

RESULTS OF REDETERMINATION PURSUANT TO PANEL REMAND

PURE MAGNESIUM FROM CANADA

North American Free Trade Agreement (“NAFTA”)

Article 1904 Panel Review

USA-CDA-00-1904-06

SUMMARY

The Department of Commerce (“Commerce”) has prepared these results of redetermination pursuant to the determination of the Binational NAFTA Panel in Pure Magnesium from Canada, USA-CDA-00-1904-06 (October 15, 2002) (“Panel’s Second Determination”). These results pertain to Commerce’s determination in Pure Magnesium from Canada: Final Results of Full Sunset Review, 65 Fed. Reg. 41436 (July 5, 2000) (“Final Results”) that the revocation of the antidumping duty order on pure magnesium would be likely to lead to the continuation or recurrence of dumping. The Panel remanded Commerce’s first remand determination in this sunset review: (i) for further consideration of the record concerning the “other factors” which are required to be taken into account pursuant to the conclusions in Sections 2 and 3 of the Panel’s opinion; (ii) for consideration of whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (iii) to reconsider whether the normal preference for the investigation rate should not be followed here.

BACKGROUND

The Uruguay Round Agreements Act (“URAA”) revised the Act by requiring that antidumping duty (“AD”) orders be revoked after five years unless revocation or termination would be likely to lead to continuation or recurrence of (1) dumping, and (2) material injury to the domestic industry. 19 U.S.C. § 1675(d)(2)(A), 19 U.S.C. § 1675(d)(2)(B). The URAA assigns to Commerce the responsibility of determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping. 19 U.S.C. § 1675(d)(2)(A).

In accordance with the schedule established for the initiation of sunset reviews of “transition orders,”¹ on August 2, 1999, Commerce initiated the sunset review of the AD order on pure magnesium from Canada. See Initiation of Five-Year (“Sunset”) Reviews, 64 Fed. Reg. 41915 (Aug. 2, 1999). Commerce received a Notice of Intent to Participate from the Magnesium Corporation of America (“Magcorp”), within the deadline specified in Commerce’s regulations. See 19 C.F.R. § 351.218(d)(1)(i). See also Procedures for Conducting Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 13516, 13520-13521 (Mar. 20, 1998) (“Sunset Regulations”). On August 4, 1999, the GOQ entered an appearance as an interested party and requested and received an administrative protective order. It participated no further in the sunset review. On the basis of complete substantive responses filed on behalf of Magcorp and Norsk Hydro Canada, Inc., (“NHCI”), Commerce determined to conduct a full

¹“Transition orders” refer to those antidumping and countervailing duty orders and suspended investigations in effect on January 1, 1995, the effective date of the URAA. 19 U.S.C. § 1675(c)(6)(C).

sunset review.

On February 29, 2000, Commerce published its preliminary results of the sunset review. See Pure Magnesium from Canada; Preliminary Results of Full Sunset Reviews, 65 Fed. Reg. 10768 (Feb. 29, 2000) (“Preliminary Results”). In its Preliminary Results, Commerce determined that the revocation of the AD order would be likely to lead to continuation or recurrence of dumping. Commerce based its determination on its finding that, although dumping was eliminated after the issuance of the order, import volumes of the subject merchandise declined dramatically. Census Bureau statistics indicated that imports of pure magnesium from Canada dropped 97 percent in the year following the issuance of the order and, although they increased in subsequent years, imports remained at less than 10 percent of their pre-order level. Commerce also preliminarily determined that it would report to the Commission the dumping margins from the original investigation. Commerce affirmed these findings in its Final Results.

During the sunset review, NHCI argued that good cause existed for Commerce to consider factors other than import volumes when making its likelihood determination, pursuant to section 752(c)(2) of the Act. Commerce declined to do so, maintaining that information submitted by NHCI failed to support its claim that good cause existed to consider other factors. NHCI had also argued that the dumping margin Commerce should report to the Commission should be zero, as, *inter alia*, it had received zero dumping margins in the four most recently completed administrative reviews. Commerce rejected NHCI’s argument, citing the SAA at 890 and the House Report at 64, which provide that Commerce normally will select a margin from the investigation to report to the Commission, because that is the only calculated rate that reflects the behavior of exporters without the discipline of an order.

REMAND

The GOQ challenged certain findings made by Commerce in its Final Results before the Panel. On March 27, 2002, based on its findings pursuant to the GOQ’s challenge, the Panel upheld Commerce’s determination with respect to most issues. However, the Panel remanded to Commerce its sunset review to reconsider: (1) the Government of Quebec’s (“GOQ’s”) claims regarding “good cause” under the standards set forth in section 752(c)(2) of the Tariff Act of 1930, as amended (“the Act”); and, (2) the determination to report the investigation rate as the margin of dumping likely to prevail if the order is revoked. Panel’s First Remand. On May 13, 2002 Commerce released its draft remand results to the GOQ, Norsk Hydro Canada, Inc. (“NHCI”), and domestic interested parties.

Commerce issued the Final Results of Determination Pursuant to NAFTA Panel Remand of the Sunset Review of the Antidumping Order on Pure Magnesium from Canada (“Remand Determination”) on May 28, 2002. On July 15, 2002, the GOQ filed the Rule 73(2)(b) Challenge of Gouvernement du Quebec to Redetermination on Remand (“Rule 73(2)(b) Challenge”). The GOQ’s Rule 73(2)(b) Challenge contends that Commerce improperly interpreted the “good cause” requirement of 19 U.S.C. §1675a(c)(2), failed to consider changes in the magnesium

market that made recurrence or continuation of dumping unlikely, refused to enter into the record information relevant to the likelihood determination, and wrongfully reported the investigation rate to the ITC. No other party filed a challenge to the Remand Determination. Commerce responded to the Rule 73(2)(b) Challenge filed by the GOQ on August 5, 2002.

On October 15, 2002, the Panel remanded Commerce's first remand determination: (i) for further consideration of the record concerning the "other factors" which are required to be taken into account pursuant to the Panels' conclusion in Section 2 and 3 of its opinion; (ii) for consideration of whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (iii) to reconsider whether the normal preference for the investigation rate should not be followed here. The Panel instructed Commerce to provide a report in 45 days detailing how it would comply with its instructions and to complete the remand 60 days thereafter. Commerce issued a report to the Panel on November 29, 2002, outlining how Commerce intended to proceed with the Panel's remand instructions. On December 13, 2002, Commerce requested interested parties to provide comments as to whether this is an appropriate case in which to supplement the record. On December 20, 2002 Commerce received comments from the interested parties (NHCI, the GOQ, and US Magnesium LLC ("US Magnesium" formerly Magcorp)). On January 14, 2003, Commerce released its draft redetermination to interested parties for comment. Comments were received from interested parties on January 21, 2003.

ANALYSIS

We have considered the Panel's instructions and have made a determination on remand concerning the likelihood of continuation or recurrence of dumping and the margin of dumping likely to prevail if the order were revoked. As discussed below, pursuant to this remand, we find that the continuation or recurrence of dumping is likely if the order were revoked at the margin of dumping determined in the original investigation.

