

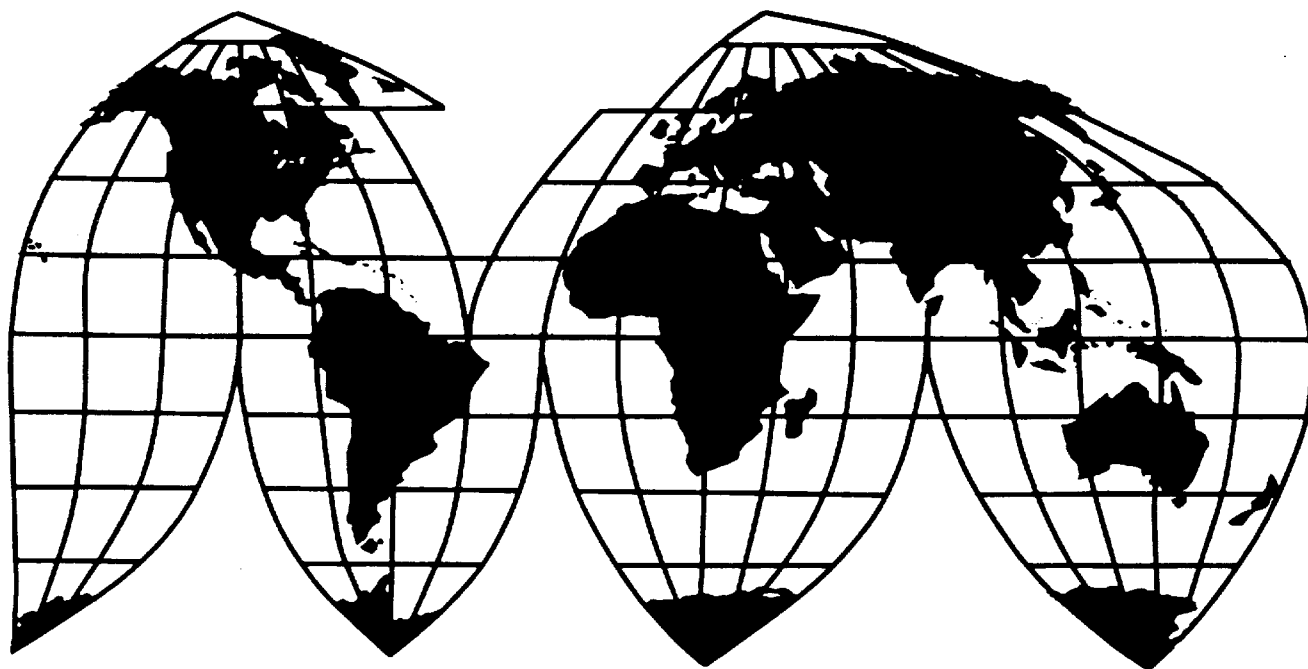
Magnesium From Canada

Investigation Nos. 701-TA-309-A-B
and 731-TA-528 (Review) (Second Remand)

Publication 3882

April 2006

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Stephen Koplan, Chairman
Deanna Tanner Okun, Vice Chairman
Jennifer A. Hillman
Charlotte R. Lane
Daniel R. Pearson
Shara L. Aranoff

Robert A. Rogowsky
Director of Operations

Staff assigned

Peter L. Sultan, *Attorney*

George L. Deyman, *Supervisory Investigator*

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436

www.usitc.gov

Magnesium From Canada

Investigation Nos. 701-TA-309-A-B
and 731-TA-528 (Review) (Second Remand)



Publication 3882

April 2006

In July 2000, the U.S. International Trade Commission (“Commission”) determined 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. The Commission also determined that revocation of the antidumping duty order covering pure 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. The Commission’s determinations were subsequently challenged before a United States-Canada Binational Panel (“Panel”), and in July 2002 the Panel remanded the Commission’s determinations. In October 2002, the Commission submitted a remand determination to the Panel. *Magnesium from Canada, Inv. Nos. 701-TA-309-A-B and 731-TA-528 (Review) (Remand)*, USITC Publication 3542 (October 2002) (“First Remand Determination”). On January 17, 2006, the Panel affirmed in part and remanded in part the First Remand Determination. The attached views were submitted to the Panel in response to the January 17, 2006 remand.

CONTENTS

	Page
Views of the Commission	1
Dissenting views of Commissioner Pearson	11

Note.—Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks.

VIEWS OF THE COMMISSION

By decision and order dated January 17, 2006, a NAFTA Chapter 19 Binational Panel remanded the Commission's October 15, 2002 determination on remand ("First Remand Determination") in *Magnesium from Canada*, as it pertains to the countervailing duty order on alloy magnesium.¹ Upon consideration of the remand order we determine that under section 751(c) of the Tariff Act of 1930, as amended, revocation of the countervailing duty order covering 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.²

I. BACKGROUND

In July 2000, the Commission determined that revocation of the countervailing duty orders covering pure magnesium and alloy magnesium from Canada, and of the antidumping duty order covering pure 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. The Gouvernement du Québec ("GOQ") subsequently challenged the Commission's final determinations before a NAFTA Chapter 19 Binational Panel.³ On July 16, 2002, the Panel issued its first decision ("First Remand Order"), in which it affirmed in part and remanded in part the Commission's determinations.

In response to this order the Commission submitted its First Remand Determination on October 15, 2002. In that determination it again found that revocation of the countervailing duty orders covering pure and alloy magnesium from Canada, and the antidumping duty order on pure magnesium from Canada, would be likely to lead to continuation or recurrence of material injury to an industry in the United States with a reasonably foreseeable time.⁴

In its January 17, 2006 decision ("Second Remand Order") the Panel affirmed the Commission's determinations with respect to the antidumping and countervailing duty orders covering pure magnesium. The Panel affirmed the First Remand Determination's analysis of the likely impact of nonsubject imports of pure and alloy magnesium, and of the likely volume, price effects, and impact upon revocation of the antidumping and countervailing duty orders on pure magnesium. However, the Panel remanded the Commission's determination as to the countervailing duty order covering alloy magnesium. With respect to the remand, the Panel 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

¹ This NAFTA panel proceeding relates to the Commission's five-year review determinations in *Magnesium from Canada*, Invs. Nos. 701-TA-309-A-B and 731-TA-528, USITC Pub. 3324 (July 2000) ("Original Sunset Views").

