

# **BINATIONAL PANEL REVIEW**

**PURSUANT TO ARTICLE 1904 OF  
NORTH AMERICA FREE TRADE AGREEMENT**

<b>In the Matter of:</b>	)	
	)	
	)	
<b>Magnesium From Canada (Injury)</b>	)	<b>Secretariat File No.:</b>
	)	<b>USA-CDA-00-1904-09</b>
	)	
<b>Full Sunset Review of Antidumping Duty and Countervailing Duty Orders</b>	)	<b>NON-PROPRIETARY</b>

## **DECISION OF THE PANEL REVIEWING THE DETERMINATION OF THE INTERNATIONAL TRADE COMMISSION ON THE SECOND REMAND**

**October 6, 2006**

**Before:**

**E. Neil McKelvey, Chairman  
W. Roy Hines  
James R. Holbein  
Gérald A. Lacoste  
Mark R. Sandstrom**

## **APPEARANCES:**

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## **1. INTRODUCTION**

By its decision dated January 17, 2006, this NAFTA Binational Panel remanded for the second time the Determination of the United States International Trade Commission (the Commission) in *Magnesium from Canada*, a five-year sunset review pursuant to section 751(c) of the *Tariff Act*, 19 U.S.C. § 1675(c), as to whether revocation of the antidumping order covering pure magnesium or of the countervailing duties orders covering pure magnesium and alloy magnesium imported from Canada would likely lead to continuation or recurrence of material injury to the U.S. industry. On March 31, 2006, the Commission issued its Views on the Panel's second remand decision.

In reviewing the Commission's second remand order, the Panel received and considered submissions from the Gouvernement du Québec (Québec), Norsk Hydro Canada Inc. (NHCI), the Commission and U.S. Magnesium LLC.

## **2. JURISDICTION AND STANDARD OF REVIEW**

The Panel's jurisdiction arises from Chapter 19 of the North American Free Trade Agreement (NAFTA). In its first remand decision of July 16, 2002, and its second remand decision of January 17, 2006, the Panel described the applicable standard of review. That standard is being applied to the Panel's consideration of the Commission's second determination on remand. This decision focuses on the analysis and conclusions of the Commission as they relate to evidence on the record to support the determination on remand pursuant to the Panel's second remand decision and to the determination as a whole.

## **3. NONSUBJECT IMPORTS**

In its first remand decision, the Panel majority, instructed 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 reasonable foreseeable time following revocation of any of the orders, would be attributable to their revocation. In its first determination on remand the Commission held that substitutable nonsubject imports did not contribute to material injury to domestic producers. In its second remand decision, the Panel affirmed the decision of the Commission on this point.

**4. PRICE AND VOLUME IMPLICATIONS OF REVOCATION OF THE ORDERS ON PURE MAGNESIUM**

In its first remand decision, the Panel instructed the Commission to present the above-mentioned price and volume implications with sufficient analysis to show how the record supports the Commission's finding that revocation of anti-dumping or countervailing duty orders on pure magnesium would be likely to lead to significant underselling or to price levels for subject goods that would have significant depressing or suppressing effects. In its first determination on remand, the Commission presented more details to describe and elaborate its assessment of the combined capacity of the two Canadian producers, identified specific export intentions of Magnola, and reasonably projected expanded shipments to the United States if the two orders on pure magnesium were revoked. The Panel affirmed the Commission's determination on remand on this point.

**5. COMMISSION FINDINGS ON PRICE AND VOLUME IMPLICATIONS AS TO ALLOY MAGNESIUM**

In its first remand decision of July 16, 2002, the Panel instructed the Commission 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 sufficient in relation to anticipated demand increases.<sup>1</sup>

In its first determination on remand, the Commission affirmed its previous determination that revocation of the countervailing duty order on imports of alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within a reasonable foreseeable time.

In its second remand decision, the Panel was of the view that the Commission's analysis failed to respond to the instructions quoted above, as the instruction was specifically directed to obtaining clarification of the evidence in the record as to the anticipated pricing policies of

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<sup>1</sup> Panel's first remand decision, July 16, 2002, p. 15

Magnola – pricing policies that the Commission concluded would lead to a significant increase in export volumes by this firm to the United States. It held that in the first determination on remand, the Commission failed to identify sufficient facts from the record specifically relating to Magnola’s future pricing policies, forecasts or projections, to satisfy the Panel that the Commission’s conclusions were reasonable and supported by substantial evidence on the record. Its statements appeared to be more in the nature of assumptions.

Accordingly, the Panel’s second remand decision instructed the Commission to:

Analyze the price, volume and impact of revocation of the countervailing duty order on alloy magnesium to show how the record supports the Commission’s conclusions, providing a reasoned explanation based on all of the evidence on the record to support a decision that revocation of the countervailing duty Order on imports of alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within the reasonably foreseeable future due to underselling by Magnola. The Commission must provide further reasoned analysis supported by substantial evidence on the record, including any factual evidence not referred to in its Views on Remand, as to the conclusion that Magnola would enter the market by underselling in order to establish export volumes that would be significant in relation to anticipated demand increases.<sup>2</sup>

In the Commission’s second determination on remand, the majority (Commissioner Pearson dissenting) found underselling by subject importers to be likely and stressed that its finding of likely price effects rests also on the likelihood of price depression as a result of the substantial increase in the volume of subject imports.<sup>3</sup>

As to the likely volume of subject imports, the Commission reviewed Magnola’s statements as to its expected production capacity and sales in the U.S. and NHCI’s intentions and capacity in detail and determined the volume likely to be exported by them. The Commission then analyzed the U.S. industry capacity to meet future demand. The Commission concluded

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<sup>2</sup> Panel’s second remand decision, January 17, 2006, p. 6.

