

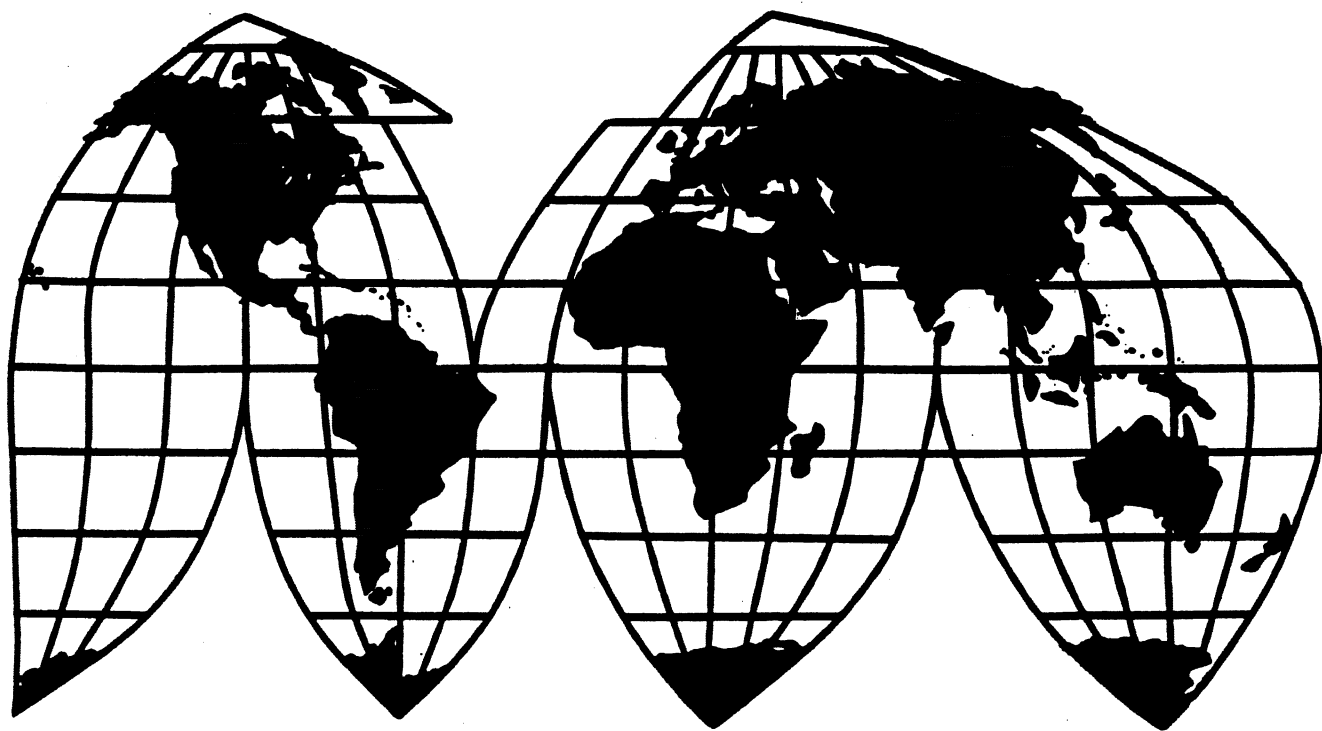
Magnesium From Canada

Investigations Nos. 701-TA-309 and 731-TA-528 (Remand)

Publication 2696

November 1993

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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In August 1992, the U.S. International Trade Commission (Commission) determined that an industry in the United States was materially injured by reason of imports from Canada of magnesium that were found by the U.S. Department of Commerce to be subsidized by the Governments of Canada and Quebec and sold in the United States at less than fair value.¹

The Commission's determinations were subsequently challenged before a United States-Canada Binational Panel (Panel), and on August 27, 1993, the Panel remanded the Commission's determinations (*Magnesium from Canada*, USA-92-1904-05 and USA-92-1904-06). The attached views were submitted to the Panel in response to the remand.

¹ USITC Publication No. 2550, August 1992.