² Commissioner Daniel Pearson dissenting.

³ See Article 1904 of the United States-Canada Free-Trade Agreement (FTA). Canadian producer Norsk Hydro Canada, Inc. ("NHCI") did not file a separate brief, but submitted a letter indicating that it "joins in the brief of the Gouvernement du Québec."

⁴ *Magnesium from Canada*, Invs. Nos. 701-TA-309-A-B and 731-TA-528, USITC Pub. 3542 (Oct. 2002).

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.⁵

We have considered the record as a whole in light of the instructions in the Panel's opinion. Having considered the Panel's order and having examined the record consistently with that order, we again determine that revocation of the countervailing duty order covering alloy magnesium would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Because the Panel did not remand the issues of the domestic like product and domestic industry, we did not reconsider those issues and we adopt our Original Sunset Views on those issues in their entirety. We also incorporate in full our previous discussion in the Original Sunset Views of the background of the reviews and the legal standard for five-year reviews. We incorporate in full our prior findings, analysis and conclusions in the Original Sunset Views and the First Remand Determination on the conditions of competition, likely volume, likely price effects, and likely impact, as supplemented and further explained below in response to the Panel's instructions.⁶

II. REVOCATION OF THE COUNTERVAILING DUTY ORDER ON ALLOY MAGNESIUM FROM CANADA IS LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

A. Introduction

As an initial matter, we stress the limitations inherent in the task of anticipating future events – including the pricing policies of a foreign producer, particularly a new entrant without an established track record, such as Magnola – in a five-year review. The U.S. Court of International Trade has repeatedly recognized that, because of the prospective nature of sunset reviews, the Commission's analysis is inherently predictive.⁷

As discussed below, 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. This would likely lead to significant price effects, either in the form of price depression as a result of increased volume alone, or in the form of such price depression *and* underselling by the Canadian producers. We find that such underselling would be likely because, in order to make sales of this highly substitutable product in the U.S. market, Canadian producers, particularly the new entrant Magnola, would have to compete aggressively with existing suppliers. Such competition would likely occur on the basis of price, because non-price factors are built into the process by which alloy magnesium suppliers become prequalified by their customers, and, as stressed in our First Remand Determination, because *** in alloy magnesium contracts encourage price competition by suppliers. We stress that, even though we find underselling by subject imports to be likely, our finding of likely price

⁵ Panel Decision at 6.

⁶ Commissioners Lane and Aranoff were not members of the Commission at the time of the original five-year review or of the First Remand Determination and they did not participate in those determinations. For purposes of this remand determination, they have adopted all findings from the original five-year review and the First Remand Determination that have not been elaborated upon in this remand determination.

⁷ *E.g.*, Committee on Fairly Traded Mexican Cement v. United States, 279 F. Supp. 2d 1314, 1335 (CIT, 2004); Usinor Beautor v. United States, 26 CIT 767, 790 (2002). *See also*, 19 U.S.C. §1675a(a)(1)(A) and SAA at 884.

effects rests also on the likelihood of price depression as a result of the substantial increase in the volume of subject imports.

B. Conditions of Competition

We adopt in its entirety our discussion in the Original Sunset Views and First Remand Determination of the conditions of competition relevant to our evaluation of the alloy magnesium industry.⁸ We note that our findings on conditions of competition remain undisturbed by the Panel.

C. Likely Volume of Subject Imports

Because the Panel's Second Remand Order does not criticize the analysis of the likely volume of imports in the Commission's First Remand Determination, we adopt that analysis in its entirety, as supplemented by the following clarifications regarding two points.

The first point relates to Magnola's projected export volumes to the United States. As we have explained before, at the time of the sunset determination in this case, Magnola was positioned to enter the U.S. market commercially within the next year or two with a large quantity of alloy magnesium. Magnola itself indicated that it intended to produce *** metric tons of alloy magnesium in 2001, and *** metric tons of alloy magnesium in 2002,⁹ and that it would have the total capacity to produce *** metric tons of magnesium ***. Magnola reported that *** metric tons of its *** metric ton projected alloy production in 2001 (its first year of full commercial production) would be sold in North America, and that it expected to sell *** percent of those *** metric tons, or approximately *** metric tons, to purchasers in the United States in 2001.¹⁰ We stress that we regard Magnola's estimated amount of North American and U.S. sales to be a minimum of the likely volume. In view of the fact that Magnola's plant was built principally to serve the North American market¹¹ (of which the United States constitutes the predominant part), and given that NHCI ships *** of its alloy magnesium production to U.S. and Canadian customers,¹² it is not likely either that *** metric tons of Magnola's *** metric ton projected alloy production in 2001 would be sold in North America, or that *** metric tons of this projected production would be sold in the United States. In addition, Magnola provided no estimate of its 2002 exports to the United States. As discussed in detail below (in part III. D), we find it likely that by 2002, Magnola's exports to the United States will be on the order of *** metric tons.

The second point relating to the likely volume of imports that it is necessary to clarify is the ability of U.S. producers to meet anticipated increases in demand for alloy magnesium. The Panel states in the Second Remand Order that "U.S. producers could not meet this anticipated increase in demand."¹³ As explained in the First Remand Determination,¹⁴ this is not borne out by the record. Taking total magnesium capacity into account, domestic producers could meet demand even at current capacity levels. Furthermore, Magcorp has invested in new cell technology in anticipation of increasing its magnesium

⁸ Original Confidential Sunset Views at 31-34, Original Sunset Views at 18-20; Confidential First Remand Determination at 27-31.

⁹ See Confidential Report ("CR") at IV-6-7 & n.4, Public Report ("PR") at IV-4 & n.4.

¹⁰ CR at IV-6-7, PR at IV-4 (*** percent of the *** metric tons that Magnola projected it would sell to North American customers in 2001).

¹¹ CR at IV-6-7, PR at IV-4.

¹² See CR and PR at Table IV-3.

¹³ Second Remand Order at 5.