<sup>3</sup> Commission’s Second Determination on Remand (Proprietary Version), p. 4.

that U.S. producers could meet any increase in the demand for alloy magnesium even at current capacity levels<sup>4</sup>.

As to the likely price effects of subject imports of alloy magnesium, the Commission majority held that a significant increase in the volume of subject imports is likely, in and of itself, to lead to sufficient price depression even without underselling by importers.<sup>5</sup> It held that there is ample evidence in the record to support findings that there would likely be significant price effects as a result of subject imports if the countervailing duty order were revoked, either as a result of increased volume alone, or as a result of the increased volume and underselling by Canadian producers.<sup>6</sup>

The majority of the Commission reviewed the evidence, providing an indication that Magnola would likely be engaged in underselling. It repeated its previous finding that Magnola had made sales approaches to U.S. purchasers. It then referred to evidence, not previously noted, of an executive from Magcorp who related that a U.S. purchaser of alloy magnesium had told him that Magnola had offered to supply it with alloy magnesium at a price less than the delivered prices at the time. It also referred to evidence of another statement by a third person alleging that Magnola will be forced to buy market share if they wish to participate in the U.S. market. In another statement, it is alleged that a senior official at Magnola is reported to have said that Magnola may incur losses for several years, indicating to the Commission it was prepared to pursue a low-price strategy to enter the U.S. market.<sup>7</sup>

The majority then went into detail on the expected volume of shipments to the United States in 2002 by Magnola and NHCI, reviewed the expected U.S. demand and concluded that the data indicated an existing imbalance between supply and demand in the market. The Commission concluded that additional supply would likely lead to additional price declines.<sup>8</sup>

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<sup>4</sup> *Ibid*, p. 7

<sup>5</sup> *Ibid*, p. 8

<sup>6</sup> *Ibid*, p. 9

<sup>7</sup> *Ibid*, p. 14

<sup>8</sup> *Ibid*, pp. 15 - 17

The decision of the majority, insofar as it determined that a decline in prices for alloy magnesium would result from increased volume, is essentially a repetition of previous determinations of the Commission, although it went into more detail. The reference to statements in the record quoting statements by Magnola, Magcorp and another, and the analysis of anticipated imports by Magnola and NHCI compared with the likely volume of domestic producers, is information that was not included in previous determinations of the Commission.

Commissioner Pearson dissenting, held that if the countervailing duty order on alloy magnesium was revoked, the resulting increase in the volume of the subject imports is not likely to be significant, given the supply and demand conditions prevalent in the U.S. alloy magnesium market.<sup>9</sup> He held that the record indicates that demand for alloy magnesium is expected to grow dramatically in the U.S. market and it was unlikely that additional imports would have a significant effect on domestic prices during the foreseeable future;<sup>10</sup> the projected increase in U.S. demand would completely absorb the likely increase in subject imports. He concluded that revocation of the countervailing duty order covering alloy magnesium from Canada would not be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.<sup>11</sup>

## **6. ISSUES CHALLENGED BY COMPLAINANTS**

NHCI challenged the Commission's second determination on remand for several reasons. It alleged that the Commission's finding that Magnola would enter the U.S. market by underselling was not supported by substantial evidence. It further challenged the finding that Magnola's imports would be significant in relation to anticipated demand increases because the Commission improperly estimated Magnola's export volumes by extrapolating from NHCI's experience, and due to improper assumptions about Magnola's product mix based on NHCI's experience. Further, NHCI alleges that the Commission was not responsive to the Panel's instructions by dealing with NHCI and Magnola in the aggregate and by improperly equating the alloy magnesium situation with the pure magnesium market. NHCI claims the Commission

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<sup>9</sup> Dissenting Views, p. 7

<sup>10</sup> *Ibid*, p. 9

<sup>11</sup> *Ibid*, pp. 14 - 15



improperly challenged a fundamental conclusion of the Panel concerning anticipated demand, and generally alleged that the Commission failed to satisfy the legal standard for sunset determinations.

Québec alleges that the Commission finding on price suppression was flawed. It alleges that the Commission improperly relied on an “all others” rate that was eliminated by the Commerce Department as a result of another Panel decision. It also alleges that the Commission improperly ignored Panel instructions on volume and impact. It then reviews the minority views and requests the Panel to instruct the Commission to terminate the alloy order.

## **7. ANALYSIS OF THE PANEL**

### **A. Price Underselling**

The Commission has consistently determined that Magnola would pursue a strategy of price underselling into the U.S. market due to its increased capacity, its need to enter the U.S. market by attracting new customers, its sales force of former Dow employees with contacts in the U.S. market, the high degree of substitutability of its products for other producers, and the need to price aggressively in order to enter the market. The Panel, in its second decision, made it clear that the Commission’s, “statements concerning underselling and price cutting appear to be more in the nature of assumptions.”<sup>12</sup>

In its second determination on remand, the Commission added an analysis of market demand to show that the U.S. market could not absorb the increased shipments that were likely in the absence of the countervailing duty order. In addition, the Commission cited several specific pieces of information to bolster its findings.<sup>13</sup> However, the Panel has concerns whether the evidence cited by the Commission rises to the level of substantial evidence, particularly in light of *Matsushita Electric Industrial Co., Ltd. v. U.S.*<sup>14</sup> (*Matsushita*). In that opinion, the Court of Appeals for the Federal Circuit analyzed in some detail the type of evidence that it found convincing to support a Commission determination. The Commission offered three scenarios to

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<sup>12</sup> Panel’s second remand decision, p. 5

<sup>13</sup> *Supra*, p. 4

<sup>14</sup> *Matsushita Electric Industrial Co., Ltd. v. U.S.*, 750 F.2d 927; 1984 U.S. App.

support its affirmative threat determination, supported by the testimony of an industry expert. The Federal Circuit accepted that testimony as substantial evidence, because:

There may not be a word of truth in any of his testimony, but we are required to suppose otherwise, since it was given in person and under oath and subject to cross-examination, since his knowledge of the subject was obviously unsurpassed, and since no opposing testimony was introduced, as it easily could have been if Mr. Moss' testimony were false or if his opinions were erroneous.

