission noted that, given the highly competitive nature of the alloy market combined with Magnola’s need to establish initial contractual relationships, Magnola’s entry would likely put pressure on NHCI to lower its prices.

*Id.* at 39. This, according to the Commission, would force Magcorp and nonsubject producers and exporters to reduce already declining prices in a downward cycle. *Id.* In this regard, the Commission observed that the downward price pressure is amplified by certain price-match mechanisms that exist in alloy magnesium markets. *Id.* at 39-40; Tr. of Panel Hearing at 77-78.

The statute mandates that the Commission examine, among other things, volume and price data in making its determination. 19 U.S.C. §§ 1671d(b)(4)(A)(ii), 1675a. In the present matter, the Commission appeared to have attached considerable weight to the domestic industry's arguments that, without the countervailing duty order, it was likely that Magnola would offer its product at low prices to obtain initial customers, and that this would pressure NHCI and domestic producers to follow suit. *See Views* at 40. The Commission concluded that, while the domestic industry was not vulnerable during the review period, there were several signs of weakness, including a slight decline in current operating income, downward trends in financial indicia (which would probably be exacerbated by Magnola's market entry), and possible adverse consequences of Magnola's market participation on Magcorp's investment in new technology. *Id.* at 40-42. However, the Commission's analysis is contingent upon the validity of its presumption that Magnola would likely enter the market at low prices and at significant volumes in relation to demand increases. Absent that scenario, the Commission's analysis fails.

The record contains considerable data relating to volumes and pricing for alloy magnesium in the U.S. market throughout the 1990s. *See Staff Report* at II-1 to -24, IV-1 to -8, V-1 to -10. However, the record does not appear to support a finding that Magnola is likely to enter the market by underselling. The Commission found that the U.S. market for alloy was growing sufficiently fast that demand could not be met from domestic sources, and that the only existing Canadian supplier, NHCI, had captured a significant market share despite the countervailing duties. *Views* at 35. The record further seems to suggest that likely alloy demand increases would exceed what the Commission found to be Magnola's likely alloy exports to the United States during the "reasonably foreseeable" period. *See PR* at II-4 (demand increases); *CR* II-7 (demand increases); *Views* at 19-21 (Magnola likely exports). Regarding the alloy magnesium, the Commission's *Views* do not show that the impact of the countervailing duty, Magnola's supply intentions in relation to demand, or the pricing of nonsubject imports, were taken into account as factors affecting the prevailing or anticipated U.S. market prices.

Furthermore, the Commission appears to have ignored the model and analysis of demand, supply and substitution elasticity, prepared by its own staff and presented in the Staff Report, which predicts relatively small impacts on alloy arising from countervailing duty revocation under both low and high growth scenarios. *See Compass Presentation*, *PR* app. D; *CR* app. D.

In light of the above, the Panel cannot see how the record supports the Commission's findings that Magnola is likely to enter the market by underselling, or that Magnola's likely volumes will be significant in relation to demand increases. Accordingly, the Panel remands this matter to the Commission instructing it to present the price and volume implications of revocation of the countervailing duty order on alloy magnesium with sufficient analysis to show how the record supports the Commission's findings that revocation of this order would be likely to lead to Magnola entering the market either by underselling, or with volumes that would be significant in relation to anticipated demand increases.

## B. Pure Magnesium

The situation in the pure magnesium market is somewhat different than that in the alloy market due to the existence of significant antidumping duties along with countervailing duties. In addition, the pure magnesium market is not anticipated to experience the increasing demand expected in the alloy market. *See* PR at II-4 to II-5; CR II-7 to II-8. The Commission found that the high substitutability and historic price alignment between U.S. and Canadian pure magnesium indicated that now, as during the original investigation, any effect of subject import prices on U.S. prices would likely be significant. Views at 26. It concluded that, as argued by the U.S. industry, absent the orders, there would be a likelihood that Magnola would offer its product at low prices in order to obtain new customers in a market that was characterized by static demand and a trend toward declining prices. Views at 26-27. Accordingly, the Commission concluded that revocation of the orders on pure magnesium would be likely to lead to significant underselling of the subject imports in relation to domestic like product, leading to significant price depression and suppression throughout the market within a reasonably foreseeable time. *Id.* at 27.