¹⁴ First Remand Determination at 32 n.104.

production capacity.¹⁵ ¹⁶ This added capacity could be used for producing either pure or alloy magnesium.¹⁷

D. Likely Price Effects of Subject Imports

In its Second Remand Order the Panel stressed that the Commission should provide “clarification of the evidence in the record as to the anticipated pricing policies of Magnola – pricing policies that the Commission concluded would lead to significant increases in export volumes by this firm to the United States.”¹⁸ We address this issue and explain further below the bases for our finding concerning likely price effects.

First, the Panel must recall that sunset reviews are inherently predictive. There is no requirement that the Commission have specific concrete evidence of a company’s future pricing plan. Indeed, Congress recognized this in noting the prospective nature of sunset reviews.¹⁹ The inability to have certain knowledge of future pricing plans is particularly apparent when we are examining the intentions of a company that is just now poised to enter the market.

Although, as explained below, we continue to find that it is likely that Magnola would engage in aggressive price competition in order to enter the U.S. market, such a pricing strategy by the firm is not an indispensable element for finding likely price effects by subject imports.²⁰ 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 the imports.²¹ This is especially the case where, as here, demand is inelastic, or, in other words, not particularly responsive to increases in supply.²² U.S. purchasers would require the same amount of alloy magnesium irrespective of prices. That would mean that the increased volume from NHCI and Magnola would of

¹⁵ See Original Confidential Sunset Views at 44, USITC Pub. 3324 at 24.

¹⁶ The Commission has also noted that “there is no short supply provision in the statute” and “the fact that the domestic industry may not be able to supply all of demand does not mean the industry may not be materially injured or threatened with material injury by reason of subject imports.” See, e.g., Certain Orange Juice from Brazil, Inv. No. 731-TA-1089 (Final), USITC Pub. 3838 (Mar. 2006) at 20, n. 143.

¹⁷ See USITC Pub. 3324 at I-9. As we explained in the Original Sunset Views (at p. 10), the production processes for alloy magnesium and pure magnesium are very similar, and, from a production standpoint, a domestic or foreign producer can easily switch between production of pure magnesium and alloy magnesium.

¹⁸ Second Remand Order at 5.

¹⁹ The SAA explains that “[t]he likelihood of continuation or recurrence of material injury standard is prospective in nature. . . .” SAA at 884.

²⁰ See e.g., Cemex S.A. v. United States, 790 F. Supp. 290, 299 (CIT 1992) (“To require findings of underselling would be inconsistent with the proposition that price suppression or depression is sufficient.”), aff’d 989 F. 2d 1202 (Fed. Cir. 1993); Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (CIT 1985) (higher quality imports may have price-suppressing effects notwithstanding their higher price).

²¹ The SAA states that “the Commission need not determine that both the volume and price effects of imports are likely to be significant to determine that material injury is likely within a reasonable foreseeable time.” SAA at 886. Since the SAA recognizes that likely volume effects alone, even without any likely price effects, could be sufficient for an affirmative determination in a sunset review, likely increases in volume that would lead to some price effects are clearly also sufficient for an affirmative determination.

²² Alloy magnesium is used primarily in diecasting applications, especially in the automotive sector. USITC Pub. 3324 at II-4. The demand for alloy magnesium castings is thus derived from the demand for automobiles and other products in which alloy magnesium is used, and does not depend to any great extent on the price of alloy magnesium. USITC Pub. 3324 at II-4.

necessity displace existing sales.²³ As we stated in our First Remand Determination,²⁴ these sales would most likely to a large extent be taken from those of the U.S. producers, whose products and service are most competitive with the Canadian product.

As detailed in the Commission's sunset review determination and First Remand Determination, there is ample evidence in the record to support the Commission's 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 the Canadian producers NHCI and Magnola.

Starting with NHCI, the record shows that the company intended to double its magnesium production capacity of *** metric tons. This expansion is scheduled to occur in two stages, with first stage construction (adding *** metric tons to total magnesium capacity) originally scheduled to begin in 1998.²⁵ This substantial new capacity could be added within 18 months to two years.²⁶ The record shows that NHCI has chosen to focus its sales on the alloy magnesium market,²⁷ and thus it is likely that a substantial portion of its new capacity would be devoted to alloy magnesium production. Moreover, due to the small size of the Canadian home market and the proximity of the United States to Canada, NHCI must rely heavily on sales in the U.S. market.²⁸ In short, the record evidence with respect to NHCI fully supports our conclusion that a significant increase in the volume of alloy magnesium imports from Canada is likely in the event of the revocation of the countervailing duty order, and, as noted above, such a volume increase would be likely to lead to price depression.

In addition, the record also supports the conclusion that NHCI would likely engage in underselling in order to sell its increased production volume.²⁹ Magnola's entry likely would put pressure on NHCI, which would be competing for the same customers and sells a highly substitutable product, to lower prices in the U.S. market. In order for NHCI or Magnola to take customers away from each other or from U.S. producers, they likely would reduce their prices below those of their U.S. competitors. The Commission fully explained, in its Original Sunset Views (confidential version at p. 39) and its First Remand Determination (at p. 40), that the *** make adverse price effects even more likely.³⁰ *** provisions, which are included in Magcorp's *** and ***.³¹ In addition, NHCI's ***.³²

²³ The Panel has not questioned our finding that the volume of subject imports is likely to increase significantly, but only whether that increase is likely to be significant "in relation to anticipated demand increases." Second Remand Order at 4, 6. As explained further below, the record shows that the increase in the volume of subject imports will likely be substantially greater than the increase in U.S. apparent consumption of alloy magnesium.

²⁴ First Remand Determination at 23.

²⁵ See Magcorp's Prehearing Brief at Exhibit 33.

²⁶ Tr. at 108, 170-71.

²⁷ See, e.g., Tr. at 124.

²⁸ The company reported that *** percent of its alloy magnesium shipments went to the United States in 1998. CR/PR at Table IV-3.

²⁹ We recognize that the pricing data gathered in the sunset review (reflecting imports from NHCI) was ***. Confidential Staff Report at Table V-2. However, the pricing data for the period of review are of only limited relevance in predicting future pricing in an environment where the countervailing duty order is not in place, and where there has been a substantial increase in the supply of alloy magnesium.