The Moss testimony is just the kind a court must look for when it is required to review a determination under the "substantial evidence" standard. One who seeks to overturn a quasi-legislative determination, reviewed under that standard, without such testimony in support of his own position is undertaking a heavy load indeed.<sup>15</sup>

In the present case the specific evidence cited by the Commission to support its price underselling determination was not presented orally under oath and was not subject to cross-examination. However, the affidavits were from industry participants who are industry experts, as in the Matsushita case. They were submitted properly via sworn affidavits in the course of the proceeding. They were also subject to challenge through briefs and submissions of counter evidence by opposing counsel. The Panel notes that NHCI and Quebec, although given the opportunity, chose not to challenge the references to price underselling in the specific evidence cited by the Commission. Complainants point to other evidence in the record, including affidavits and other positive evidence to support contrary findings, that may or may not have more probity than the specific evidence relied upon by the Commission.

While the Panel has expressed its concerns as to whether the evidence in this case constitutes substantial evidence, the recent decision by the Court of Appeals for the Federal Circuit (CAFC) in *Nippon Steel*,<sup>16</sup> helps to clarify the situation. There, the CAFC determined that the Court of International Trade erred by overturning a decision of the Commission based on the court's careful analysis of the evidence. The CAFC reversed, after a thorough analysis, citing *Altx Inc.*<sup>17</sup> for the proposition that, "we must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the

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<sup>15</sup> Matsushita, Additional Views of Senior Circuit Judge Nichols, p. 937.

<sup>16</sup> *Nippon Steel Corp. v. United States*, No. 05-1404 (Slip Op., August 10, 2006).

<sup>17</sup> *Altx Inc. v. U.S.*, 370 F. 3d 1108, 1121 (Fed. Cir. 2004).

Commission's conclusion."<sup>18</sup> The CAFC then elaborated further, "In short, we do not make the determination, we merely vet the determination."<sup>19</sup> The CAFC then made clear that where there is substantial evidence to support both sides of an issue, the courts must defer to the Commission. "Substantial evidence exists on both sides of the issues. The Commission opted for one inference, and the Court of International Trade for another. In such a situation, however, the statutory substantial evidence standard compels deference to the Commission."<sup>20</sup> The same principle applies to Panel reviews of Commission determinations. Despite the Panel's earlier concerns about the evidence, the specific new evidence cited by the Commission in its second determination on remand, taken in the context of the record as a whole, supports the price underselling determination.

### **B. Anticipated Demand and U.S. Capacity**

The Commission has made numerous findings as to the likely volume of subject imports in order to reach its conclusions. It incorporated in its entirety the findings in the original and first remand determinations, including:

- Canadian producers have flexibility to switch production between pure and alloy magnesium;
- Either NHCI or Magnola could switch a large amount of production;
- There is substantial additional capacity expected to be added by Magnola and NHCI;
- Magnola alone could eventually produce 63,000 metric tons of alloy, enough to saturate the Canadian and U.S. markets despite the growth in demand;
- There is already substantial market presence of subject imports from Canada;
- Both NHCI and Magnola stated they will focus on the alloy magnesium market;
- NHCI and Magnola have the ability to increase significantly exports to the U.S. market given its size and proximate location;
- There is limited demand for alloy magnesium in Canada; and

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<sup>18</sup> Nippon Slip Op., *supra*, note 16, p. 10.

<sup>19</sup> *Ibid.*, p. 10.

<sup>20</sup> *Ibid.*, p. 14.

- NHCI has large inventory levels;

All of these considerations led the Commission to the conclusion that “subject Canadian producers are likely to export significant additional volumes of alloy magnesium from Canada to the United States within the reasonably foreseeable future if the countervailing duty order on alloy magnesium is revoked.”<sup>21</sup>

In the Second Determination on Remand, the Commission made additional findings to support its conclusions.<sup>22</sup> These findings include an analysis of Magnola’s projected volumes of imports, with calculations as to the minimum volumes of imports based on Magnola statements. The Commission also analyzed U.S. demand and capacity to conclude that U.S. capacity was sufficient to meet anticipated increases in demand for alloy magnesium. Its calculations on Canadian and U.S. industry capacity estimates and demand projections were based on evidence in the record. In fact, much of this evidence had already been considered by the Commission for the purposes of making its earlier findings on volume.

While it is correct that Magnola had not sold any alloy magnesium into the U.S. market, the Panel must evaluate whether it was reasonable for the Commission to extrapolate Magnola’s product mix and export volumes based on NHCI’s experience. The Commission relied upon statements made by Magnola in order to estimate the amount of alloy magnesium it would sell into the U.S. market. That type of evidence is reasonable for the agency to rely upon in making such an estimate. The range of estimated growth in demand was drawn from information submitted by NHCI and Magnola, and the Commission used the lowest estimate and highest estimate of the two to give the broadest range for demand growth. Within that range, the Commission used information submitted by the participants to make its calculations. This was a reasonable approach to take in a prospective sunset review. Therefore, the Panel finds that the Commission did not improperly estimate U.S. demand increases, product mix or capacity.