A. Rejection of NHCI's Additional Evidence Concerning Long-Term Contracts and Alloy Magnesium Commitments

The GOQ requested the Panel to order Commerce to reopen the record to obtain additional information related to the economic and market changes affecting the importation of pure and alloy magnesium. Rule 73(2)(b) Challenge at 3. The Panel concluded that the GOQ had waived the right to raise this issue because it was not mentioned in the Complaint or in the briefs to the Panel. Panel's Second Determination at 10. However, the Panel noted that it was concerned that the proffered evidence would, in fact, shed light on Commerce's determination of the likely conduct of importers absent an order. Panel's Second Determination at 10-11. Therefore, on remand, the Panel instructed Commerce to: (i) obtain the views of the parties concerning whether this is an appropriate case in which to supplement the record pursuant to NAFTA Panel Rule 73(2)(a), and (ii) after due consideration of those views and of DOC's fact gathering obligation in full sunset reviews, determine whether the record should be supplemented in this case. Panel's

Second Determination at 11.

As instructed by the Panel, on December 13, 2002, Commerce sent a letter to the parties to obtain their views as to whether this is an appropriate case in which to supplement the record. On December 20, 2002, the parties responded to Commerce's request.

The GOQ argues that the Department should revoke the antidumping duty order on pure magnesium from Canada. The GOQ claims that the Panel has rejected the only basis - the decline in post-order import volumes of pure magnesium - upon which the Department previously found renewed dumping likely. However, according to the GOQ, should the Department proceed instead to continue the order, the Department should supplement the record with additional evidence, because the evidence that was previously submitted was not considered by the Department. The GOQ notes that the Panel has established that the Department has a "fact gathering obligation" with which it must comply concerning the contentions, and evidence was proffered - including NHCI's long-term contracts - but not considered on these points. The GOQ asserts that once the Department considers the evidence in support of revoking the order, the Department can only make one decision - to revoke the order.²

NHCI also argues that the Department should revoke the order. Absent revoking the order at this time, NHCI states that the Department should reopen the record in response to the instructions of the Panel. According to NHCI, the shift from pure to alloy magnesium seen in its production and in the magnesium market in general has direct implications for the Department's analysis required under the statute. NHCI notes that on April 10, 2000, following the Department's preliminary results in this sunset review, it submitted a case brief explaining that it had drastically changed its product mix and marketing strategy to become primarily a producer of alloy magnesium. NHCI provided the Department with an attachment detailing the long-term nature of certain contracts requiring it to continue production and shipment of substantial volumes of alloy magnesium. NHCI explained that these long-term contracts precluded it from using its production capacity to resume the volume of pure magnesium exports made prior to imposition of the current order. The Department rejected this information on the grounds that it was untimely new information. According to NHCI, the record is clear that it is improbable that NHCI will resume dumping and the Department should sunset this case. If the Department decides not to revoke the order, then this is an appropriate case to supplement the record pursuant to NAFTA Panel Rule 73(2)(a). NHCI has consistently pointed out that the shift in its production, in response to market demand, from pure to alloy magnesium products precludes a return to its pre-order shipment volumes for pure magnesium and, thus, a recurrence of pure magnesium dumping is improbable. According to NHCI, in the absence of the information rejected by the Department, there is insufficient factual data on the record for the Department to

² See Submission from Paul Hastings, on behalf of the Gouvernement du Quebec ("the GOQ") dated December 20, 2002.

properly analyze this issue.³

US Magnesium LLC (“US Magnesium”) argues that the Department should decline to re-open and supplement the record. The Department’s decision to reject NHCI’s information was based on its regulations and long-standing policy, which provide that factual information submitted for the first time in a proceeding in a party’s case brief cannot be considered. 19 C.F.R. 351.301(b). US Magnesium notes there are two important policy reasons for this rule. First, submission of factual information in a case brief denies other parties to a proceeding an opportunity to analyze the information, comment on it, and submit rebuttal factual information. Second, factual information submitted in a case brief denies the Department a sufficient opportunity to analyze the information, and verify the information, if necessary. US Magnesium states that it had no opportunity to comment on the credibility of NHCI’s information, nor did the Department. US Magnesium notes that the Department properly refused to consider the information. Moreover, the Department provided all parties an opportunity to submit all factual information they wished the Department to consider, and the Department thereby fulfilled its “fact gathering obligations.”

Finally, US Magnesium argues that this case is distinguished from AG der Dillinger Huttenwerke v. United States, 193 F.Supp.2d (Ct. Int’l Trade 2002), on at least two grounds. First, this was a case in which the respondents sought to introduce information regarding (1) the status of challenges in the U.S. Court of Appeals for the Federal Circuit and before a WTO dispute settlement panel with respect to the Department’s change-in-ownership subsidy methodology, and (2) the average useful life (“AUL”) depreciation schedule used by the Department in a recent, prior countervailing duty case involving imports of a German steel product. Both of these submissions involved information of which the Department could take “judicial notice,” i.e., neither submission required any clarification, follow-up, or verification. In contrast, in this case the information submitted by NHCI involved NHCI’s purported business plans and other information purporting to demonstrate that NHCI was unlikely to dump pure magnesium in the United States in the future. It was not the type of information that could be accepted without further investigation. Second, the information was confidential, company-specific information and not the type of information that could have been accepted and treated as factual without (1) an opportunity for comment and analysis by other interested parties, and (2) further analysis and investigation by the Department.⁴

After due consideration of the parties’ comments as to whether this is an appropriate case in which to supplement the record pursuant to NAFTA Panel Rule 73(2)(a) and our fact gathering obligation in full sunset reviews, we conclude that this is not an appropriate case in which to supplement the record.

³ See Submission from Steptoe & Johnson, on behalf of Norsk Hydro Canada Inc. (“NCHI”) dated December 20, 2002.

⁴ See Submission from King & Spalding on behalf of US Magnesium LLC (“US Magnesium”) dated December 20, 2002.

In sunset reviews, the Department permits factual information to be submitted in response to the notice of initiation and in rebuttal comments to responses filed by other parties. The Department's sunset regulations clearly indicate that the response to the notice of initiation and rebuttal comments to other parties' rebuttal comments are parties' only opportunity to submit unsolicited factual information in the sunset review process. The Department's regulations state:

[T]he Department normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired, unless the Secretary requests additional information from the parties after determining to proceed to a full sunset review under paragraph (e)(2) of this section. 19 C.F.R. 351.218(d)(4)

NHCI knew, or should have known, of the Department's regulations and procedures in sunset reviews. Furthermore, the Panel noted that "it is concerned that the proffered evidence would in fact shed light" on Commerce's determination of the likely conduct of importers absent an order. Panel's Second Determination at 10-11. As discussed below in **Consideration of Other Factors**, we are convinced that NHCI's long-term contract commitments would not change the outcome of this sunset review. There is significant additional information on the record from Commerce's previous administrative reviews and this sunset review that leads us to conclude that absent the antidumping duty order on Pure Magnesium from Canada, dumping is likely to continue or recur. Thus, we have determined not to supplement the record.