³⁰ As the Commission stated in its Original Sunset Views (at p. 20) and First Remand Determination (at 29), contracts play an even more important role in the alloy magnesium industry than they do in the pure magnesium industry.

³¹ CR at V-3-5, PR at V-2-3.

³² CR at V-5, PR at V-3; NHCI's Posthearing Brief at Attachment 1, pp. 1-2.

Thus, Magnola's likely efforts to enter the U.S. market by offering low prices likely would result not only in NHCI and Magcorp having to lower prices to their customers to meet competitors' prices, but would also force them to ***. In light of the existing pricing practices, even a seemingly small change in price likely would have a *** effect on prices for *** of NHCI's, and consequently, Magcorp's alloy magnesium sales.³³

The information in the record regarding Magnola also supports the conclusion there would likely be significant price effects either as a result of increased volume alone, or as a result of the increased volume and underselling. As explained above, Magnola was positioned to enter the U.S. market commercially within a year or two with a large quantity of alloy magnesium.

In the Second Remand Order (at p. 5) the Panel stated that "Magnola had not benefitted from a subsidy." As the Commission explained in the Original Sunset Views (at p. 15 n.106), however, the Department of Commerce determined an "all others rate" of 4.48 percent that will be applied to any Canadian exporter except NHCI (which was assigned a company-specific rate) and Timminco (which Commerce expressly excluded from the scope of the order).³⁴ Thus, Commerce implicitly found that any new shipper, including Magnola, will benefit from the subsidy. The Commission lacks authority to question or look behind Commerce's determination as to what merchandise is subsidized or sold at less than fair value.³⁵ Likewise, Commerce has sole authority to determine the likely countervailable subsidy if the order is revoked.³⁶

Especially because of the inelastic demand for alloy magnesium, this likely increase in the volume of imports alone would be likely to depress U.S. prices, even without a deliberate strategy of underselling by Magnola. Moreover, as discussed above, the *** in this market make adverse price effects more likely.

We find that underselling by Magnola would be likely. Magnola itself stated that it intended to introduce *** metric tons – a significant volume – of alloy magnesium into the U.S. market. We view this admitted amount as a floor, representing the minimum amount of alloy magnesium that Magnola would likely export to the United States. However, based on the record, we find the likely volume to be greater. As noted above, in order for Magnola to take customers away from U.S. producers or NHCI, it would have to reduce its prices below those of NHCI or its U.S. competitors. We recognize – as the Panel did in its Second Remand Order³⁷ – that customers generally also consider non-price factors in choosing a supplier. However, these non-price factors are generally built into the process by which alloy magnesium suppliers become certified or prequalified by their customers.³⁸ Further, all purchasers

³³ In the Second Remand Order (at p. 6) the Panel stated that the Commission had failed to provide "an explanation of how revocation of the Orders would lead to significant underselling and to price levels for subject goods that would have significant price depressing or suppressing effects causing a continuation or recurrence of material injury to the U.S. industry." The Panel appears to have overlooked the discussion in the First Remand Determination of these ***.

³⁴ Final Results of Full Sunset Reviews: Pure Magnesium and Alloy Magnesium from Canada, 65 Fed. Reg. 41444 July 5, 2000).

³⁵ Algoma Steel Corp., Ltd. v. United States, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F. 2d 240 (Fed. Cir. 1989).

³⁶ 19 U.S.C. § 1675a(b)(3), SAA at 887.

³⁷ Second Remand Order at 6.

³⁸ USITC Pub. 3324 at II-8. As noted here, all of the seven alloy magnesium purchasers that responded to the Commission's questionnaire reported that they require their suppliers to become certified or prequalified, and five of the purchasers reported that no domestic or foreign producers ever failed in their attempts to qualify or lost their approved status. CR at II-13, PR at II-8. (We note that the Staff Report contains a typographical error, stating "five of seven responding pure magnesium purchasers." This reference is clearly to alloy magnesium purchasers as the paragraph in question discusses alloy magnesium and is preceded by a parallel paragraph discussing pure

reported price as an important factor.³⁹ *** reported that U.S.-produced and imported subject Canadian magnesium are generally used interchangeably.⁴⁰ In order for a new supplier like Magnola, without a pre-existing reputation,⁴¹ to persuade a purchaser to move its business from an established, certified or prequalified supplier, the new supplier would need to compete at least to a significant degree on the basis of price.

As we have noted, Congress anticipated that the Commission would necessarily draw inferences about the likely future behavior of foreign producers, and that it would “rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.”⁴² This is particularly so, and necessary, when the producer in question is a new entrant in the market. The evidence in the record of this review provides a clear indication that Magnola would likely engage in underselling. First, as noted in the First Remand Determination (at 39), at the time of the five-year review, Magnola had already made sales approaches to U.S. purchasers, including *** Magcorp’s customers.⁴³ An executive from Magcorp testified in an affidavit that a U.S. purchaser of alloy magnesium had told him that Magnola had offered to supply it with alloy magnesium at prices in “the \$1.30’s per pound,” at a time at which delivered prices for both U.S. and Canadian alloy magnesium were in the range of *** per pound.⁴⁴ Second, there was evidence that industry participants expected Magnola to engage in underselling. ***.⁴⁵ Furthermore, *** “***,”⁴⁶ suggesting that the company was prepared to pursue a low-price strategy to enter the U.S. market. We also note again that seven purchasers stated their intention to seek out new suppliers.⁴⁷

We note that the record does not support a finding that increased demand would likely exceed the likely increase in subject imports. We found, based on information from the parties, that alloy magnesium demand was forecast to increase between *** and *** percent a year.⁴⁸ The Commission does not view demand as amenable to precise numerical forecasting, particularly for a several-year period; rather, it collects such information to get an idea of the general trend and magnitude of market participants’ expectations. Nevertheless, in the interest of responding fully to the Panel, we explain here how even the upper end of the forecast demand increase would not exceed likely increases in subject import volume.