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<sup>21</sup> First Determination on Remand, pp. 36 - 37

<sup>22</sup> Second Determination on Remand, pp. 15 - 17

### **C. Other Allegations Raised by Complainants**

Concerning the NHCI allegations that the Commission was not responsive to the Panel's instructions, and improperly challenges a Panel conclusion, the Panel disagrees. In making its price underselling finding, the Commission clearly attempted to meet all of the instructions in the Panel's opinion. It took exception to some statements in the Panel decision, and sought to clarify those points. There is nothing improper in such an exercise, especially when conducted as a means to improve the Panel's understanding of the factual and legal basis of the findings under review. Therefore the NHCI challenges on these points fail.

Québec challenged the Commission's price finding that has been analyzed above. In addition, Québec challenged the Commission's use of the "all others" rate because that rate was eliminated to comply with another Panel's instructions. The Commission responded that the rate was eliminated, but that a rate for Magnola could be determined when it began shipments and the Commerce Department undertook an administrative review.<sup>23</sup> This is legally correct and therefore the Commission's determination on remand commits harmless error, in this instance.

Québec also challenges the Commission's adoption of its previous views on volume and impact. The Panel instruction covered volume, price and impact, which the Commission addressed in the new determination by adopting some of its previous reasoning. This approach is in compliance with the instructions of the Panel.

### **D. Analysis of the Commission Determination on Remand**

The Panel analyzes the second determination on remand as a whole in order to ensure that all issues determined by the Commission are properly reviewed under U.S. law. Under U.S. law, the Commission is tasked with considering a variety of factors in making a sunset determination. The Commission is required to revoke a countervailing or antidumping duty order unless it makes a determination that revocation of an order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."<sup>24</sup> Sunset analysis is different from that in an original antidumping or countervailing duty investigation,

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<sup>23</sup> Response of the Commission in Support of Remand Determination, May 10, 2006, pp. 11 – 13

<sup>24</sup> 19 U.S.C. § 1675a(a)

where actual or threatened material injury must be assessed.<sup>25</sup> Unlike the material injury standard in original investigations, the statutory sunset review standard is prospective and “inherently predictive and speculative” in nature.<sup>26</sup> The sunset review statute focuses on “likelihood of injury” and directs the Commission to take into account, aside from volume, price and impact on the industry: its prior injury determinations, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.<sup>27</sup> The statute further provides that “[t]he presence or absence of any factor which the Commission is required to consider ... shall not necessarily give decisive guidance with respect to the Commission’s determination ...”<sup>28</sup> This provision leaves significant latitude to the Commission to weigh all of the available evidence in the record regarding a myriad of factors and draw reasonable inferences from the evidence it finds most persuasive.<sup>29</sup> While, “... the Commission must consider all factors, no one factor is necessarily dispositive.”<sup>30</sup> This point is made clear as to the basis for the Commission determination, whether as an original determination or on remand:

Basis for determination. The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission’s determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.<sup>31</sup>

(i) Conditions of Competition

The Commission analyzed the conditions of competition in all three determinations. The Commission found that U.S. demand was growing, as described previously. It found that producers of pure and alloy magnesium could switch easily between them, based on evidence in the record. There is a high degree of substitutability between domestic alloy magnesium and

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<sup>25</sup> 19 *Ibid* § 1677(7)

<sup>26</sup> SAA at 883.

<sup>27</sup> 19 U.S.C. § 1675a(a)(1).

<sup>28</sup> 19 *Ibid* § 1675a(a)(5).

<sup>29</sup> SAA at 869.

<sup>30</sup> *Ibid* at 886.

<sup>31</sup> *Ibid* § 752(a)(5).

subject imports, and that the market is highly price competitive. All producers must be certified or pre-qualified and products are comparable on many terms. Purchasing patterns are stable and purchasers change suppliers only infrequently, although some purchases may seek new suppliers in the next two years. Subject imports maintain a sizeable presence in the U.S. alloy market. Contracts with large purchasers in the alloy magnesium market generally have price matching clauses that force producers to meet the lowest price in the market. The Commission also made findings as to the imminent entry of Magnola, particularly noting the 63,000 metric tons of additional capacity that would make it the largest single producer in North America.<sup>32</sup> It also found that Magnola was actively soliciting potential customers in the United States. These findings are not challenged in this phase of the Panel review, except to the extent that they have been dealt with in the demand analysis above. They are hereby AFFIRMED.

(ii) Volume Findings

These findings are analyzed above and are hereby AFFIRMED.

(iii) Price Findings

The Commission findings as to price underselling have been analyzed above. The Commission also made alternative findings that subject imports would be likely to depress prices due to the inelastic demand for alloy magnesium and the contract provisions prevalent in the market place even without a specific price underselling strategy by Magnola. There is ample evidence in the record cited to support this proposition. The Commission's findings as to the price depressing effects of higher Canadian production, linked to the inelastic demand and contract practices prevalent in the industry are reasonable and supported by substantial evidence on the record, and therefore they are hereby AFFIRMED.