Contents

	Page
Views of Chairman Newquist, Vice Chairman Watson, Commissioner Crawford and Commissioner Nuzum	1
Additional views of Vice Chairman Watson and Commissioner Nuzum	21
Views of Commissioner David B. Rohr	23

Note.--Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report.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 CHAIRMAN NEWQUIST, VICE CHAIRMAN WATSON, COMMISSIONER CRAWFORD AND COMMISSIONER NUZUM^{1 2}

Based on the record in these final investigations, and pursuant to the Order of the United States-Canada Binational Panel in *Magnesium from Canada*,³ we determine that an industry in the United States is materially injured by reason of imports of pure magnesium from Canada that have been found by the Department of Commerce (Commerce) to be sold at less than fair value (LTFV). We also determine that industries in the United States are materially injured by reason of imports of pure magnesium and alloy magnesium from Canada that have been found by Commerce to be subsidized.⁴

I. Background

In its original determinations in these investigations, the Commission found one domestic industry--that producing all primary magnesium--and found that this domestic industry was materially injured by reason of the unfairly traded imports.⁵ Alternatively, the Commission found that, had it found two domestic industries, it still would have reached affirmative determinations with respect to both industries.⁶

Respondents subsequently challenged the Commission's final determinations before a United States-Canada Binational Panel.⁷ The parties briefed and argued the case before the Panel, and on August 27, 1993, the Panel remanded the Commission's determinations.

The Panel concluded that the record lacked substantial evidence to support the Commission's finding of one like product. The Panel further found that the

¹ In the original determinations, Commissioner Rohr found two domestic industries, and reached affirmative determinations with respect to both industries. He readopts his original views, as amended for technical errors in his attached Views on Remand.

² In the original determinations, Commissioner Brunsdale found three domestic industries. She reached affirmative determinations with respect to the domestic industries producing pure and alloy magnesium, and negative determinations with respect to the domestic industry producing ultra-pure magnesium. She readopts her original views and also joins parts I and V, and the relevant aspects of Parts III and IV of the majority's Views on Remand.

³ *Magnesium from Canada*, USA-92-1904-05 and USA-92-1904-06 (August 27, 1993).

⁴ In our original determinations, we found that critical circumstances did not exist with respect to LTFV imports of pure magnesium. No party has challenged this finding before the Binational Panel, and our original findings on this issue therefore remain intact.

⁵ *Magnesium from Canada*, Inv. Nos. 701-TA-309 and 731-TA-528 (Final), USITC Pub. 2550 (August 1992).

⁶ USITC Pub. 2550 at 14 n.53. See also USITC Pub. 2550 at 16-17 and 18.

⁷ See Article 1904 of the United States-Canada Free-Trade Agreement (FTA).

Commission had "insufficiently explained" its alternative holdings that, had it found two industries, it would have found material injury to each of these industries by reason of the unfairly traded imports.⁸ In this regard, however, the Panel discussed and upheld a substantial part of the Commission's injury analysis, particularly with regard to the volume and price effects of imports from Canada.

Thus, the Panel found that "the ITC's analysis of the absolute increase in the volume of Canadian imports and the increase in those imports relative to consumption is adequately stated and is supported by substantial evidence of record cited by the ITC."⁹ The Panel likewise noted that the Commission's findings regarding steady declines in both U.S.- and Canadian-produced commodity-grade pure and alloy magnesium prices were "adequately stated and supported by the record."¹⁰

The Panel found, however, that the discussion of the third statutory factor--the impact of imports on the domestic industry--was not adequately stated with regard to the separate pure and alloy industries.¹¹ In this regard, the Panel found that the Commission's discussions of substitutability and conditions of competition were unclear in the context of separate industries.¹²

The Panel instructed the Commission to provide, on remand--

... a detailed explanation as to (1) whether the U.S. industry producing pure magnesium is materially injured or threatened with material injury by reason of dumped or subsidized imports of pure magnesium from Canada and (2) whether the U.S. industry producing alloy magnesium is materially injured or threatened with material injury by reason of subsidized imports of alloy magnesium from Canada.^{13 14}

⁸ Panel Decision at 22-23.

⁹ Panel Decision at 26-27.

¹⁰ Panel Decision at 27.

¹¹ Panel Decision at 27-28.

¹² Panel Decision at 25 and 27-28.

¹³ Panel Decision at 29. The Panel indicated that it did not necessarily intend to foreclose a finding of more than two like products and industries. The Panel provided for this possibility in its remand instructions.

¹⁴ Commissioner Brunsdale notes that in *Hosiden Corp. v. United States*, 810 F. Supp. 322, 328 (Ct. Int'l Trade 1992), decided after the Commission's initial determinations in these final investigations, the Court of International Trade held that "[t]he plain language of the statute . . . limits the Commission to individual determinations of whether a domestic industry producing products like each separate class or kind of imported article is being injured by each separate class or kind of imported merchandise designated by Commerce." Although the Panel specifically did not require separate determinations, the two like products found by the Commission today correspond to the two classes or kinds of merchandise defined by Commerce, and the two affirmative findings amount to two affirmative determinations.