Even if we assume that apparent consumption will increase by *** percent each year, the cumulative increase in consumption would be *** metric tons in 2000, *** metric tons in 2001, and *** metric tons in 2002. If apparent consumption were to increase by *** percent each year, the increased

magnesium. Purchaser questionnaire responses confirm this is a typographical error.)

³⁹ USITC Pub. 3324 at Table II-1.

⁴⁰ Confidential Staff Report at II-12

⁴¹ Magnola had no pre-existing reputation with respect to these non-price factors in connection with supplying magnesium or any other product.

⁴² SAA at 886.

⁴³ Tr. at 27- 28, 35. *See also* Purchasers’ Questionnaire Responses of ***; Magcorp’s Prehearing Brief at Exhibit 30.

⁴⁴ Magcorp Posthearing Brief, Attachment 11 and Confidential Staff Report at Table V-2.

⁴⁵ Magcorp Posthearing Brief, Attachment 11.

⁴⁶ Magcorp Prehearing Brief, Exhibit 31.

⁴⁷ *See* First Remand determination at 39, citing CR at II-10 & n. 21.

⁴⁸ Confidential Original Sunset Views at 30. NHCI expected demand growth to be in the range of *** percent over the next few years; Magcorp expected demand growth to be in the range of *** percent over the next few years. CR at II-7, nn. 10 and 11; PR at II-4, nn. 11 and 12.

cumulative consumption would be *** metric tons in 2000, *** metric tons in 2001, and *** metric tons in 2002. The actual increase would most likely be somewhere between these two sets of figures.

As discussed above, we view Magnola's admitted intent to export *** metric tons of alloy magnesium in 2001 to the United States as a bare minimum. The record indicates that, when fully operational, Magnola would be a very large producer of magnesium. Magnola stated its intent to produce *** metric tons of alloy magnesium in 2002.⁴⁹ We view NHCI's pattern of shipments as indicative of Magnola's likely pattern; *** percent of NHCI's alloy magnesium shipments were to the United States in 1999.⁵⁰ As stated earlier, Magnola's plant was built principally to serve the North American market, of which the United States is the predominant part. Thus, we find it likely that Magnola's shipments to the United States in 2002 would be on the order of *** metric tons.

NHCI, which was operating *** capacity during the period of review, publicly announced its intention to double its capacity in two stages, with first stage construction (adding *** metric tons to total magnesium capacity) that could be added within 18 months to two years.⁵¹ As stated in our First Remand Determination, we find this additional capacity likely if the orders were revoked. In 1999, alloy magnesium accounted for *** percent of NHCI's production, and *** percent of its alloy magnesium shipments were to the United States.⁵² We view this pattern as probative of likely future behavior. Therefore, the first stage of additional capacity alone would likely lead to additional alloy magnesium shipments to the United States on the order of *** metric tons. Any additional capacity additions would increase this figure; the full planned increase of *** metric tons would likely lead to an increase on the order of *** metric tons.

Thus, between Magnola and NHCI, subject imports would be likely to increase by somewhere in the region of *** metric tons, and this assumes that NHCI had increased capacity by only *** metric tons and that alloy magnesium comprised only *** percent of NHCI's production. This is substantially greater than the upper ceiling on additional U.S. demand, *** metric tons, and even greater than the more likely, smaller increase.

The record also shows that increasing demand does not automatically translate into increased prices. The record for the period of review shows that prices for alloy magnesium were declining, despite increasing demand.⁵³ This indicates an existing imbalance between supply and demand in the market. Additional supply, in such situations, would likely lead to additional price declines.

For the foregoing reasons, we find that revocation of the countervailing duty order on alloy magnesium from Canada would be likely to lead to significant underselling by the subject imports of the domestic like product, as well as significant price depression, within a reasonably foreseeable time.⁵⁴

⁴⁹ Magnola stated that alloy magnesium would account for *** percent of its total magnesium production. We view this as improbably low, given that *** percent of NHCI's production is of alloy magnesium, and the alloy magnesium market is predicted to grow while that for pure magnesium is predicted to remain roughly steady.

⁵⁰ CR and PR at Table IV-3.

⁵¹ See Magcorp's Prehearing Brief at Exhibit 33.

⁵² CR and PR at Table IV-3.

⁵³ Confidential Staff Report at Table V-2.

⁵⁴ We note that, in affirming the Commission's First Remand Determination with respect to pure magnesium, the Panel appeared to place great weight on "capacity projections and the past history of dumping and subsidization involving producers other than Magnola." Second Remand Order at 4. The same factors apply to alloy magnesium. As discussed, NHCI projected *** capacity increases; in 1999, *** percent of its production was of alloy magnesium and *** percent of its alloy magnesium shipments were exported to the United States. In addition, NHCI had a past history of subsidization.

E. Likely Impact

The Panel left undisturbed the Commission's prior findings in the Original Sunset Views concerning the likely impact of subject imports, and the Commission again adopts these findings in their entirety.

CONCLUSION

For the foregoing reasons, we determine 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 reasonably foreseeable time.

DISSENTING VIEWS OF COMMISSIONER PEARSON

Section 751 (d) of the Tariff Act of 1930, as amended, requires the Department of Commerce to revoke an antidumping duty or countervailing duty order in a five-year (“sunset”) review unless Commerce determines that dumping or a countervailable subsidy would be likely to continue or recur within a reasonably foreseeable time.¹

Based on the record in these five-year reviews, I concur with the Commission’s findings concerning the legal standards governing our analysis in these reviews, the domestic like product, and the domestic industry. Accordingly, I join the Commission’s opinion discussing these findings, to the extent noted.² I also concur with Commissioner Askey’s findings with respect to conditions of competition, and join Commissioner Askey’s dissenting opinion discussing these findings, to the extent noted.³

However, unlike the Commission majority and like Commissioner Askey, I determine 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 to an industry in the United States within a reasonably foreseeable time. Accordingly, I write separately to explain my determination with respect to this order.