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<sup>32</sup> Repeating its original finding in Magnesium from Canada, Determination and Views of the Commission, USITC Pub. 3324, July 2000, p. 12

(iv) Likely Impact

The Commission adopted its findings on impact from the Original Sunset Determination. There the Commission found that NHCI had increased its market share, resulting in higher domestic inventories and lower prices. Because domestic plants producing alloy could only produce pure magnesium and no other products, industry-wide price declines would lead to reductions in revenues. While the industry was not vulnerable, the Commission found that it was showing signs of weakness. The Commission analyzed Magcorp's situation, because it had become the entire U.S. industry with the withdrawal of Dow from the market. The imminent entry of Magnola and increased capacity by NHCI would weaken the industry and prevent it from turning its financial condition back around despite the new cell technology that would increase capacity. According to the Commission, revocation of the countervailing duty order would likely lead to a significant increase in the already high volume and market share of subject imports at prices that would undersell the domestic like product and significantly depress U.S. prices. The Commission then noted others related effects:

... the price and volume declines would likely have a significant adverse impact on the production, shipment, sales, and revenue levels of the domestic industry. The reduction in the industry's production, sales, and revenue levels would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. In addition, we find it likely that revocation of the orders will result in commensurate employment declines for the industry.<sup>33</sup>

As a result, the Commission, by a majority, found that the impact of the revocation of the countervailing duty order "would be likely lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within a reasonably foreseeable time".<sup>34</sup> The Panel has reviewed this finding in light of the complaints, challenges, briefs and other documents filed in this Panel review, and concludes that the Commission impact finding must be AFFIRMED.

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<sup>33</sup> Second Determination on Remand, p. 26.

<sup>34</sup> *Ibid.*, p. 18



**E. Conclusion**

While the Panel had some reasonable concerns about the evidence supporting the Commission's price underselling finding, the totality of the Commission's determination, including its alternative price depression finding, is reasonable, made in accordance with law, and supported by substantial evidence on the record as a whole. Therefore, the second determination on remand is hereby AFFIRMED.

**8. ORDER**

The Panel hereby ORDERS the NAFTA Secretary to issue a Notice of Final Panel Action at the appropriate time under the Article 1904 Panel Rules.

Dated October 6, 2006

E. Neil McKelvey

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E. Neil McKelvey, Chair

Mark R. Sandstrom

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Mark R. Sandstrom

James R. Holbein

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James R. Holbein

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**NON-PROPRIETARY**

**DISSENTING OPINION**

BY PANEL MEMBERS HINES AND LACOSTE

**A. Introduction**

There are two basic issues in the present review. The first relates to the Commission's determination "that underselling by Magnola would be likely"<sup>1</sup> which was a response to a specific order of the Panel in its second remand decision of January 17, 2006. The second issue, brought forward again by the Commission in its determination, concerns the likely effect of the revocation of the countervailing duty order (the "Order") on the alloy magnesium industry in the U.S.

We share the view of the majority as to the applicable legal standards in a sunset review. However, we differ in our view as to the requirements of the legal precedents regarding what constitutes "substantial evidence". Our dissent does not attempt to weigh contradictory evidence or indicate a preference for one set of conclusions over another. Rather, our concern is directed to identifying the substantive evidence underlying the Commission's determination in relation to the legal requirement that justification for the continuation of the Order must be attributable to some degree to the price and volume effects on the domestic industry of revocation of the Order rather than other factors such as the likely effect on the industry of increases in the volume of imported goods irrespective of whether the Order is continued or not.

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<sup>1</sup>Views of the Commission, Second Remand Determination , p.12.

*B. Price underselling by Magnola*

The Commission has consistently determined that Magnola would pursue a strategy of price underselling into the U.S. market due to its increased capacity, its need to enter the U.S. market by attracting new customers, its sales force of former Dow employees with contacts in the U.S. market, the high degree of substitutability of its products for those of other producers, and the need to price aggressively in order to enter the market. The Panel, in its second Remand, made it clear that the Commission's "statements concerning underselling and price cutting appear to be more in the nature of assumptions" <sup>2</sup>.

In its second determination on remand, the Commission cited several specific pieces of information to support its findings concerning Magnola's pricing intentions.<sup>3</sup> It is important to note that the only new evidence cited by the Commission in this instance was the reference to a third-hand statement concerning possible future sales at \$1.30 per pound. However, we find that this evidence cited by the Commission does not rise to the level of substantial evidence, particularly in light of *Matsushita Electric Industrial Co., Ltd. v. U.S.* <sup>4</sup> ("Matsushita").

In that opinion, the Court of Appeals for the Federal Circuit analysed in some detail the type of evidence that it found convincing to support a Commission's determination. In that case, the Commission offered three scenarios to support its affirmative threat determination, supported by the testimony of an industry expert. The Federal Circuit accepted that testimony as substantial evidence, because:

"There may not be a word of truth in any of his testimony, but we are required to suppose otherwise, since it was given in person and under oath and subject to cross-examination, since his knowledge of the subject was obviously unsurpassed, and since no opposing testimony was introduced,

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<sup>2</sup> Panel's second remand decision, p.5.

<sup>3</sup> Views of Commission, Second Remand Determination, page 14.

<sup>4</sup> 750 F. 2d 927 (Fed. Cir. 1984).

as it easily could have been if Mr. Moss' testimony were false or if his opinions were erroneous.

The Moss testimony is just the kind a court must look for when it is required to review a determination under the "substantial evidence" standard. One who seeks to overturn a quasi-legislative determination, reviewed under that standard, without such testimony in support of his own position is undertaking a heavy load indeed.”<sup>5</sup>

This characterisation of the evidence contrasts sharply with the current case.