B. Good Cause

During the litigation, the GOQ and NHCI urged Commerce to find that good cause exists to consider factors other than the weighted average dumping margins determined in the investigation and subsequent reviews and the volume of imports in determining the likelihood of continuation or recurrence of dumping. The GOQ and NHCI stressed that section 752(c)(2) of the Tariff Act of 1930, as amended, ("the Act"), 19 U.S.C. § 1675a(c)(2), authorizes Commerce to consider price, cost, market or economic factors when "good cause" is shown and contend that there is such good cause in this Sunset Review. Panel's Second Determination at 2-7. In its second remand, the Panel held that "where a party alleges that there is good cause because of zero margins, the DOC must consider that such an allegation is good cause to consider other factors in order to fulfill the mandate of the special rule of section 752(c)(4)(A)." Panel Second Determination at 7.

Section 752(c)(4)(A) of the Act, 19 U.S.C. § 1675(c)(4)(A), states that a zero dumping margin "shall not by itself require a finding that revocation of an order would not be likely to lead to continuation or recurrence of sales at less than fair value." As the Panel noted, this provision means that while the Department "may consider the existence of zero margins, a negative determination is not required when they exist." Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed.

Reg. 18871 (Apr. 16, 1998) (“Sunset Policy Bulletin”); Panel’s Second Determination at 4. Moreover, the SAA states that the “present absence of dumping is not necessarily indicative of how exporters would behave in the absence” of an order. Uruguay Round Agreements Act, Statement of Administrative Action, at 890, reprinted in H.R. Doc. No. 103-316 (1994) (“SAA”).

As we noted in our first remand determination, we fail to see how the mere fact that NHCI was found not to have been dumping in the most recent administrative reviews is a good cause for addressing other factors. Remand Determination at 4. Indeed, the level of dumping is a criterion that Commerce is required to consider in making its likelihood determination, pursuant to section 752(c)(1) of the Act.

Section 752(c)(1) provides that, in making its likelihood determination, Commerce shall consider (A) the weighted average dumping margins determined in the investigation and subsequent reviews; and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the AD order.

The Sunset Policy Bulletin further instructs that Commerce will normally find likelihood where, inter alia, dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly. Sunset Policy Bulletin at section II.A.3.

While we disagree with the Panel’s conclusion, we are again considering the “other factors” presented by NHCI and the GOQ as instructed by the Panel.

A. The Consideration of Other Factors

In our first remand determination, we considered the “other factors” alleged by NHCI and found them to be “insufficient to compel us to reverse our affirmative likelihood determination.” Remand Determination at 4. In considering the “other factors” again, we have considered the entire record of this case, paying particular attention to the three points advanced in NHCI’s Substantive Response and further argued by the GOQ, in addition to those specifically addressed by the Panel in its second remand determination.⁵ In considering NHCI’s and the GOQ’s good cause claim arguments to be compelling for the consideration of other factors, as requested by the Panel, we find that those factors and NHCI’s and the GOQ’s evidence supporting them would again be insufficient to compel us to reverse our affirmative likelihood determination.

NHCI argued and the GOQ further adopted that good cause existed for Commerce to consider the following factors when making its likelihood determination:

- NHCI’s share of the U.S. pure magnesium market has dropped to insignificant levels and is not likely to substantially increase;

⁵NHCI also argued that exchange rates were a relevant factor to be considered. However, the GOQ withdrew this claim at the hearing before the Panel.

- Commerce has never found NHCI to be making sales below cost;
- Since the original investigation, U.S. import duties imposed on pure magnesium from Canada have been eliminated.

Further, the Panel specifically requested Commerce to address the following arguments asserted by the GOQ:

- The GOQ and NHCI claimed that there were changes in product mix and marketing strategy that made it unlikely that NHCI would attempt to regain its pre-order level of imports - an assertion that was certified by company officials, yet not considered as “proof” by Commerce;
- The GOQ noted that information supplied by Magcorp for the record showed that NHCI has achieved a substantial and sustained level of alloy magnesium shipments to the U.S. market; and
- The GOQ referenced the annual reviews wherein changes in the magnesium market were noted by DOC in its reviews of the periods subsequent to the magnesium order.

Since the GOQ’s arguments directly relate to NHCI’s claims, we will address them accordingly below:

NHCI’s share of the U.S. pure magnesium market has dropped to insignificant levels and is not likely to substantially increase

The Panel noted in its second remand determination that both the GOQ and NHCI claimed that there were changes in product mix and marketing strategy that made it unlikely that NHCI would attempt to regain its pre-order level of imports. Panel’s Second Determination at 8. The GOQ pointed out in its Rule 73(2)(b) Challenge that NHCI’s case brief made the factual assertion that it had become primarily an alloy producer - an assertion that was certified by company officials. Rule 73(2)(b) Challenge at 10. Panel’s Second Determination at 8. The Panel states that “{w}e fail to see why this written testimony was not considered ‘proof’ by DOC.” Panel’s Second Determination at 8-9.

The GOQ further takes issue with Commerce’s determination on this issue, arguing that it suggests that failure to submit “proof” with the substantive response is enough to defeat a claim that “other factors” indicate that there is no likelihood of recurrence or continuation of dumping. The GOQ’s Rule 73(b)(2) Challenge to the Department’s Redetermination on Remand at 10; Panel’s Second Determination at 8.

As the Panel correctly notes, and the administrative record of this sunset review demonstrates,

NHCI submitted its “proof” on these points, in conjunction with its case brief. Panel’s Second Determination at 9. NHCI’s original case brief stated that it was committed to the alloy magnesium business and would be unable to expand pure magnesium exports to the United States because of its existing “long-term” contract commitments (emphasis added). NHCI’s Case Brief at 6. NHCI’s case brief, however, contained new information submitted after Commerce’s deadline in this sunset review.⁶ As a result, Commerce requested NHCI to withdraw this information from the record.⁷ NHCI re-submitted its case brief deleting this new information (e.g., the long-term contracts). Commerce notes that it was NHCI that relied on these long-term contract commitments as its “proof,” not Commerce. Furthermore, we note that NHCI had ample opportunity to provide this information to Commerce in a timely manner, but failed to do so. Given the fact that NHCI’s entire argument rests on the premise that it is primarily an alloy producer and has long-term contract commitments, it is unclear why NHCI did not provide this information in a timely fashion in its first substantive response. As US Magnesium notes, whether the new information submitted by NHCI was “certified by company officials” is irrelevant.⁸ The Department’s rejection of the new information had nothing to do with its credibility. The information was untimely and therefore rejected by Commerce.

Even assuming *arguendo* that NHCI had long-term contract commitments in the United States, there is sufficient *additional* evidence on the record of this sunset review for Commerce to conclude that revocation of the antidumping order on pure magnesium would be likely to lead to the continuation or recurrence of dumping.

First, the Panel notes that the GOQ referenced the annual reviews wherein changes in the magnesium market were noted by Commerce. Panel’s Second Determination at 9. Specifically, the Panel notes that the GOQ pointed to Commerce’s March 16, 1999, administrative review where Commerce commented that

Respondent [NHCI] explains that after the imposition of the antidumping duty order, it redirected its marketing strategy toward other export markets and developed a strong home market for pure magnesium. NHCI, along with other interested parties, notes that it also increased its production and sales of alloy magnesium to the extent that by 1997, it had become primarily a producer of alloy

⁶ See Memorandum from Commerce to Carol A. Mitchell, Steptoe & Johnson, LLP dated April 18, 2000 rejecting NHCI’s Case Brief due to the inclusion of new information.

⁷ Id.