II. Like Product and Domestic Industry

In our original determination, we stated that, although we would have reached affirmative determinations whether we found one like product or two, we made a single like product determination based principally upon the existence of common production facilities and employees, similar physical characteristics, and our finding that there were not clear dividing lines among all types of primary magnesium but a continuum of types of primary magnesium based upon marginal differences in magnesium content.¹⁵ In light of the Panel's explicit directions to provide a detailed injury analysis for at least two separate industries, we base these determinations on the existence of two separate industries--one producing pure magnesium and the second producing alloy magnesium.¹⁶

We decline to find more than two like products based upon the existence of multiple like products within the separate categories of pure and alloy magnesium. The main support for further dividing the like products is based on the difference in end uses among various products.¹⁷ The general end uses for pure and alloy magnesium are for chemical applications and structural applications, respectively.¹⁸ The various types of end products within the two like product groups fall within the parameters of these respective applications.

As the Panel noted, "[a] like product determination is in essence a determination as to the domestic industry or industries that are the subject of an injury investigation."¹⁹ The record shows that various grades of alloy are made by the same firms, ***, by adding different amounts of alloying elements to a furnace molding pure magnesium, and that various grades of pure magnesium are made by extracting different impurities.²⁰ Firms producing one kind or grade of pure or alloy can easily make others. We have been reluctant to fragment our like product definition where a continuum of products exists and numerous separate like products

¹⁵ The Panel agreed that there was substantial evidence supporting the Commission's determination of common production facilities, but did not address the Commission's view that there are no clear dividing lines among all types of primary magnesium.

¹⁶ We note that the Panel's instructions preclude the Commission from finding fewer than two like products and thus follow an approach that, insofar as we are aware, has not been used in any Court of International Trade (CIT) decision. We know of no CIT case where, having found a lack of substantial evidence to support a Commission like product finding, the court then reversed the Commission on that issue. Rather, the approach used in the CIT follows applicable principles of appellate review, which is to remand the issue to the Commission for further explanation or reconsideration consistent with the court's opinion. *E.g., Chung Ling Co., Ltd. v. United States*, 805 F. Supp. 45, 54-56, 805 F. Supp. 56, 65 (Ct. Int'l Trade 1992); *Torrington Co. v. United States*, 747 F. Supp. 744, 751 (Ct. Int'l Trade 1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991); *Asociacion Colombiana de Exportadores de Flores v. United States*, 693 F. Supp. 1165, 1169 (Ct. Int'l Trade 1988) (*Asocoflores*).

¹⁷ See Confidential Report (INV-P-137, Aug. 4, 1992) at I-8-10; Public Report at I-6-7.

¹⁸ Confidential Report at I-8-9; Public Report at I-6-7.

¹⁹ Panel Decision at 10, citing *Asocoflores*.

²⁰ Confidential Report at I-15-18.

could result from an unduly narrow application of the like product factors.²¹ ²² We find no clear dividing lines within the two like products based upon the various types or grades of pure or alloy magnesium, and decline to find that different industries making the several different grades of alloy or pure magnesium exist.²³

III. Condition of the Domestic Industry

In assessing whether there is material injury to a domestic industry by reason of LTFV and subsidized imports, the Commission considers all relevant economic factors that have a bearing on the state of the industry in the United States. These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital and research and development. No single factor is determinative and we consider all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."²⁴

A. Domestic Pure Magnesium Industry

There are several conditions of competition distinctive to the domestic industry producing pure magnesium. Pure magnesium is sold mainly to aluminum producers, to magnesium granule producers for steel desulfurization and to chemical and pharmaceutical manufacturers.²⁵ The demand for pure magnesium is dictated largely by the demand in these end-use markets. In turn, consumption of the finished

²¹ *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Invs. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Pub. 2664 at 11-12 (August 1993).

²² Chairman Newquist notes that his "reluctance" to fragment like product definitions is grounded in his interpretation of the applicable legislative history, which provides, in pertinent part:

[t]he requirement that a product be 'like' the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation.