The price impact of the combined antidumping and countervailing duty orders on pure magnesium after 1992 effectively eliminated Canadian competition. PR at I-3, Figure I-1; CR at I-7, Figure I-1. Except for nominal imports of subject goods, the U.S. market was supplied during this period by U.S. and third-country producers. *See id.* As a result, prevailing price levels responded to normal market factors, *to wit*, supply and demand, including supplies of substitutable nonsubject imports from third-country suppliers.

Central to the pure magnesium market analysis is the extent to which prevailing and anticipated U.S. market prices on pure magnesium are likely to be driven downward by revocation of the two orders and, in turn, adversely affect the U.S. industry. However, the Commission failed to show how it determined the impact on U.S. price levels of revocation of the antidumping or countervailing duty orders, either independently or in combination.

It does not appear that the Commission took into account the impact of the pricing of nonsubject imports on U.S. market prices for pure magnesium. Moreover, as with its alloy analysis, it does not appear that the Commission took into account the model and analysis of demand, supply and substitution elasticity prepared by its own staff and presented in the Staff Reports' *Compass Presentation*, which predicts relatively small output and price impacts upon revocation of the pure magnesium orders. *See* PR app. D; CR at app. D.

As pricing is a significant factor involved in this case, it is important that the Commission clearly identify how it concluded that the revocation of these orders would be likely to lead to significant underselling, and to price levels for subject goods that would have significant depressing or suppressing effects. Accordingly, the Panel remands this matter to the Commission instructing it to present the price and volume implications of revocation of the antidumping or countervailing duty orders on pure magnesium with sufficient analysis to show how the record supports the Commission's findings that revocation of these orders would be likely to lead either to significant underselling, or to price levels for subject goods that would have significant depressing or suppressing effects.

## **X. DISPOSITION AND ORDER**

The PANEL remands this matter to the United States International Trade Commission and ORDERS the Commission to take action consistent with the findings and instructions set forth herein. In particular, the Panel instructs the Commission to:

EXAMINE the likely impact of substitutable nonsubject imports sufficiently to establish the extent to which material injury that might be likely to occur within a reasonably foreseeable time following revocation of any of the orders, would be attributable to revocation of the orders.

PRESENT the price and volume implications of revocation of the countervailing duty order on alloy magnesium with sufficient analysis to show how the record supports the Commission's findings that revocation of this order would be likely to lead to Magnola entering the market either by underselling, or with volumes that would be significant in relation to anticipated demand increases.

PRESENT the price and volume implications of revocation of the antidumping or countervailing duty orders on pure magnesium with sufficient analysis to show how the record supports the Commission's findings that revocation of these orders would be likely to lead either to significant underselling, or to price levels for subject goods that would have significant depressing or suppressing effects.

The Commission shall return a decision on remand on or before October 15, 2002.

Signed in the original on July 15, 2002 by:

Matthew A. Gold  
Matthew A. Gold, Esq., Chairman

Alan S. Alexandroff  
Alan S. Alexandroff

W. Roy Hines  
W. Roy Hines

E. Neil McKelvey  
E. Neil McKelvey, O.C., Q.C.

## DISSENTING VIEWS OF MORTON POMERANZ

The International Trade Commission (“the Commission”) has determined, under section 751(c) of the Tariff Act of 1930 as amended (“the Act”), that revocation of the countervailing duty orders covering pure magnesium and alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. In a companion decision, the Commission determined that revocation of the antidumping duty on pure magnesium from Canada would be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonable time.

The record demonstrates that these are appropriate conclusions to the Commission’s investigations.

Basic to this conclusion is the fact that the standard in five-year reviews is not the same as that applied in original antidumping or countervailing duty investigations, notwithstanding that some of the same fundamental economic elements must be examined by the Commission in both instances.