⁸ See Comments Regarding Whether the Department Should Re-Open the Record in the Sunset Review of the Antidumping Order on Pure Magnesium from Canada, December 20, 2002 Submitted on behalf of US Magnesium LLC (formerly Magcorp).

magnesium.⁹

This quote, however, was taken out of its original context. In fact, Commerce was simply reiterating NHCI's argument prior to addressing its own position. Commerce's position in the fifth administrative review, which the GOQ failed to address, was as follows:

In addition to examining NHCI's commercial activity during the period of investigation, the Department also examined information regarding NHCI's sales of pure magnesium to other markets for the three years in question. Examination of the number and volume of sales made in these markets further supports our determination that the sales to the United States were not made in commercial quantities. Moreover, this very evidence indicates that NHCI has not completely redirected its market focus toward alloy magnesium but, in fact, maintains significant pure magnesium sales volumes in other pure magnesium markets, all of which are markedly smaller and more distant than the U.S. market.¹⁰

Since NCHI maintained pure magnesium sales in other, much smaller markets, Commerce concluded that NHCI had not completely redirected its market focus towards the alloy magnesium market. Moreover, during the course of the revocation review in 1998, Commerce also addressed NHCI's product mix. Specifically, Commerce noted the following:

First, while we recognize the recent and projected rapid growth rates for alloy magnesium, we find it extremely difficult to conclude that NHCI's abrupt abandonment of the U.S. market for pure magnesium was unrelated to the dumping proceedings. Second, given the size and importance of the U.S. market for pure magnesium and NHCI's continued sales of pure magnesium in other markets, we are not convinced that NHCI has permanently changed its marketing and sales strategy to focus solely on alloy magnesium. Although the company implies that it has little interest in the U.S. market for pure magnesium, we note that NHCI maintains significant sales of pure magnesium in Canada and third countries. The magnitude of NHCI's pure magnesium sales in Canada reflects the current global reality of a higher demand for pure than alloy magnesium. The higher demand for pure magnesium also exists in the United States. U.S. consumption of pure magnesium in 1996, for instance, was nearly triple that of

⁹ Pure Magnesium from Canada, 64 Fed. Reg. 12977, 12980 (Mar. 16, 1999) (admin. review, final).

¹⁰ Id. (emphasis added).

allow magnesium consumption. Given the mix of magnesium products in the United States and the fact that the United States is the largest market in the world for pure magnesium, it appears likely that NHCI, in the absence of the antidumping duty order, would seek to reestablish itself in the U.S. pure magnesium market.¹¹

Again, Commerce noted that it appeared likely that NHCI had a distinct interest in the U.S. pure magnesium market, and in the absence of the order, would likely seek to reestablish itself in the U.S. market. In addition, when making its arguments on this point in the Final Results of Fifth Review, NHCI actually admitted that it redirected its U.S. marketing strategy after the imposition of the antidumping duty order.¹² Evidence on the record of the sunset review suggests that in the pure magnesium industry, as in other industries that produce commodity products, marketing strategies can change quickly. For example, after the imposition of the order, other producers from around the world reacted quickly to supply the U.S. import market when Canadian suppliers retreated.¹³

As Magcorp stated in its rebuttal brief, “the U.S. market remains predominantly a pure magnesium market, but even with a zero deposit rate, NHCI has not meaningfully re-entered the U.S. market and has been forced to export pure magnesium production to distant Asian markets rather than the United States.”¹⁴ In addition, Magcorp noted that while NHCI asserts that it is “primarily an alloy magnesium producer,” NHCI ignores the technical ease with which it could switch production from alloy magnesium to pure magnesium.¹⁵ As noted by Magcorp, it is simply a matter of not adding alloying elements, such as aluminum and zinc, to the pure magnesium. In other words, NHCI produces pure magnesium prior to producing alloy magnesium.¹⁶

Furthermore, NHCI had announced plans to double its production capacity.¹⁷ In June 1997, NHCI announced that it planned to increase its production capacity from the current 43,000

¹¹ See 63 Fed. Reg. 26147, 26149 (May 12, 1998).

¹² See Pure Magnesium from Canada; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part, 64 Fed. Reg. 12,977, 12980 (March 16, 1999).

¹³ See King and Spalding Submission dated September 1, 1999 at 30 and 31.

¹⁴ See Magcorp’s Rebuttal Brief, dated April 21, 2000 at 12.

¹⁵ Id.

¹⁶ Id.

¹⁷ See Magcorp’s Sept. 1, 1999 substantive response (“Magcorp’s Substantive Response”) at 23-35.

metric tons to 86,000 metric tons. According to the press release, the expansion was to be carried out in two phases. In the first phase, NHCI was to increase its capacity by 25,000 metric tons, with construction initially announced to begin in 1998 and production to commence in the year 2000. In fact, NHCI had already invested in two projects at its Becancour plant related to its intended capacity expansion. The investments, totaling C\$20 million, were to be required to support NHCI's expansion of primary magnesium production at the facility. Thus, if NHCI were to increase production capacity, given the size and demand in the U.S. pure magnesium market, it is logical to assume that NHCI would have to dump its pure magnesium in the U.S. market in order to gain market share, if the order were revoked.

The Panel notes that NHCI disputed Magcorp's evidence of a plant expansion in its Case Brief, which was certified by company officials. Panel's Second Determination at 9. In its September 13, 1999, submission, NHCI argued that many of the production expansions announced in Canada and around the world were still in the initial assessment stages, and that Commerce should not rely on announcements of intentions to increase production capacity as a basis for determining what will occur in the future. During the sunset review, NHCI did not refute its own announced plant expansion at Becancour.¹⁸ Moreover, while we agree that NHCI's plant expansion plan is speculation into the future as noted in the companion countervailing duty case, the sunset review itself is, by definition, forward looking in nature. Commerce must assess the facts of each case and determine whether or not it is *likely* that dumping will continue or recur if the antidumping duty order is revoked. While the GOQ and NHCI argue that Commerce should dismiss the information regarding NHCI's possible plant expansions, we note that this is only one factor, which, when combined with other information gleaned from previous administrative reviews and this sunset review, leads Commerce to conclude that there is sufficient evidence that dumping is likely to continue or recur if the antidumping order is revoked.

Finally, NHCI maintains that a shift in the U.S. import market from Canada to other suppliers of imported pure magnesium subsequent to the issuance of the order would preclude NHCI from increasing its market share to "significant" levels, "even if the order is revoked." NHCI's Substantive Response at 9-10. As we noted in our first remand determination, NHCI has not provided any evidence to support this claim. Remand Determination at 5. In fact, as we noted, an objective analysis of the import statistics would indicate that it was the imposition of the order that caused the shift to other suppliers of imports of pure magnesium. Import statistics indicate that, once the order was issued against imports of pure magnesium from Canada, imports from Canada immediately dropped to zero for more than two years and then increased slightly over the life of the order and have remained at less than 10 percent of their pre-order levels. In contrast, total U.S. imports of pure magnesium have remained steady or increased over the life of the order, indicating that other foreign suppliers made up for the imports accounted for by Canada prior to the imposition of the order. Thus, as we determined in our first remand, we find it reasonable to conclude that prior to the order, Canadian producers were only able to maintain

¹⁸ See Steptoe & Johnson, LLP's September 13, 1999 rebuttal comments on the substantive response of Magnesium Corporation of America ("Magcorp") at 3.

their share of import levels by dumping. Remand Determination at 5. We consider NHCI's activity prior to the imposition of the order to be highly probative of what its activity would be if the order were revoked. Therefore, we find it to be likely that, in order for NHCI to regain its pre-order level of imports, NHCI would have to resume dumping.