The Court of Appeals recently<sup>6</sup> revisited the definition of “substantial evidence”, both from a legislative and judicial point of view:

“In the legislative history of the APA, which adopted the “substantial evidence” standard of judicial review for certain agency decisions, see 5 U.S.C. § 706(2)(E), the Senate Judiciary Committee report recognized the difficulty of precise definition:

As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less – to rely upon suspicion, surmise, implications or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law.”

The Court also reiterated the *Universal Camera* standard:

“ Accordingly, the Court in *Universal Camera* instructed that, under the substantial evidence standard, ‘a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.’<sup>7</sup> ”

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<sup>5</sup> *Ibid*, Additional Views of Senior Circuit Judge Nichols at 937.

<sup>6</sup> *Nippon Steel Corp. V. United States*, No. 05-1404,-1417 (August 10, 2006) at p. 9.

<sup>7</sup> *Universal Camera Corp. V. NLRB*, 340 U.S. 474, at p.467-468.

Accordingly, although the attorneys for the Gouvernement du Québec and Norsk Hydro Canada, Inc. (“NHCI”) in this case did not bring forward an evaluation of the substantiality of the new evidence, we are bound by the Court’s instruction to review it “in the light of the record in its entirety”.

The main specific evidence cited by the Commission to support its determination “that underselling by Magnola would be likely” is found in a statement that was introduced in the form of an affidavit<sup>8</sup>. The affidavit was made by [ ], an executive from Magcorp. It refers to a statement heard during a meeting with [ ], a senior officer of [ ], a U.S. purchaser-client for alloy magnesium. This senior officer told him “that [ ] of Magnola Metallurgical Inc. (“Magnola”) had told him that Magnola would make alloy magnesium available to [ ] through Noranda during the year 2000, priced in “the \$1.30’s” per pound.”<sup>9</sup>, a figure significantly below the then market price<sup>10</sup>. It was signed before the inquiry and submitted after the hearing, eight months after its signature. At the time of the filing of the affidavit, the alloy magnesium purchaser was no longer doing business with Magcorp<sup>11</sup>. The same senior officer of the U.S. alloy magnesium purchaser later signed the certification statement in the questionnaire filed with the Commission in this review.<sup>12</sup> Magcorp also filed such a questionnaire.<sup>13</sup> Neither made reference to this pricing statement in their answers to the questionnaire.

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<sup>8</sup> Confidential Record (“CR”) doc. No. 24, Posthearing brief Attachment 11. We note that two other documents were referred to by the Commission ( Magcorp Posthearing Brief, Attachment 3 and Magcorp Prehearing Brief, Exhibit 31). They do not constitute “direct” nor “circumstantial “ evidence that is “substantial” as they are statements or expression of opinions that could have many meanings other than a “clear indication that Magnola would engage in underselling” (Second Remand Determination, page 14).

<sup>9</sup> *Ibid.* Parenthesis to conceal names.

<sup>10</sup> Confidential List No. 2, Document No. 49, June 26, 2000 Staff Report to the Commission (« SR »),

Table V-2 , p V-8.

<sup>11</sup> CR doc. No 63, sect. III-29.

<sup>12</sup> CR doc. No 63.

<sup>13</sup> CR doc. No 93.

The Magcorp officer introducing that evidence did testify in person at the hearing but did not mention the statement made in his prior affidavit that was never submitted before or at the hearing, as it easily could have been, and, as such, his affidavit was not subject to cross-examination. The U.S. alloy purchaser-client's senior officer to whom he refers also testified at the hearing but did not mention the price underselling statement. This latter person did not sign an affidavit nor was he under oath when reporting the price underselling statement. Because of the late filing of the affidavit, he could not be cross-examined on this issue.

Because of the nature and the content of this document, it cannot be considered as "expertise evidence".

Moreover, this evidence is contradicted by other positive evidence, including a letter by the same Magnola's senior officer referred to above specifically denying intentions to undersell.<sup>14</sup> This denial was not refuted in subsequent Final Comments that refuted other aspects of the same letter.<sup>15</sup>

This evidence does not meet the standards set in Matsushita and it is plainly incredible, to use the words of the Judiciary Committee. Therefore, we cannot conscientiously find that the evidence supporting price underselling by Magnola is substantial. Consequently, the Commission's conclusion as to price underselling by Magnola cannot be affirmed. Had this review consisted only of this determination, as per this Panel's second remand order, we would have ordered accordingly.

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<sup>14</sup> CR Attachment to doc. 29 and 31, both at page 8.

<sup>15</sup> CR doc. No 46 and 48.

### **C. The likely volume, price effect and impact of imports if the order is revoked**

The Commission stated its main findings as follows<sup>16</sup>:

“...the record shows that a large increase in the volume of subject imports from both Norsk Hydro Canada, Inc. (“NHCI”) and Magnola was likely in the event that the countervailing duty order was revoked.”

“We stress that, even though we find underselling by subject imports to be likely, our finding of likely price effects rests also on the likelihood of price depression as a result of the substantial increase in the volume of subject imports.”

Our review focuses on whether the likely effect of the revocation of the Order would likely lead to the continuation or recurrence of material injury or threat of material injury within a reasonably foreseeable time. In so doing, we consider the likely volume/price effect and impact of subject imports on the industry in the U.S. As the first remand order by this Panel clearly states:

“...it is the revocation of the duties on the subject goods, not the subject goods themselves, that must give rise to the relevant injurious condition.”<sup>17</sup>

#### 1. Likely volume of subject imports

The Commission examined a large volume of data from the Record to establish the likely volume of subject imports. Even though the Commission’s analysis must by its nature be predictive in a sunset review, record evidence must be put in the perspective of the alloy magnesium industry in the U.S. before projections can be used in any analysis. In our view the relevant record evidence consists of the following:

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<sup>16</sup> Views of the Commission, Second Remand Determination at p. 4 and 5.