S. Rpt. No. 96-249, 96th Cong., 1st Sess. (1979) at 90-91.

²³ The Commission generally has not found differing grades of a product to be separate like products. See *Sebacic Acid from the People's Republic of China*, Inv. No. 731-TA-653 (Preliminary), USITC Pub. 2676 at 8, n. 18 (Sept. 1993) and cases cited therein.

²⁴ 19 U.S.C. § 1677(7)(C)(iii).

²⁵ Confidential Report at I-34 and I-109; Public Report at I-69.

products often tracks general economic conditions, including recession and recovery. Thus, the domestic industry producing pure magnesium is affected by the business cycles of the industries that consume pure magnesium. As the demand in the consuming industries declined slightly from 1989 to 1991, so did the demand for pure magnesium.²⁶

Second, electrolytic cells used in the production of both pure and alloy magnesium will deteriorate if they are not kept running constantly.²⁷ If they deteriorate, they must be rebuilt. The costs of rebuilding these cells are so high that producers must try to keep the cells in constant operation. Thus, to be cost-effective, producers must maintain continuous and steady production of both pure and alloy magnesium. Further, because of the need to keep the cells running, energy costs as a factor of production in this industry are high, and any reduction in these costs is likely to create a competitive edge for a producer.

Third, the subject imports of pure magnesium and the domestic like product are close substitutes. Pure magnesium is subject to strict industry purity and content standards. Both domestic and imported pure magnesium must meet the same American Society for Testing and Materials (ASTM) specifications for chemical and physical properties.²⁸ These specifications limit the differences between subject imports and the domestic product. In fact, purchasers reported few differences between the domestic and the imported product, and rated both products identical in terms of availability and reliability of supply.²⁹

Fourth, the market for pure magnesium is very price competitive.³⁰ Most contracts for sales of both pure and alloy magnesium in the U.S. market contain "meet-or-release" clauses.³¹ These clauses require suppliers to meet the price of competitors or to release the purchaser from the contract. Even in the absence of specific contractual provisions, price changes by one producer are followed by price changes by other producers.³²

In the context of these conditions of competition,³³ we next examine the relevant economic factors which have a bearing on the state of the industry. Apparent U.S. consumption of pure magnesium was relatively stable, but decreased slightly from *** metric tons in 1989 to *** metric tons in 1991.³⁴ While U.S. consumption of pure magnesium declined by only *** percent, U.S. producers' U.S.

²⁶ Confidential Report at I-109 and I-31 (Table 5); Public Report at I-69 and I-25.

²⁷ Transcript of Hearing (July 14, 1992) (Tr.) at 37-38.

²⁸ See Economic Memorandum EC-P-056 (August 5, 1992) at 20.

²⁹ See Economic Memorandum at 21-22.

³⁰ See Economic Memorandum at 21-23.

³¹ Report at I-73; Economic Memorandum at 23.

³² *Id.*

³³ We also note the global nature of the pure magnesium market and that the U.S. pure magnesium industry has developed a large and stable export market for its products. See Report at I-39 (Table 12 and Figure 9) and I-41.

³⁴ Confidential Report at C-3 (Table C-1).

shipments of pure magnesium declined substantially, falling from *** metric tons in 1989 to *** metric tons in 1991, for an overall decline of *** percent.³⁵ By value, U.S. producers' U.S. shipments of pure magnesium declined even more markedly, from *** million in 1989 to *** million in 1991, for an overall decline of *** percent.³⁶

Domestic production also declined, from *** metric tons in 1989 to *** metric tons in 1991.³⁷ While capacity remained constant during this period, capacity utilization fell sharply from *** percent in 1989 to *** percent in 1991.³⁸ At the same time, inventories grew from *** metric tons to *** metric tons.³⁹ Inventories increased in both absolute terms and relative to production. In 1989, inventories equaled *** percent of annual production, increasing to *** percent of annual production in 1991.⁴⁰

Employment data were mixed, with several indicators showing declines. Employment of production and related workers in the pure magnesium industry fell slightly during the period of investigation, from *** workers to *** workers.⁴¹ Hours worked also declined, although total and hourly compensation rose somewhat.⁴² Unit labor costs increased, while productivity declined.⁴³

Finally, the domestic industry also reported poor financial performance.⁴⁴ ⁴⁵ The financial data of the industry show steady and substantial declines in net sales, operating income and operating income margins, and gross profits.⁴⁶ Thus, net sales

³⁵ Confidential Report at C-4 (Table C-1).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, as amended by Memorandum INV-P-138, Aug. 7, 1992.