Commerce has never found NHCI to be making sales below cost

NHCI claims that Commerce has never found NHCI to have made sales below cost, a "fact" further supporting a finding that NHCI is not likely to engage in future dumping. NHCI's Substantive Response at 10. As Commerce stated in the first remand, NHCI simply makes this claim and fails to provide any evidence or further argument to support it. Remand Determination at 6. We note that, in the original investigation, NHCI refused to submit to the Department any of its sales or cost data. Therefore, the Department based the antidumping duty margins on the constructed value information contained in the petition. The Department noted the following:

Petitioners' analysis provides reasonable ground to believe or suspect that Norsk Hydro has made sales in the home market at prices below cost of production. Therefore, . . . we are initiating an investigation to determine whether home market sales are made at prices below the cost of production.¹⁹

As such, when the Department determined that it had to rely on the constructed valued information contained in the petition for its dumping determination, it implicitly found that NHCI was making sales below cost.

Irrespective of the Department's cost determination in the investigation, NHCI's claim, on its face, is illogical, in that it implies a direct relationship between the selling of subject merchandise in the home market at below cost with dumping in the United States. There is no direct relationship. A determination regarding sales below cost in the home market concerns the appropriate basis for the determination of normal value. Dumping occurs when the producer sells in the export market at prices below the normal value. This is an entirely distinct analysis. Therefore, we find NHCI's argument to be specious.

Since the original investigation, U.S. import duties imposed on pure magnesium from Canada have been eliminated.

Finally, NHCI claims that the elimination of the 4.8 percent import duty on pure magnesium from Canada supports a negative likelihood finding because NHCI's U.S. prices no longer require the deduction of import duties in calculating U.S. price. NHCI's Substantive Response at 10. As noted in our first remand, NHCI provides no evidence to support this claim and, indeed, we believe that there is no logic in this claim. Remand Determination at 6. If NHCI were correct

¹⁹ Pure Magnesium from Canada, 56 Fed. Reg. At 49,743 (initiation).

that the absence of the import duty adjustment had such a large impact on whether NHCI were dumping pure magnesium in the United States, then, since the elimination of the import duty, NHCI should have been able to resume exporting at pre-order levels. On the contrary, its imports have remained at less than 10 percent of their pre-order level. Moreover, in the investigation, the Department determined that NHCI was dumping at a rate of 21 percent. Logically, it makes little sense that the elimination of the 4.8 percent import duty adjustment would eliminate dumping at a level of 21 percent.²⁰

For the reasons discussed above, we find that, whether we consider each factor individually or *in toto*, they have no impact on our affirmative likelihood determination. Consequently, we find upon remand that revocation of the AD order on pure magnesium from Canada would be likely to lead to the continuation or recurrence of dumping.

A. The Rate to Report to the International Trade Commission

In section II.B.1 of the Sunset Policy Bulletin, Commerce states that it normally will provide to the Commission the margin that was determined in the final determination of the original investigation. This comports with the SAA, which instructs that Commerce will normally select this rate because it is the only calculated rate that reflects the behavior of exporters without the discipline of an order in place. SAA at 890. As the Panel noted in its first remand, the SAA also states that Commerce *may* select a more recently calculated rate from an administrative review if, for instance, dumping margins have declined and imports have remained steady or increased over the life of the order. Panel's First Determination at 29.

Commerce stated in its Sunset Policy Bulletin that it may depart from its preference for using the margins calculated in the original investigation and use more recently calculated margins if (1) dumping margins have decreased over the life of the order, and (2) imports have remained steady or increased. Sunset Policy Bulletin. In this case, imports of the subject merchandise from Canada have significantly declined from the imposition of the antidumping duty order.

During the sunset review, NHCI argued that Commerce should report a margin of zero to the Commission, the rate Commerce calculated in the four most recently completed administrative reviews. Among its reasons in support of this argument is NHCI's claim that, since the time of the investigation, "NHCI has drastically changed its product mix and marketing strategy." NHCI's Case Brief at 9.

In its final results, Commerce determined that NHCI had not provided convincing evidence to report a margin other than the investigation rate. Consequently, pursuant to the SAA and the Sunset Policy Bulletin, Commerce decided to report to the Commission the rate determined in the investigation.

²⁰ Pure Magnesium from Canada: Final Results of Full Sunset Review, 65 Fed. Reg. 41436 (July 5, 2000) ("Final Results")

The Panel rejected Commerce's reasoning and, in its first remand, instructed Commerce to reconsider its determination to report the investigation rate as the margin of dumping likely to prevail if the order were revoked. Panel's First Determination at 33. In doing so, the Panel has instructed Commerce to consider whether the market and product changes advanced by NHCI are sufficient to overcome the normal preference for the investigation rate. Panel's First Determination at 29.

Commerce determined that under the Good Cause section of its determination, there was no evidence on the record of the sunset review to substantiate NHCI's claim that changes in its product mix and the marketing strategy support a conclusion that the margin of dumping likely to prevail if the order were revoked is zero. Accordingly, Commerce found upon remand that NHCI's unsupported claim is insufficient to overcome the SAA's explicit preference for reporting to the Commission the dumping margin from the investigation.

The Panel concluded that Commerce's reasoning is not a satisfactory analysis for the reasons it articulated in its opinion. Panel's Second Determination at 11. Specifically, the Panel disagreed that there was no evidence of record to substantiate NHCI's claims. Consequently, the Panel instructed Commerce to reconsider this issue, in its instructions to consider the record concerning "other factors."

As discussed above, pursuant to the Panel's instructions, we have considered additional information with respect to the "other factors" alleged by NHCI. In doing so, we continue to conclude upon remand that the rate calculated during the investigation is the only calculated rate that reflects the behavior of NHCI absent an order. As noted above, Commerce is not convinced that NHCI is no longer interested in the pure magnesium market. Moreover, NHCI has not been able to sell in the U.S. market in commercial quantities since the imposition of the antidumping duty order. We have relied on our previous findings of non-commercial quantities in the administrative reviews of this order to reinforce our conclusion that NHCI's shipments to the United States declined significantly since the imposition of the original order. We noted in the fifth administrative review the following:

[F]or each year, the volume of merchandise sold was less than one-half of one percent of the volume of merchandise sold in the last completed fiscal year prior to the order. These sales and volume figures are so small, both in absolute terms and in comparison with the period of investigation, that we cannot reasonably conclude that the zero margins NHCI received are reflective of the company's normal commercial experience. More specifically, the abnormally low level of sales activity does not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping.²¹

²¹ Pure Magnesium from Canada, 64 Fed. Reg. At 12978 (fifth review).