<sup>17</sup> Panel’s First Remand Determination, at page 9.

- The Canadian share of the U.S. market for alloy magnesium was [ ]% in 1998. It was [ ]% in 1999 and represented then [ ]thousands metric tons. <sup>18</sup>
- The U.S. domestic industry produced [ ]metric tons of alloy magnesium in 1991 and [ ] metric tons in 1999. Its combined capacity utilisation rate was then [ ]%. <sup>19</sup>
- The demand for alloy magnesium in the U.S. increased from [ ]metric tons in 1991 to [ ]metric tons in 1999. <sup>20</sup>
- Assuming a growth rate of 10% per annum (as participants suggested rates between [ ]% and [ ]% for 2001 and 2002) <sup>21</sup>, the U.S. demand in 2001 should be about [ ]thousands metric tons higher than 1999, i.e. [ ] thousands metric tons.
- In 1999, NHCI (the only Canadian producer) shipped [ ] metric tons of alloy magnesium in the U.S. and its overall capacity of production for pure and alloy magnesium was at [ ]%. <sup>22</sup> It could not easily change its production mix as most of its shipments were [ ]. <sup>23</sup> It had announced in 1997 two projects in stages for new production facilities. These projects had not started at the end of the review period and NHCI stated it did not anticipated any of these to be operational before the end of 2001. <sup>24</sup> Consequently, at full capacity at the end of 2001, it could then only add [ ] thousands metric tons to its production.
- The Record states Magnola's intention to export to the U.S. market [ ] thousands metric tons of alloy magnesium in 2001. (It could reach [ ] thousands metric tons if its mix of production of alloy magnesium increases to [ ]% instead of [ ]% for alloy magnesium)<sup>25</sup>. Magnola did not provide an estimate of its likely shipments in 2002.

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<sup>18</sup> SR, Table I-2 at p. I-5.

<sup>19</sup> *Ibid.* Table I-2 at p. I-6.

<sup>20</sup> *Ibid.* Table I-2 at p. I-5.

<sup>21</sup> *Ibid.* At page II-7, notes 10 to 15.

<sup>22</sup> *Ibid.* Table IV-3, note 1, at page IV-8.

<sup>23</sup> *Ibid.* Page V-5.

<sup>24</sup> Transcript at pages 88, 140 and 171.

<sup>25</sup> From the data in SR at pages IV-6 and IV-7 and notes 3 and 4 at page IV-7.



From these figures, the combined estimated maximum additional shipment of subject goods by producers from Canada in 2001 would be between [ ] and [ ] thousands metric tons, for a total shipment of between [ ] and [ ] thousands metric tons depending on the mix of production.

Given the expected U.S. demand for alloy magnesium of [ ] thousands metric tons in 2001, the limit in the growth of the production by domestic producers, the relatively low volume of inventories by U.S. and Canadian producers<sup>26</sup> and the shutdown of Dow Chemicals, the likely volume of subject imports was not likely to fill the projected U.S. consumption in 2001. As the demand for alloy magnesium in the foreseeable future was expected to outgrow the supply by domestic and Canadian producers, the increase in subject imports should have been absorbed by the increase in demand. Thus, the volume of sales by domestic producers was not likely to be affected or reduced by the increases of imports of subject goods.

These figures contrast with the Commission's projections. These extend into 2002, a period that may exceed "the length of time it is likely to take for the market to adjust to a revocation"<sup>27</sup>, to quote Chairman Koplman in the original Determination. In this connection, it must be remembered that this review examined the impact of a minimal countervailing duty rate of 2.02% and the time needed by the domestic industry to adjust to the removal of that duty. The Commission's projections as to the likely import volumes by Magnola do not rest on the evidence provided by Magnola as to its stated proposed shipments to the U.S. in 2001 but rather on an extrapolation reflecting NHCI's product mix, in contradiction to data provided by Magnola's president for 2001

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<sup>26</sup> *Ibid.* at pages III-7 and IV-6.

<sup>27</sup> Original Determination, Views of the Commission, page 10, note 36.

<sup>28</sup>. In addition, these projections are based on NHCI past experience in terms of the percentage of its production it sold in the U.S. and Canadian markets, which is virtually all of its production. Again, this assumption is contradicted by evidence in the Record <sup>29</sup>. Finally, the projections are not in accordance with the standards set by the Courts for the ITC to make predictions with assumptions and extrapolations, to wit:

“It is of course true that here, the ITC is making a prediction about the future. Nonetheless, it must base its analysis on facts, not speculation.” <sup>30</sup>

And

“(The) Commission must assess, based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence, the likely effect of revocation on the antidumping order on the behaviour of the importers.” <sup>31</sup>

As these projections for 2002 are unsupported by substantial evidence and are contradicted by uncontested evidence in the Record, we find them more in the nature of speculations. Therefore, we cannot accept the reasonableness of these projections or extrapolations by the Commission: they fail to meet the legal standards set by the Courts.

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<sup>28</sup> See note 23.

<sup>29</sup> See note 23.

<sup>30</sup> *Nippon Steel Corp. v. United States*, 391 F. Supp. 2d 1258, 1283-84 (CIT 2005).

<sup>31</sup> *Matsushita Electric Industrial Co. Ltd v. United States*, 750 F.2d 927, 939 (Fed. Cir. 1984).