A. Likely Volume of Subject Imports of Alloy Magnesium from Canada

In evaluating the likely volume of imports of subject merchandise if a countervailing duty order is revoked, the statute directs the Commission to consider whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States.⁴ In doing so, the Commission must consider “all relevant economic factors,” including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise into countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.⁵

In its original investigation, the Commission found that the volume of subsidized imports of alloy magnesium was significant and increased substantially during the period of investigation.⁶ The Commission also found that the market penetration of subject imports increased dramatically during the period of investigation.⁷ Nonetheless, the record of this review indicates that the countervailing duty order has had little or no restraining effect on the volume of subject imports. Even with the order in

¹ 19 U.S.C. §§ 1675(d)(2).

² Magnesium from Canada, Invs. Nos. 701-TA-309-A-B and 731-TA-528 (Review), USITC Pub. 3324 (July 2000) (“Original Sunset Views”) at 5-9.

³ Original Sunset Views at 29-31.

⁴ 19 U.S.C. § 1675a(a)(2).

⁵ 19 U.S.C. § 1675a(a)(2)(A)-(D).

⁶ Magnesium from Canada, Invs. Nos. 701-TA-309 and 731-TA-528 (Final), USITC Pub. 2696 (Oct. 1993) (“Original Remand Determination”) at 22, *citing* original confidential report at Table 38. Imports of NHCI’s alloy magnesium increased from *** in 1989 to *** metric tons in 1991.

⁷ Original Remand Determination at 22. Imports of subject alloy magnesium accounted for *** share of domestic consumption in 1989, but captured *** of the market in 1991. CR and PR at Table I-2.

place, the subject Canadian producer NHCI shipped substantial and increasing volumes of alloy magnesium to the United States, and increased its market share significantly.⁸ During the period of review, the subject Canadian imports of alloy magnesium occupied the bulk of the market, with their U.S. market share reaching *** percent in 1998 and *** percent in 1999.⁹

I find that the volume of subject imports of alloy magnesium from Canada currently is significant and is likely to remain so regardless of whether the countervailing duty order is revoked. However, I find that any increase in the volume of subject imports of alloy magnesium from Canada resulting from revocation of the countervailing duty order would not be likely to be significant in the context of the supply and demand conditions prevalent in this marketplace.

NHCI, the only subject producer of alloy magnesium now producing alloy magnesium in commercial quantities, is unlikely to ship more than minimal additional volumes of alloy magnesium to the United States upon revocation of the order. NHCI is currently operating at *** capacity utilization, with its combined capacity utilization rate being *** percent in 1998 and *** percent in 1999.¹⁰ These high capacity utilization rates indicate that NHCI has little or no existing capacity that could be used to ship additional amounts of subject alloy magnesium to the United States upon revocation of the order.¹¹

In addition, NHCI is currently subject to a minimal countervailing duty rate of 2.02 percent, and has been subject to relatively small countervailing duty rates during the period of review.¹² I find that these relatively low countervailing duty rates have had little or no restraining effect on the volume of imports of NHCI's alloy magnesium. On the contrary, the volume of subject imports increased more than *** since 1991, growing from *** metric tons in 1991 to *** metric tons in 1999, at the same time that the countervailing duty rates were in effect.¹³ Subject market share has also increased dramatically since the imposition of the order, growing from *** percent of the market in 1991 to *** percent of the market in 1999.¹⁴

⁸ CR and PR at Table I-2.

⁹ CR and PR at Table I-2.

¹⁰ CR and PR at Table IV-3.

¹¹ Although NHCI has announced that it intends to expand its overall magnesium capacity by as much as *** metric tons, I find that this capacity expansion is unlikely to occur within a reasonably foreseeable time. NHCI announced these plans in 1997, but had not broken ground on the project by the end of the review period. Moreover, the record indicates that it will take at least eighteen months to two years to complete the project. TR at 88, 140, and 171. In addition, NHCI has reported that it does not anticipate that these additional facilities will be on line by ***. Given this, I do not find that this capacity expansion is likely to occur within a reasonably foreseeable time. Moreover, even if it were completed within such a time-frame, the impact of the capacity expansion would be significantly diluted by the dramatic expansion in demand in the United States market.

¹² During 1997 and 1998, imports of alloy magnesium from NHCI were subject to a countervailing duty rate of 7.61 percent. During a Commerce administrative review in September 1999, the countervailing duty rate applicable to NHCI subject imports during 1997 was lowered to 2.02 percent. CR at I-10-11, PR at I-6. The countervailing duty margins have dropped in recent years due to the termination of subsidy programs and the diminution over time of the value of the previously bestowed subsidies. According to the amortization schedule used by Commerce in its countervailing duty calculations, the sole remaining subsidy will be completely amortized before the next sunset review. Northern Diecast's prehearing brief, pp. 10-11. Accordingly, I do not find that the nature of the subsidy is such that it will likely cause the subject producers to increase their exports to the United States significantly upon revocation of the order.

¹³ CR and PR at Table I-2 and original confidential report at Table 38.

¹⁴ CR and PR at Table I-2.

Given NHCI's high levels of capacity utilization, and the relatively low and nonrestrictive countervailing duty rates applicable to NHCI, I find that any increase in subject import volume from NHCI resulting from revocation of the countervailing duty order is not likely to be significant.¹⁵

I also find that, were the order to be revoked, Magnola is unlikely to ship volumes of alloy magnesium to the United States that would be significant given the supply and demand conditions prevalent in the U.S. alloy magnesium market. Magnola is a new entrant in the North American magnesium marketplace and *** alloy magnesium to the United States within the reasonably foreseeable future.¹⁶ Magnola expects its pure and alloy production facilities to be on-line by the end of 2001 and plans to ship approximately *** metric tons of alloy magnesium to the United States during 2001.¹⁷ These projected shipments levels are not an insubstantial amount of alloy magnesium in a market in which apparent consumption was *** metric tons in 1999. Nonetheless, I find that, even if Magnola actually ships this projected amount of alloy magnesium to the United States in 2001, these shipments will be absorbed by the increases in demand that are expected to occur in 2000, 2001 and beyond.¹⁸

All of the responding parties in this review agree that demand for alloy magnesium is expected to grow at an accelerated pace throughout the foreseeable future. Most market participants, including Magcorp and NHCI, project that annual demand will grow at rates between *** and *** percent per year during 2000, 2001, and 2002.¹⁹ If one conservatively assumes that total U.S. consumption of alloy magnesium will grow at a *** percent annual pace during 2000 and 2001, total U.S. consumption in 2001 can be expected to be *** tons higher than in 1999.²⁰ Thus, Magnola's projected alloy magnesium shipment volume of *** tons to the United States in 2001 is likely to be absorbed completely by the expected growth in demand in the U.S. alloy magnesium market. In light of this, I find that Magnola's projected shipments of alloy magnesium to the United States in 2001 are unlikely to cause any reduction in sales volume on the part of the domestic industry, given that the industry is currently operating at high capacity utilization rates and that it has no plans to expand capacity significantly in the foreseeable future.