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

Interested Party Comments

Comment 1 - Reopening the Administrative Record

NHCI argues that the Department did not respond to the Panel when it cited to its regulations precluding it from accepting new data after the time for filing rebuttals has expired. NHCI states that the Department relied on the same regulation under which it originally rejected NHCI's submission. NHCI submits that the Department should revise its draft to include an analysis of both (1) the fact gathering obligation outlined by the Panel and (2) the comments of the parties (rather than just the current summary of comments), and an application of these two factors to the facts of the case. Furthermore, NHCI argues that the Department should explain under what circumstances the Panel should reopen a factual record.

The GOQ argues that the Department disregarded the Panel's instructions to consider reopening the record. The GOQ claims that the Department had never before considered whether "good cause" existed or whether "other factors" supported revocation of the order. Moreover, the GOQ argues that since the Panel found that NHCI and the GOQ had demonstrated good cause and the existence of other factors, the Department is required either to revoke the order or to reopen the record. The GOQ contends that the Department has improperly chosen to do neither.

Commerce's Position

We disagree with NHCI and the GOQ. First, NHCI is incorrect in stating that the Department has never before considered whether "good cause" and the existence of "other factors" support revocation in this case. The Department analyzed NHCI's good cause claim in its initial remand determination.²² Second, the Department was not instructed to either revoke the order or to reopen the record. Rather, the Panel instructed the Department: (i) to further consider the record concerning the "other factors" which are required to be taken into account pursuant to the conclusions in Sections 2 and 3 of the Panel's opinion; (ii) to consider whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (iii) to reconsider whether the normal preference for the investigation rate should not be followed here. The Department followed the Panel's instructions. Specifically, regarding the Panel's instructions for consideration of whether this is an appropriate case in which to supplement the record, the Department obtained the views of interested parties, and after due consideration of interested parties comments and our fact finding obligation in sunset reviews, determined not to supplement the record. We based this decision on the specific facts of this case, in addition to

²² See Results of Redetermination Pursuant to Panel Remand, Pure Magnesium from Canada, USA-CDA-00-1904-06, dated May 28, 2001.

our regulations.

As discussed above in the **Rejection of NHCI's Additional Evidence Concerning Long -Term Contracts and Alloy Magnesium Commitments** section, the Department's regulations clearly indicate that the response to the notice of initiation and rebuttal comments to other parties' rebuttal comments are parties' only opportunity to submit unsolicited factual information in the sunset review process. Moreover, NHCI continues to sell pure magnesium in Canada and other markets, indicating that it is a significant pure magnesium producer. As we have determined in previous administrative reviews, given the demand for pure magnesium in the United States and the fact that the United States is the largest market in the world for pure magnesium, it appears likely that NHCI, in the absence of the antidumping duty order, would seek to reestablish itself in the U.S. pure magnesium market.

Comment 2- Good Cause

NHCI asserts that the Department should revise its draft results to recognize that good cause exists to consider factors other than the weighted average dumping margins and volume of imports. NHCI argues that the Department's application of the Policy Bulletin in this case assumes that zero dumping margins lead to a presumption against revocation, even on the facts of this case. According to NHCI, the Department cites to the Sunset Policy Bulletin in order to create the reverse presumption that zero margins, coupled with decreases in import volumes, necessarily indicate that dumping will recur in the absence of an order. NHCI claims that its situation is unusual because the reduction in import volumes, as compared to the shipments before the order was imposed, was a function of commercial factors other than the simple imposition of the order. Finally, NHCI argues that the Panel remanded this case to the Department to consider other factors because of (1) the differing possible interpretations of the Act and the Sunset Policy Bulletin, (2) the Department's affirmative obligation to seek evidence necessary to make its determination, (3) the Department's responsibility to find the probable, not just possible, outcome if the order is revoked and (4) NHCI's explanation, supported on the record, that the facts in this case demonstrate that zero margins are consistent with non-recurrence of dumping.

Commerce's Position

We disagree with NHCI. The Panel did not find in its remand that Commerce's practices under the Sunset Policy Bulletin were inconsistent with the statute. The Sunset Policy Bulletin provides guidance to the Department and states that the Department will *normally* find likelihood where, inter alia, dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly. Sunset Policy Bulletin at section II.A.3. While we disagree with the Panel's conclusion that good cause exists to consider factors other than the weighted average dumping margins and volume of imports, we have again considered the "other factors" presented by NHCI and the GOQ as instructed by the Panel.

NHCI maintains that the reduction in import volumes, as compared to shipments before the order was imposed, was a function of commercial factors other than the simple imposition of the order. We do not agree with NHCI. We analyzed the commercial factors raised by NHCI and conclude that the import statistics indicate that it was the imposition of the order that caused the shift to other suppliers of imports of pure magnesium.

Comment 3 - Other Factors on the Record

NHCI takes issue with the Department's conclusion that the evidence on the record is insufficient to compel the Department to reverse its affirmative likelihood determination. NHCI asserts that the Department should revise its draft to indicate that it is examining these factors without reference to its prior decisions. Finally, NHCI states that the Department should search for the "probable" outcome, rather than the "possible" outcome of revocation of the order.

Commerce's Position

We disagree with NHCI. We have thoroughly analyzed the administrative record of this sunset review and our previous administrative reviews, and we continue to find that NHCI's immediate retreat from the pure magnesium was a direct result of the imposition of this order. The import statistics indicate that, once the order was issued against pure magnesium from Canada, imports from Canada dropped to zero for more than two years and then increased slightly over the life of the order and have remained at less than 10 percent of their pre-order levels. Moreover, NHCI continues to sell pure magnesium in Canada and other markets. Given the mix of magnesium products in the United States and the fact that the United States is the largest market in the world for pure magnesium, it appears likely that NHCI, in the absence of the antidumping duty order, would seek to reestablish itself in the U.S. pure magnesium market. Finally, in following the Panel's instructions, the Department determined the probable outcome.

Comment 4 - NHCI Has Become Primarily a Producer of Alloy Magnesium and Has Executed Long-Term Contracts

NHCI argues that the long-term supply contracts in question are not the only support for the fact that it has changed its production mix. NHCI maintains that Magcorp (now U.S. Magnesium) referred to NHCI's long-term alloy magnesium contract with General Motors in its substantive response. In addition, according to NHCI, in an earlier segment of this proceeding, the Department formally noted NHCI's position regarding its long-term contracts. Furthermore, NHCI asserts that the Panel noted that NHCI's case brief made the factual assertion that it had become primarily an alloy producer, an assertion that was certified by company officials. According to NHCI, the Department should revise its draft to recognize that even if the record is not reopened, facts exist to demonstrate the existence of NHCI's long-term alloy contracts which it asserts make it primarily an alloy producer.

Commerce's Position

We disagree with NHCI. In Magcorp's substantive response, it noted that Russia's largest producer, Solikamsk Magnesium Plant ("SMZ"), had secured a long-term contract to supply alloy magnesium to General Motors. It further stated that "NHCI can be confident that when General Motors conducts negotiations regarding its long-term contract with NHCI, General Motors will be aware of lower prices and expanding production available to it from its Russian supplier."²³ This does not indicate that NHCI is primarily an alloy producer. As noted above in the **Consideration of Other Factors** section, our thorough analysis of previous administrative reviews indicates that NHCI has not completely redirected its market focus towards alloy magnesium. Moreover, Commerce never formally noted NHCI's position regarding its long-term contracts. Commerce was simply reiterating NHCI's argument prior to stating its position. Finally, while company officials certified that NHCI had become primarily an alloy producer, such a certification does not negate the fact that NHCI continues to sell significant amounts of pure magnesium in Canada and other markets, thus indicating that it continues to be a significant pure magnesium producer.