³⁹ Confidential Report at C-4 (Table C-1).

⁴⁰ *Id.*

⁴¹ Confidential Report at C-4 (Table C-1).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ One of the three U.S. pure magnesium producers, Northwest Alloys, exited the open market at the end of the period of investigation, citing depressed conditions in both domestic and foreign markets. Confidential Report at I-41; Public Report at I-30. With this action, Northwest announced cutbacks of 50 percent in both capacity and personnel. *Id.*

In 1992, Northwest's employees were certified for trade adjustment assistance from the Department of Labor, with Northwest citing the flooding of world markets by Russian products and the recession and oversupply of magnesium in the U.S. market. Confidential Report at I-6-7; Public Report at I-5-6. While we are careful not to draw any unsubstantiated conclusions from this grant of assistance, we do note that, in 1991, the unfairly traded imports from Canada accounted for the vast majority of total imports of pure magnesium into the United States. Confidential Report at I-30 (Table 5).

⁴⁵ Although ***. We note that the only increased supply of pure magnesium in the U.S. market came from Canada. See Confidential Report at C-3 (Table C-1).

⁴⁶ Confidential Report at C-5 (Table C-1) and I-76 (Table 25). In considering the financial performance of the industry, we have considered only the information pertaining to actual magnesium operations. Expenses required by federal environmental law are properly

(continued...)

for the pure magnesium industry fell from *** in 1989 to *** in 1991.⁴⁷ Operating income fell from *** in 1989 to *** in 1991, while operating income margins similarly fell from *** percent in 1989 to *** percent in 1991.⁴⁸ At the same time, gross profits dropped dramatically from *** to ***.⁴⁹

There were slight increases in the industry's overall capital expenditures and research and development expenses from the beginning to the end of the period of investigation.^{50 51}

B. Domestic Alloy Magnesium Industry

Several of the conditions of competition applicable to the domestic industry producing pure magnesium also are applicable to the domestic industry producing alloy magnesium. As with pure magnesium, from which alloy is derived and which is processed using the same equipment, the production of alloy magnesium requires electrolytic cells that must run constantly to avoid deterioration or costly rebuilding. As noted above, producers must maintain continuous and steady production of both pure and alloy magnesium.

The subject imports of alloy magnesium similarly are close substitutes for, and are very price competitive with, their U.S.-produced counterparts.⁵² Both domestic and imported alloy magnesium of a particular grade must meet the same ASTM specifications, particularly with regard to chemical content.⁵³ Purchasers reported few differences between the alloy magnesium they purchased from domestic and Canadian suppliers, and indicated that the products from both countries were employed in the same range of uses.⁵⁴ Most contracts for sales of alloy magnesium

⁴⁶ (...continued)

classified as a cost of production, and in this regard we note that cost of goods sold and SG&A expenses actually declined during the period of investigation. In any event, the environmental costs noted in the Commission Report are not significant compared to total costs. Confidential Report at I-12, n. 29 (Compare Magcorp's \$2.5 million environmental costs over two-year period 1989-1990, including a chlorine reduction burner installed in June 1990, with Magcorp's total costs of production (cost of goods sold plus SG&A) for one year alone (1990)—***. Expenses associated with *** do not affect net sales, operating income, or gross profits for the domestic industry.

⁴⁷ Confidential Report at I-76 (Table 25).

⁴⁸ *Id.*

⁴⁹ Confidential Report at I-76 (Table 25).

⁵⁰ Confidential Report at I-85 and I-86 (Tables 32 and 33).

⁵¹ Based on the foregoing performance indicators, Chairman Newquist finds that the domestic industry producing pure magnesium is experiencing material injury.

⁵² See Economic Memorandum at 26-27 and 30.

⁵³ See Economic Memorandum at 24 and Norsk Hydro Canada's prehearing brief at Exhibit 3.