The Congress, in its Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements, states that, “under the likelihood standard, the Commission will engage in a counter-factual analysis; it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo — the revocation [of the order]...and the elimination of its restraining effects on volumes and prices of imports.”<sup>1</sup> Thus, the likelihood standard is *prospective* in nature, rather than focused on current material injury.

This standard has here been applied to the magnesium industry which has its own unique aspects.

### The Industry

- o Pure magnesium and alloy magnesium, the two products of this investigation, can be produced in the same factory, on the same line, by the same employees, differentiated only by the non-magnesium element added to the pure magnesium to obtain the desired alloy.
- o The basis of this case arose a decade ago when the Canadian Company, Norsk Hydro Canada, Inc. (“NHCI”), a new market entrant, needed to price aggressively in order to capture market share in the United States. The result was prompt imposition of dumping duties on pure magnesium which has virtually shut the door on Canadian shipments to the United States of the pure metal. Subsidies granted to NHCI by the government resulted in countervailing duties, as well.
- o Magnesium is essentially a commodity product. As long as magnesium products meet the same American Society for Testing Materials (ASTM) specifications, the market will consider them commercially equivalent and substitutable.
- o In the past decade, Canada and the United States produced almost half the world production of magnesium, with the U.S. being by far the larger consumer of the two.

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<sup>1</sup>SAA, H.R. Rep. 316, 103d Cong. 2d Sess., Vol. 1, at 883 (1994)

## Recent Changes

The last decade has witnessed a number of important developments in the magnesium industry:

- o Producers in China, Russia, the Ukraine and Israel have provided substantial new production to world markets.
- o Large amounts of that production have been sold at price levels which have prompted dumping actions in major consuming nations (e.g, the EU and the US).
- o Dow Chemical, once the largest U.S. producer, exited the magnesium production business in 1998.
- o Magnesium Corporation of America (Magcorp), currently the largest U.S. producer, is engaged in a program of improving its electrolytic cell line, thereby increasing capacity.
- o Magnola Metallurgy, Inc. (Magnola), a new greenfield plant in Canada, is coming on stream with a reported ultimate capacity exceeding total U.S. imports from the world.
- o Magnesium purchase contracts have, in recent years, increasingly included pricing arrangements requiring producers to meet competitors' prices. There has also been a trend toward shorter-term contracts, further increasing price sensitivity in the market.

## Elements of Record Supporting the Likelihood of Recurrence

1. Excess capacity resulting from Magnola's entrance into the market and NHCI's planned expansion can only lead to price cutting in search of market share, thereby repeating the injurious conditions that prevailed during 1990-1991.
2. During the period of review, prices for alloy magnesium were falling even prior to Magnola's achievement of full commercial production. (See Majority Views at 38).
3. Magnola has already made sales approaches to U.S. purchasers, including current customers of U.S. producers.
4. The likelihood that Magnola will offer low prices to obtain customers is increased by the stated intentions of some U.S. purchasers to seek out new suppliers.<sup>2</sup>
5. The likelihood of price depression in the market is accentuated by contract provisions that require producers to meet competitors' prices.
6. Under present circumstances, Magnola's shipments to the United States would be subject to the "all other" countervailing duty rate of 4.48 percent<sup>3</sup>. Revocation of this penalty duty would be a considerable advantage to Magnola in this narrow margin commodity product business.

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<sup>2</sup>The record evidence indicates that Magnola's marketing team consists of a number of former Dow employees who are experienced in selling in the U.S. and have purchaser contracts throughout the country. TR at 38

<sup>3</sup>The rate in effect at the time of the Commission decision.

The effect will be considerably greater in the case of the 21 percent dumping duty on pure magnesium.

7. Due to the U.S. industry's financial condition, Magcorp has been unable to speed up completion of improvements in its electrolytic cell line and thereby increase production.