Comment 5 - Likelihood

The GOQ takes issue with the Department's likelihood analysis. The GOQ asserts that the Department's determination does not rest on "the probable scenario." As to the likelihood that NHCI will begin its announced plant expansions, the GOQ argues that the Panel has already concluded that NHCI's plant expansion plans are unsubstantiated. As to the likelihood that NHCI will switch from alloy to pure magnesium production if the order is revoked, the GOQ argues that whether a producer is able to switch to pure magnesium does not mean that it is likely to switch to pure magnesium. Further, the GOQ argues that the Department must look forward, not backward, to determine what is the likely behavior after the order is revoked. The GOQ questions why an established producer of alloy magnesium would seek to re-enter post-order an over saturated pure magnesium market in an effort to regain its pre-order share of imports, when it has been successfully competing and profiting as an alloy magnesium producer in the segment of the magnesium market that is projected for significant growth demand?

Commerce's Position

As noted above in Comment 3, the Department followed the Panel's instructions and determined "the probable scenario" that revocation of the antidumping order on pure magnesium from Canada would likely lead to the continuation or recurrence of dumping. Furthermore, the Panel did not conclude that NHCI's plant expansion plans are unsubstantiated. The Panel stated in its remand that "although DOC stated that NHCI did not dispute MagCorp's evidence of a plant

²³ See King & Spalding's September 1, 1999 substantive response to the Department at 29 (emphasis added).

expansion, NHCI in fact did dispute this claim in its Case Brief, which was certified by company officials.”²⁴

Comment 6 - Small Markets

NHCI argues that one of the reasons it sells pure magnesium to smaller markets is because it is selling much less pure magnesium than it once did. According to NHCI this supports its argument that it has redirected its market focus away from an emphasis on pure magnesium and towards its current emphasis on alloy magnesium.

Commerce’s Position

We disagree with NHCI. The Department determined in previous administrative reviews that NHCI maintains significant pure magnesium sales volumes in other pure magnesium markets.²⁵ NHCI’s “factual” argument ignores the fact that it began selling much less pure magnesium than it once did immediately subsequent to the imposition of the U.S. antidumping duty order. Thus, any shift away from pure magnesium can be directly attributed to the order. Consequently, given the size of the U.S. pure magnesium market and the mix of magnesium products, it appears likely that NHCI, in the absence of the order, would seek to reestablish itself in the U.S. pure magnesium market.

Comment 7 - Other Factors Relied on By NHCI and the GOQ

The GOQ asserts that the Department has pre-determined the outcome of this case. According to the GOQ, NHCI’s long-term contractual commitments preclude NHCI from selling pure magnesium in the U.S. at pre-order levels. Thus, NHCI argues, the Department’s refusal to properly analyze NHCI’s long-term contract commitments violates its obligation to seek additional evidence that may be necessary to make its determination. Furthermore, NHCI claims that the Department challenges the fact that NHCI has shifted its production to alloy magnesium, which according to NHCI, has been an uncontroversial fact. The GOQ states that “pre-order NHCI produced approximately 90% pure magnesium; at the time of the sunset review, it produced approximately 10% pure magnesium.” (emphasis added). The GOQ argues that the global reality of a higher demand for pure magnesium than for alloy magnesium is irrelevant. Finally, the GOQ states that the fact that marketing strategies can change quickly is also irrelevant.

Commerce’s Position

We disagree with the GOQ. We have thoroughly analyzed the administrative record of this

²⁴ See Panel’s Second Remand Determination at 9.

²⁵ Pure Magnesium from Canada, 64 Fed. Reg. 12977, 12980 (Mar. 16, 1999) (admin. review, final).

sunset review and our previous administrative reviews, and we continue to find that NHCI's immediate retreat from the pure magnesium market was a direct result of the imposition of this order. The import statistics indicate that, once the order was issued against pure magnesium from Canada, imports from Canada dropped to zero for more than two years and then increased slightly over the life of the order and have remained at less than 10 percent of their pre-order levels. Thus, as we determined in our first remand, we find it reasonable to conclude that prior to the order, Canadian producers were only able to maintain their share of the import levels by dumping. The global demand for pure magnesium is relevant to the Department's determination since it affects the U.S. pure magnesium market. A higher demand for pure magnesium in the U.S. market will increase the likelihood that NHCI will seek to reestablish itself in the U.S. pure magnesium market. Finally, the fact that marketing strategies can change quickly directly relates to the Department's likelihood analysis as discussed above in the **Consideration of Other Factors** section.

Comment 8 - The U.S Alloy Market

NHCI contends that its long-term contract commitments in the United States preclude it from reestablishing itself as a pure magnesium supplier. NHCI points to the Department's conclusion in the sixth administrative review in which the Department noted that because the United States is "the largest market in the world for pure magnesium, it appears likely that NHCI, in the absence of the antidumping duty order, would seek to reestablish itself in the U.S. pure magnesium market." According to NHCI, as an alloy producer, its primary focus is not participating in the pure market, no matter what size.

Commerce's Position

We disagree with NHCI. As discussed above in the **Consideration of Other Factors** section, we have concluded, based on the record evidence in this case, that it appears likely that NHCI has a distinct interest in the U.S. pure magnesium market, and in the absence of the order, would likely seek to reestablish itself in the U.S. market. NHCI continues to sell pure magnesium in Canada and other markets therefore indicating that it remains a significant producer of pure magnesium.

Comment 9 - NHCI's U.S. Marketing Strategy

NHCI contends that whether or not NHCI retreated from the pure magnesium market due to the imposition of the dumping order is irrelevant. According to NHCI, there is no requirement that changes in commercial behavior be unrelated to the existence of the antidumping order for the Department to revoke the order.

Commerce's Position

In sunset reviews, a drop-off in exports after the imposition of an antidumping duty order is

probative in the determination of the likelihood of continued or resumed dumping if the order were revoked. While there is no requirement that changes in commercial behavior be unrelated to the existence of the antidumping order for the Department to revoke the order, past behavior is a good indication of future behavior. Thus, NHCI's retreat from the U.S. market subsequent to the imposition of the antidumping duty order, is probative evidence NHCI was only able to sell in the U.S. market by dumping, and absent the order, NHCI would only be able to re-enter the market by dumping.

Comment 10 - Technical Changes

NHCI asserts that its production capacity is committed to alloy magnesium and thus it cannot simply switch from alloy magnesium to pure magnesium. According to NHCI, to do so could lead to default on its long-term contracts. NHCI further argues that the Department has not followed the Panel's instructions to "evaluate these factual assertions in view of the certifications which lend authenticity to the rebuttal arguments."

Commerce's Position

We disagree with NHCI. NHCI relies on its long-term alloy contract commitments to argue that it is unable to switch production from alloy to pure. As discussed in the **Consideration of Other Factors** section, the U.S. remains predominantly a pure magnesium market. Given the technical ease with which NHCI could switch to the production of pure magnesium, combined with the fact that it continues to sell significant amounts of pure magnesium in Canada and other markets, it is likely that absent the order, dumping will likely continue or recur.