⁵⁴ Economic Memorandum at 24.

in the U.S. market contain "meet-or-release" clauses,⁵⁵ and, even in the absence of such contractual provisions, changes in prices charged for alloy magnesium by one producer are followed by price changes by other producers.⁵⁶

Unlike pure magnesium, alloy magnesium is sold primarily to diecasters for structural applications.⁵⁷ Further, the alloy magnesium market has been characterized as one of potential growth as new diecast applications develop in the automotive and computer markets segments.⁵⁸ Notwithstanding these new applications, however, the market for alloy magnesium actually contracted somewhat between 1990 and 1991.⁵⁹

In the context of these conditions of competition, we next examine the relevant economic factors which have a bearing on the state of the domestic alloy magnesium industry. There was a slight overall increase in apparent U.S. consumption of alloy magnesium from 1989 to 1991. Specifically, apparent U.S. consumption increased *** percent from *** metric tons in 1989 to *** metric tons in 1990, followed by a *** percent decrease, to *** metric tons in 1991.⁶⁰

As was true for consumption, U.S. producers' domestic shipments of alloy magnesium increased from 1989 to 1990 and then decreased from 1990 to 1991.⁶¹ We note, however, that the decrease in shipments was sharper than the decrease in consumption, resulting in an overall net decrease for the period examined.⁶² Specifically, these shipments increased *** percent, from *** metric tons in 1989 to *** metric tons in 1990, followed by a *** percent decrease, to *** metric tons in 1991.

During this period, domestic production of alloy magnesium declined *** percent, from *** metric tons in 1989 to *** metric tons in 1991.⁶³ While capacity remained constant during this period, capacity utilization fell from *** percent in 1989 to *** percent in 1991.⁶⁴ At the same time, inventories grew from *** metric tons to *** metric tons.⁶⁵ Inventories increased in both absolute terms and relative to

⁵⁵ Report at I-73; Economic Memorandum at 29.

⁵⁶ *Id.*

⁵⁷ Confidential Report at I-9; Public Report at I-7.

⁵⁸ Confidential Report at I-109; Public Report at I-69.

⁵⁹ See Confidential Report at I-31 (Table 5).

⁶⁰ Confidential Report at I-31 (Table 5).

⁶¹ Confidential Report at I-54 (Table 13).

⁶² *Id.*

⁶³ Confidential Report at I-47 (Table 11).

⁶⁴ Confidential Report at C-7 (Table C-2, as amended by Memorandum INV-P-138. *** Confidential Report at C-8 (Table C-2, n. 5). Given this discrepancy, we find that the capacity utilization figure reported for alloy magnesium alone is not particularly probative, but that the aggregate capacity utilization figure for all primary magnesium is more accurate and probative. We note that the aggregate capacity utilization rate for both U.S. producers of alloy magnesium *** from 1989 to 1991. Dow's capacity utilization rate ***. Magcorp's capacity utilization rate ***. Confidential Report at I-48, n. 81.

⁶⁵ *Id.*

production. In 1989, inventories equaled *** percent of annual production, increasing to *** percent of annual production in 1991.⁶⁶

Some employment data reflected declines, although other indicators did not. Employment of production and related workers in the alloy magnesium industry fell substantially, from *** workers to *** workers.⁶⁷ Hours worked also declined, as well as total compensation paid.⁶⁸ However, productivity increased and labor costs fell.⁶⁹

The domestic industry producing alloy magnesium reported poor financial performance.⁷⁰ The financial data of the alloy magnesium industry show substantial declines in net sales, operating income and operating income margins, and gross profits. Net sales decreased from *** in 1989 to *** in 1991; operating income decreased from *** to ***; operating income margins fell from *** percent to *** percent; and gross profits declined from *** to ***.⁷¹ There was little change in the industry's overall capital expenditures and research and development expenses from the beginning to the end of the period of investigation.^{72 73}

IV. Material Injury by Reason of LTFV and Subsidized Imports

A. Legal Standard

In determining whether a domestic industry is materially injured by reason of the imports under investigation, the statute directs the Commission to consider:

- (I) the volume of imports of the merchandise which is the subject of the investigation,
- (II) the effect of imports of that merchandise on prices in the United States for like products, and
- (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States⁷⁴

⁶⁶ *Id.*

⁶⁷ Confidential Report at C-7 (Table C-2).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Regarding ***, we again note that, as with pure magnesium, the only increased supply of alloy magnesium in the U.S. market came from Canada. See Confidential Report at C-6 (Table C-2).

⁷¹ *Id.*

⁷² Confidential Report at I-85 and 86 (Tables 32 and 33).

⁷³ Based on the foregoing performance indicators, Chairman Newquist finds that the domestic industry producing alloy magnesium is experiencing material injury.

⁷⁴ 19 U.S.C. § 1677(7)(B)(i).