Furthermore, I note that there are no reported trade barriers or antidumping duty orders against Canadian subject imports in other countries. In addition, although NHCI does have the ability to shift production between pure and alloy magnesium within its production facilities, it is currently operating at *** capacity utilization rates and is unlikely to shift significant volumes of production from its existing base of pure magnesium customers based on the revocation of the relatively small applicable countervailing duty rate. In the case of Magnola, I note that the company is not currently producing

¹⁵ As a final note, I would add that the *** of NHCI's shipments are subject to *** contracts. CR at V-5, PR at V-2-3. *** of these contracts will expire in *** and cover *** percent of NHCI's current production. Moreover, nearly *** percent of its 1999 production of alloy magnesium is covered by contracts that will expire ***. The existence of these contracts indicates that NHCI has *** to ship additional alloy magnesium to the United States.

¹⁶ CR at IV-6-7, PR at IV-4.

¹⁷ CR at IV-6-7, PR at IV-4. I note that Magnola plans on shipping *** metric tons of alloy magnesium to the United States during 2001, whether or not the relatively low all other countervailing duty rate (4.48 percent) is revoked.

¹⁸ I also note that Magnola's statements about its likely future production and shipment levels only represent what the company anticipates that it will ship to the United States in 2001. Magnola's expectations may not reflect its likely shipment levels in that year, given that there is no clear indication in the record that the company will actually have its expected capacity on-line by the end of 2001 or that it will be qualified to sell alloy magnesium to U.S. customers by the end of 2001.

¹⁹ CR at II-7-8, nn 10-15, PR at II-4-5, nn 10-15.

²⁰ See CR and PR at Table I-2.

commercial quantities of pure and alloy magnesium, but has provided the Commission with its projected pure and alloy production mix for 2001. Similarly, I see little evidence in the record to suggest that Magnola would significantly change its projected production mix as a result of revocation of a countervailing duty order that would otherwise subject Magnola to relatively small countervailing duty rates. Finally, I note that the current inventory levels of the subject producer are *** to suggest that they could have more than a *** impact in a market in which demand is expected to increase dramatically for the foreseeable future.²¹

Accordingly, I find that, if the countervailing duty order on alloy magnesium from Canada was revoked, the resulting increase in 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.

B. Likely Price Effects of the Subject Imports from Canada

In evaluating the likely price effects of subject imports if the countervailing duty order is revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared with the domestic like product, and whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the prices of the domestic like product.²²

In the original investigation, the Commission found that prices for both U.S.- and Canadian-produced alloy magnesium steadily declined at the same time that the volume and market share of subject imports increased.²³ The Commission noted that the prices of the domestic and Canadian producers' contract sales of alloy magnesium declined during the period of investigation as did the average unit values of alloy magnesium from Canada. The Commission also noted that there was a high degree of substitutability between U.S. and Canadian alloy magnesium. Prior to imposition of the antidumping and countervailing duty orders, the U.S. and Canadian products sold at similar prices, with price changes by one firm followed by equivalent changes by other producers. Accordingly, the Commission found that the effect of subject imports prices on U.S. prices was significant.

Nonetheless, I find that the subject imports of alloy magnesium from Canada are not likely to have significant adverse effects on domestic prices if the order is revoked. Although the record of this review indicates that there is a high degree of substitutability between the subject and domestic merchandise and that price is an important factor in the purchase decision, the record of this review also indicates that demand for alloy magnesium is expected to grow dramatically in the U.S. market for the foreseeable future. Since these demand increases are expected to outstrip likely increases in domestic and subject import supply, any likely increases in subject imports will be completely absorbed by the projected demand increases, and subject imports will not take sales from domestic producers. Accordingly, I find that it is unlikely that additional subject alloy magnesium imports resulting from revocation of the countervailing duty order would have a significant effect on domestic prices during the foreseeable future.

²¹ CR and PR at Table IV-3.

²² 19 U.S.C. § 1675a(a)(3). The SAA states that “[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation and termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.” SAA at 886.

²³ Original Remand Determination at 25.

It is true that price data show that domestic producers' prices declined during the review period.²⁴ However, the price data also show that, during the last half of the review period, the subject imports from NHCI (the only current Canadian producer) consistently *** the domestic producers at margins that are ***.²⁵ These data suggest that it is the domestic producers, and not NHCI, who are leading U.S. prices for alloy magnesium downward. In light of the growing current levels of *** in the face of minimal countervailing duty rates, and the fact that NHCI was able to gain a substantial share of the U.S. alloy magnesium market while subject to these countervailing duties, I find that it is unlikely that NHCI will *** the domestic producers significantly upon revocation of the order, or that it would significantly suppress or depress domestic prices in the foreseeable future.

I find that it is likely that Magnola, as a new entrant to the U.S. alloy magnesium market, would initially price its alloy magnesium competitively with domestic, NHCI-produced, and non-subject alloy magnesium. However, I find it unlikely that subject imports from Magnola would have significant price effects on the domestic industry, primarily for two reasons. First, as noted above, the projected increases in U.S. demand for alloy magnesium would completely absorb the likely increase in subject imports from Magnola in the foreseeable future. As a result, domestic producers will be able to maintain or increase their sales of alloy magnesium in the growing U.S. alloy magnesium market.