Comment 11 - Production Capacity

NHCI argues that its planned expansion plans are speculative and despite the fact that they were three years old at the time of the Department's final determination, the Department did not attempt to verify whether these plans were ever implemented. NHCI further argues that it is speculation to assume that if production capacity increases, imports of pure magnesium will also increase. NHCI notes that reviewing courts have emphasized that the intentions of a foreign producer are an important component in consideration of whether an increase in capacity will ripen into an actual increase in imports.

Commerce's Position

As noted in the **Consideration of Other Factors** section, NHCI's possible plant expansion is just one factor, which when combined with other information gleaned from previous administrative reviews and the record of this sunset review, leads Commerce to conclude that there is sufficient evidence that dumping is likely to continue or recur. Furthermore, as we noted above, NHCI can easily switch production from alloy to pure magnesium. NHCI's possible plant expansion is additional evidence that it is likely dumping will continue or recur, absent the

antidumping order.

Comment 12 - Shift to Other Suppliers

NHCI asserts that the large volumes of pure magnesium imports from Russia, Israel and China in the U.S. market will preclude it from increasing its market share in the future if the order is revoked. According to NHCI, this statement was substantiated by the import data it provided in its substantive response. Moreover, NHCI argues that assuming *arguendo* that it is primarily a producer of alloy magnesium, it has no incentive to attempt to regain its pre-order level of dumping.

Commerce's Position

As we noted in the **Consideration of Other Factors** section, an objective analysis of the import statistics would indicate that it was the imposition of the order that caused the shift to other suppliers of imports of pure magnesium. Evidence on the record of the sunset review suggests that in the pure magnesium industry, as in other industries that produce commodity products, marketing strategies can change quickly. For example, after the imposition of the order, other producers from around the world reacted quickly to supply the U.S. import market when Canadian suppliers retreated.²⁶ Moreover, given the mix of magnesium products in the United States and the fact that the United States is the largest market in the world for pure magnesium, it appears likely that NHCI, in the absence of the antidumping duty order, would seek to reestablish itself in the U.S. pure magnesium market.

Comment 13 - The Department's Lack of Sales Below Cost

NHCI asserts that the Department challenges its statement that it has never made a finding of sales below cost. In addition, NHCI argues that its history indicates that it makes sales that recoup costs, not sales at any price to gain market share.

The GOQ argues that Commerce's conclusion that there is no connection between sales below cost and dumping is illogical. According to the GOQ, NHCI's zero margins are evidence that it never sold below cost. In addition, the GOQ argues that the 1992 investigation based on best information available ("BIA") has no probative bearing on what pricing conduct is likely by NHCI in a post-order situation. Thus, according to the GOQ, the Department cannot conclude that it is probable that NHCI would resume dumping if the order were revoked on the basis on the 1992 BIA finding.

Commerce's Position

We disagree with NHCI and the GOQ. NHCI and the GOQ have confusingly attempted to tie the

²⁶ See King & Spalding Submission dated September 1, 1999 at 30 and 31.

issue of whether NHCI has ever made sale in the home market at less than the cost of production to Commerce's finding that NHCI has not dumped in the U.S. market in recent administrative reviews. NHCI's claim was that because Commerce never found it to have made sales in the home market below cost, NHCI would not be likely to dump in the future if the order were revoked. This reasoning is illogical, as it implies a direct relationship between selling subject merchandise in the home market at below cost with dumping. Dumping occurs when the producer sells in the export market at prices below normal value. Furthermore, we note that the zero margins calculated by Commerce were based on sales volumes that were not in commercial quantities. Thus, we conclude that the margins from the original investigation are probative of the behavior of Canadian producers and exporters of pure magnesium if the order were to be revoked.

Comment 14 - U.S. Import Duties on Pure Magnesium

According to NHCI, the Department has challenged its statement that the reduction to zero for normal import duties makes it less likely that dumping will be found.

Commerce's Position

As discussed in the **Consideration of Other Factors** section, if NHCI were correct that the absence of the import duty adjustment had such a large impact on whether NHCI were dumping pure magnesium in the United States, then, since the elimination of import duty, NHCI should have been able to resume exporting at pre-order levels. On the contrary, its imports have remained at less than 10 percent of their pre-order level. Furthermore, in the investigation, the Department determined that NHCI was dumping at a rate of 21 percent. Logically, elimination of the 4.8 percent import duty adjustment would not eliminate dumping at that rate.

Comment 15 - Rate Reported to the International Trade Commission

NHCI argues that the record demonstrates that it has changed its product mix and marketing strategy and thus the Department should select a more recent rate from the administrative reviews to report to the International Trade Commission. In addition, NHCI notes that the investigation rate was based on BIA. NHCI further argues that the Department found zero margins in the four administrative reviews. According to NHCI, the difference in the availability of data should be a significant factor in the Department's decision to report a rate from the administrative review, as opposed to the investigation.

The GOQ asserts that there is nothing new in the Department's analysis and reasoning of the proper rate to report to the International Trade Commission. According to the GOQ, the analysis of the rate to report to the International Trade Commission is an independent inquiry that is not tied to the likelihood of dumping. The GOQ argues that an annual review rate is the more probable scenario than the original investigation rate. The GOQ further argues that there is nothing in the record to support the notion that NHCI would be likely to resort to 21% margins,

although there are items in the record to support the likelihood of 0% margins.

Commerce's Position

We disagree with NHCI and the GOQ. Pursuant to the Panel's instructions, we have considered additional evidence with respect to the "other factors" alleged by NHCI. In doing so, we continue to conclude upon remand that the rate calculated during the investigation is the only calculated rate that reflects the behavior of NHCI absent an order. Importantly, NHCI has not been able to sell in the U.S. market in commercial quantities since the imposition of the antidumping duty order. Thus, the zero margins calculated by the Department were not based on sales in commercial quantities. Therefore, upon remand, we conclude that the margins from the original investigation are probative of the behavior of Canadian producers and exporters of pure magnesium if the order were to be revoked.

Comment 16 - Removal of the All Others Rate

The GOQ argues that it is inappropriate for the Department to report an all others rate in the instant remand since, according to the GOQ, the Panel found the all others rate unsustainable for the countervailing duty sunset review. The GOQ asserts that the Panel found the reporting of an all others rate to the Commission in a sunset review is discretionary, and not mandatory. Moreover, according to the GOQ, since there is only one Canadian producer in this case, the Department should determine that it is inappropriate to report an all others rate to the International Trade Commission. Finally, the GOQ contends that since the all others rate was based on best information available, it is contrary to law, and thus must be removed from the remand determination.

Commerce's Position

This issue is not properly before the Panel because it was not previously raised in this case and therefore is not being addressed.

Conclusion

We have followed the Panel's instructions to: (1) further consider the record concerning the "other factors" which are required to be taken into account pursuant to the Panel's conclusion in Section 2 and 3 of its opinion; (2) further consider whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (3) reconsider whether the normal preference for the investigation rate should not be followed here. We have also considered the comments of interested parties on our draft remand results. Upon remand, we

continue to find that revocation of the antidumping duty order on pure magnesium from Canada would be likely to lead to the continuation or recurrence of dumping at the rate determined in the investigation.

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

(Date)