8. In September, 1999, Magcorp laid off approximately 54 workers due to a decline in sales. In January, 1999, eligible workers at Northwest Alloys (the other U.S. producer) were certified for adjustment assistance under Section 223 of the Trade Act of 1974.<sup>4</sup>

#### Question of Non-Subject Imports

As indicated above, in these sunset reviews, the Commission must predict the future impact of subject imports on the domestic industries if the constraints of the orders are removed. The record evidence is overwhelming that if the orders are revoked, unfairly priced imports from Canada, where excess capacity is about to spike, will increase substantially, leading to the injurious conditions that occurred during 1990-1991. Thus, the subject imports will be a significant and substantial cause of material injury if the orders are revoked. This conclusion of the Commission was reached with full record knowledge of non-subject imports. Even if it were applicable to a prospective sunset review analysis, *Gerald Metals*<sup>5</sup> requires nothing more. In fact, the Congress, in its statement of Administrative Action, cites with approval the U.S. practice "that the Commission need not isolate the injury caused by other factors from injury caused by unfair imports."<sup>6</sup> This is consistent with *United States Steel Group*, 96 Fed 3d 1352.

There is no suggestion that the Commission must rule out the possibility of additional injury from non-subject sources (nor that it need quantify such other potential injury) but only that it conclude that the subject imports are likely to cause substantial injury.

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<sup>4</sup>In its petition for adjustment assistance, Northwest Alloys listed the reason for actual or threatened loss of employment as "Dead Sea Works, Israel, and CIS (Commonwealth of Independent States — former Soviet Union) exports have flooded world markets at discounted prices."

<sup>5</sup>*Gerald Metals, Inc. v United States*, 132 F 2d 716 (Fed. Cir. 1997)

<sup>6</sup>SAA, p. 851. The Uruguay Round Agreements Act of 1994 states that "the Statement of Administrative Action approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expressions by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application (19 USC 3512(d))."

## Conclusion

Under controlling U.S. law, the Commission is presumed to have considered all evidence in the record and need not address every argument advanced by a party to the investigation.<sup>7</sup>

The panel must affirm the Commission's factual determinations as long as they are reasonable and supported by the record as a whole, even though there may be evidence on the record which detracts from the Commission's conclusions.<sup>8</sup> Legal authorities underline that the panel "may not remand the Commission's determination simply because the evidence on the record may support inconsistent conclusions."<sup>9</sup>

Implicit in the Commission's view of the future is a world with an oversupply of magnesium, resulting in constant pressure for price depression. We have earlier seen that so long as products meet the same ASTM specifications, the market will consider them commercially equivalent and substitutable. As a result, they are exceedingly price-sensitive.

A large measure of the oversupply will originate in the new production from Magnola and the expansion of production by NHCI. These Canadian producers, with only a limited Canadian magnesium consumption, have depended to a large extent on sales to consuming countries outside of North America. In the world envisaged by the Commission, these markets may be lost to Canadian producers by the press of other supplier price competition. The normal pressures for the Canadian producers to direct sales to the proximate U.S. market will be greatly increased if these other country sales are foreclosed. Logic alone would clearly dictate that removal of the U.S. penalty duties could only result in a continuation or recurrence of material injury to U.S. industry in the reasonably foreseeable future.

Respectfully submitted on July 15, 2002 by:

Morton Pomeranz

Morton Pomeranz

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<sup>7</sup>*Metallwerken Nederland BV vs United States*, 728 F Supp 730, 740 (CIT 1989); *Maine Potato Council v United States*, 613 F Supp 1237, 1245 (CIT 1985); *Roses Inc. v United States*, 720 F Supp 180, 185 (CIT 1989); *Avesta AB v United States*, 689 F Supp 1182, 1183 (CIT 1988).

<sup>8</sup>*Atlantic Sugar, Ltd. V United States*, 744 F 2d 1556, 1563 (Fed. Cir. 1984)

<sup>9</sup>*BIC Corp v United States*, 964 F Supp 391, 396 (CIT 1997), citing *Consolo v Federal Maritime Commission*, 383 U.S. 607, 620 (1966)