Second, although I find it likely that Magnola may initially price its alloy magnesium competitively, I also find that it is likely that, as Magnola becomes an established supplier to the U.S. market, any margins of underselling would narrow and in fact may turn to margins of overselling. As Magnola enters the U.S. alloy magnesium market and is able to demonstrate that it can consistently provide U.S. purchasers with alloy magnesium of an acceptable level of quality, with reliable and relatively short lead times, it should have no need to price its alloy magnesium below U.S. and other producers' prices in order to sell into the U.S. market.²⁶ For example, I note that, during the review period, NHCI, an established supplier to the U.S. market, priced its alloy magnesium ***.²⁷

Accordingly, given the significant increases in demand that are projected for the future, I find that the likely increases in subject imports of alloy magnesium are unlikely to lead to significant underselling or have significant depressing or suppressing effects on prices for the domestic like product within a reasonably foreseeable time.

C. Likely Impact of the Subject Imports from Canada

In evaluating the likely impact of imports of subject merchandise if the countervailing duty order is revoked, the Commission is directed to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including but not limited to: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity;

²⁴ CR at Table V-2 and Figure V-3.

²⁵ CR and PR at Table V-2. NHCI is subject to a current countervailing duty rate of 2.02 percent and Magnola will be subject to the all others rate of 4.48 percent. CR at I-10-11, PR at I-5-6. Moreover, Commerce found that NHCI will likely be subsidized at a rate of 1.84 percent upon revocation and that the all others rate would be 4.48 percent upon revocation.

²⁶ I note that Magnola, with state-of-the-art production facilities which are located relatively close to the U.S. market, is likely to be able to produce a relatively high quality product with relatively short lead times to the U.S. market. This is in contrast to producers in China, Israel, and Russia that have older production facilities that are located farther away from the U.S. market. For these reasons, Magnola would have less need or incentive to price its alloy magnesium at or below prices charged by these non-subject producers in the U.S. market.

²⁷ CR and PR at Table V-2.

(2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.²⁸ All relevant economic factors are to be considered within the context of the business cycle and the conditions of competition that are distinctive to the industry.²⁹

In the original investigation, the Commission found that substantial increases in NHCI's share of a stable market resulted in increased domestic inventories and placed significant pressure on the domestic producers to lower their prices.³⁰ Noting that the U.S. plants producing alloy magnesium were dedicated to primary magnesium production and had little flexibility to produce products other than magnesium, the Commission further found that industry-wide price declines caused a direct reduction in revenues, as reflected in the financial data collected in the investigations.

As an initial matter, I find that the U.S. industry is not currently in a vulnerable state. Despite the continued substantial and increasing presence of subject imports in the market since the imposition of the order in 1992, the industry's condition is ***. During the period of review, U.S. producers' alloy magnesium production increased by *** percent, U.S. shipments increased by *** percent, and inventories declined by *** percent.³¹ U.S. producers' combined pure and alloy capacity utilization rates increased from *** percent in 1998 to *** percent in 1999.³² Alloy magnesium employment indicators also generally improved, as the number of production workers, hours worked, wages paid, and hourly wages all increased over the period of review.³³ The financial indicators of the domestic industry were also *** during the period of review, as net sales value increased by *** percent and operating income increased from \$*** in 1998 to \$***, or by *** percent.³⁴ Although operating income margins fell from *** percent in 1998 to *** percent in 1999, they were still at a *** level of profitability during the review period.^{35 36}

²⁸ 19 U.S.C. § 1675a(a)(4).

²⁹ 19 U.S.C. § 1675a(a)(4).

³⁰ Original Remand Determination at 26.

³¹ CR/PR at Table C-2.

³² CR/PR at Table C-3. Since both pure and alloy magnesium are produced on the same equipment, the only meaningful, yet still understated, capacity utilization rate is reached by combining the production of pure and alloy magnesium. CR and PR at III-1.

³³ CR/PR at Table C-2.

³⁴ CR/PR at Table C-2.

³⁵ CR/PR at Table C-2.

³⁶ Petitioner argues that the Commission should include production and financial data from Dow Chemicals in its analysis of vulnerability of the domestic industry. Dow Chemicals, once the largest domestic producer of alloy magnesium, shut down its alloy magnesium operations in November 1998. CR at I-19, PR at I-11. Petitioner maintains that, if Dow Chemical's 1998 production and financial data are included in the Commission's analysis of the domestic industry, many of the domestic industry's production and financial indicators ***.

As an initial matter, I note that Dow Chemicals shut down its operations due to extensive damage from lightning strikes and floods. CR at I-19, PR at I-11. I further note that, at the time that Dow Chemicals closed its alloy magnesium operations, U.S. imports of Canadian alloy magnesium were subject to countervailing duties and were thus fairly traded imports. Therefore, Dow Chemicals' closure was not the result of unfairly traded subject imports from Canada.

More importantly, I believe that, in making its determination of vulnerability in a review investigation, the Commission should consider the condition of the domestic industry as it currently exists. The Commission is required to determine whether the domestic industry is vulnerable, not whether the domestic industry was vulnerable

In addition, I find that the industry's condition is likely to strengthen considerably in the future with the departure of the domestic producer Dow Chemicals from the marketplace in November 1998.³⁷ The consolidation of this already concentrated industry, and the departure of less efficient production facilities, will help insulate the domestic industry from any adverse effects by reason of the subject imports. Most importantly, I find that the record strongly suggests that the domestic industry will benefit significantly from the *** to *** percent annual increases in demand that are expected to occur in this market during the foreseeable future.

As I discussed above, the record of these reviews indicates that the subject imports of alloy magnesium from Canada are not likely to have significant adverse volume and price effects on the domestic industry within the reasonably foreseeable future if the order is revoked. Accordingly, I also find that the subject imports would not be likely to have a significant impact on the domestic industry's cash flow, inventories, employment, wages, growth, ability to raise capital, investment or development efforts within a reasonably foreseeable time if the order is revoked. Further, I find that revocation of the order would not be likely to lead to a significant reduction in U.S. producers' output, sales, market share, profits, productivity, ability to raise capital, or return on investments within a reasonably foreseeable time.

Accordingly, I find that revocation of the countervailing duty order covering alloy magnesium from Canada is not likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time. I therefore determine that revocation of the order covering these imports would not be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

at some time prior to the date of the review. For this reason, I have not included Dow Chemical's data in my analysis of the vulnerability of the domestic industry.

³⁷ CR and PR at III-1.