On the supply and demand question, we could not find in the Commission's decision any pertinent data or substantive evidence to justify its statement at page 7 that the Panel's conclusion "is not borne out by the record". In that conclusion, the Panel had stated that U.S. producers could not meet the anticipated increase in demand in the foreseeable future. It is relevant to note that the Staff Report<sup>32</sup> states the following regarding the domestic supply: "Based on available information, U.S. producers of magnesium are likely to respond to changes in price with moderate changes in the quantity shipped to the U.S. market. Supply responsiveness is constrained by a [ ] rate of capacity utilization, the [ ] share of shipments which are exported, and the lack of significant production alternatives." With respect to U.S. industry capacity, the staff noted that "The combined capacity to produce both pure and alloy magnesium remained unchanged at [ ] metric tons during 1998 and 1999. Production of pure magnesium increased from [ ] metric tons in 1998 to [ ] metric tons in 1999, while production of alloy magnesium increased from [ ] metric tons in 1998 to [ ] metric tons in 1999. The combined capacity utilization for both pure and alloy magnesium increased from [ ] percent to [ ] percent in 1999."

The analysis of the data on the Record, as cited above, points definitively to the conclusion that the additional increase in the volume of subject imports was not likely to be significant in the context of the supply and demand in the U.S. industry for alloy magnesium. Indeed, we continue in the view that U.S. producers could not meet the anticipated demand unless perhaps Magcorp was prepared to convert a substantial portion of its pure magnesium production to the production of alloy magnesium. There is no evidence in the record to indicate that Magcorp was prepared to take such action.

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<sup>32</sup> SR at pages II-3 and II-4 and Tables C-2 and C-3.

## 2. The likely price effect of the subject imports

Although prices for alloy magnesium from domestic and Canadian producers slightly declined during the review period <sup>33</sup>, the Record indicates that NHCI, in all quarters of 1999, [ ] its alloy magnesium at a percentage [ ] <sup>34</sup>. We must conclude from this evidence that NHCI's pricing practice, notwithstanding the countervailing duty rates, was not the cause of the decline in prices. It is rather the domestic producers that were driving the prices downward, because *inter alia* of the price matching mechanism <sup>35</sup>. It is also unlikely, because of the imbalance between the expected supply and demand, as described above, that NHCI would undersell its product or that its pricing policy would suppress or depress the domestic prices for alloy magnesium.

Furthermore, the record incorporates a number of conclusions made by the Commission that suggest that increases in potential import volumes would be due to factors other than the effect of the revocation of the Order. In this connection, we note the following:

“We stress that, even though we find underselling by subject imports to be likely, our finding of likely price effects rests also on the likelihood of price depression as a result of the substantial increase in the volume of subject imports.” <sup>36</sup>

“The record fully supports a finding that, in the market for alloy magnesium, a significant increase in the volume of subject imports is likely, *in and of itself*, to lead to significant price depression even without underselling by imports. This is especially the case where, as here, demand is inelastic, or, in other words, not

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<sup>33</sup> SR Table V-2 at page V-8 and Figure V-3 at page V-9.

<sup>34</sup> *Ibid.* Table V-2 at page V-8.

<sup>35</sup> Original Determination, Views of the Commission, at page 39.

<sup>36</sup> Views of the Commission, March 31, 2006 page 4.

particularly responsive to increases in supply. U.S. producers would require the same amount of alloy magnesium irrespective of price.”<sup>37</sup>

These conclusions by the Commission clearly indicate that it views import volumes and prices generally, not the revocation of the Order, as having possible adverse impacts on the U.S. industry of alloy magnesium.

### 3. Likely impact on the industry

Having reviewed the likely volume and price of subject imports, we attempted to also examine the substantial evidence identified by the Commission to support its evaluation of the likely impact of the revocation of the Order on the industry. In short, there is no such evidence.

It is uncontested evidence that the industry was not in a vulnerable state. Reviewing the data for alloy magnesium in 1998 and 1999, the main economic and financial indicators are all positive except the operating income margin that was reduced from [ ]% to [ ]%<sup>38</sup>, a small percentage of reduction which in our view is not a sign of weakness at that rate. Positive indicators included: Inventories declined<sup>39</sup>, consumption, production and capacity increased<sup>40</sup>, the labour force increased its hours worked and its hourly wages<sup>41</sup>, and gross profits increased<sup>42</sup>. However, as cost of goods sold and wages increased<sup>43</sup>, it is not surprising that the impact of these was felt on

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<sup>37</sup> Views of Commission, March 31, 2006, page 12.

<sup>38</sup> *Ibid.* Table C-2 at page and C-6.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

operating profit margins. The data for the magnesium industry, alloy and pure magnesium combined, also shows a very positive level of profitability.<sup>44</sup>

Considering the situation of the industry and the projected increase in demand from [ ]% to [ ]%, in a market where Dow Chemicals (a major producer) disappeared, with the limited capacity of Canadian producers or U.S. domestic producers to increase production volumes of subject imports, we cannot reasonably conclude that the revocation of the Order was likely to have a significant adverse impact on the domestic industry within the foreseeable time.

#### **D. Conclusion**

Having reviewed the Commission Second Remand Determination, the briefs, substantial parts of the Record and the views of the majority, we hold unlawful the Commission's findings as they are unsupported by substantial evidence on the record.

Dated October 6, 2006

W. Roy Hines

W. Roy Hines

Gérald A. Lacoste

Gérald A. Lacoste

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<sup>44</sup> *Ibid.* Table C-3 at pages C-7 and C-8.