In making this determination, the Commission may consider "such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports."⁷⁵ Although we may consider information that indicates that injury to the industry is caused by factors other than the unfairly traded imports, we do not weigh causes.⁷⁶

For the reasons discussed below, we find that there is material injury to the domestic industry producing pure magnesium by reason of LTFV and subsidized imports of magnesium from Canada. We also find that there is material injury to the domestic industry producing alloy magnesium by reason of subsidized imports of alloy magnesium from Canada.⁷⁷

B. Material Injury to the Domestic Pure Magnesium Industry by Reason of the LTFV and Subsidized Imports

The volume of LTFV and subsidized imports, measured by both quantity and value, is significant, and increased substantially during the period of investigation.^{78 79} From 1989 to 1990, the quantity of subject imports of pure magnesium increased from *** metric tons to *** metric tons.⁸⁰ In 1991, imports

⁷⁵ 19 U.S.C. § 1677(7)(B)(ii).

⁷⁶ Views on the proper standard of causation of Chairman Newquist and Commissioner Nuzum (jointly), of Vice-Chairman Watson, and of Commissioner Crawford are set out in the Commission's original determination (USITC Pub. 2550) at 15-16, notes 57, 58, and 59, respectively.

⁷⁷ We note that much of the following discussion of the volume and prices of imports of subject magnesium from Canada repeats what we stated in the original final determinations. We also note that the Panel affirmed our original findings of the volume and price effects of imports of pure and alloy magnesium from Canada, and that those issues therefore were not remanded by the Panel. We have nonetheless included a discussion of those issues in these remand determinations in the interest of presenting a complete, and therefore more persuasive, discussion of our analyses with respect to the impact of imports of pure magnesium and alloy magnesium on the domestic industries producing the corresponding like products.

⁷⁸ Confidential Report at I-96-97 (Table 38). Because Norsk Hydro Canada did not export any ultra-pure magnesium to the United States, the imports of commodity-grade pure magnesium account for all subject imports of pure magnesium.

⁷⁹ In the original investigations, respondent Quebec argued that the Commission should not "cross cumulate" dumped and subsidized imports, but should instead render separate determinations regarding the effects of dumped and subsidized imports. Posthearing brief of Quebec at 6-13. We rejected that argument, with explanation, in our original determinations. USITC Pub. 2550 at 16-17, note 60. That issue was not challenged before the Panel, and our determination on that issue therefore remains intact.

⁸⁰ Confidential Report at I-96-99 (Table 38).

increased another *** percent, to *** metric tons. The value of the subject imports increased rapidly from 1989 to 1990, and increased again from 1990 to 1991.⁸¹

Market penetration of subject imports of pure magnesium, by both quantity and value, also increased dramatically during the period of investigation.⁸² Thus, shipments of imports in the United States of pure magnesium from Norsk Hydro Canada accounted for *** percent of domestic market share by both quantity and value in 1989, and then rose to *** percent in 1990 and to *** percent in 1991.⁸³

Respondents argued that the subject imports from Canada increased because the domestic industry was unable to supply the market in 1988, during a period of shortage caused by natural disasters and labor problems. Even if true, that explanation does not account fully for the especially large increase in subject imports from 1989 to 1990, or for the continued significant increase in 1991. Even if there was a shortage in 1988, the data demonstrate that domestic excess capacity in 1991 exceeded the volume of imports in that year, and was therefore sufficient to meet purchasers' demand for pure magnesium.⁸⁴

Respondents also argued that the increased shipments of subject imports from Canada merely replaced shipments of magnesium from Norway. This assertion is not supported by the record. In fact, imports of pure magnesium from Canada greatly exceeded the volume of imports previously imported from Norway. While pure magnesium imports from *all* sources other than Norsk Hydro Canada declined from *** metric tons in 1989 to *** metric tons in 1991, imports of pure magnesium from Norsk Hydro Canada increased from *** metric tons to *** metric tons in 1991.⁸⁵ Therefore, the 1991 volume of subject imports from Canada was over *** the volume of imports from Norway in 1989.

Coincident with the large increase in unfairly traded imports, U.S. producers' U.S. shipments of pure magnesium declined steadily, by both quantity and value.⁸⁶ By quantity, U.S. producers' U.S. shipments decreased from *** metric tons in 1989 to *** metric tons in 1990 and then to *** metric tons in 1991.⁸⁷ By value, U.S. producers' U.S. shipments dropped from *** in 1989 to *** in 1991.⁸⁸ Correspondingly, U.S. producers' market share decreased steadily by both volume

⁸¹ *Id.*

⁸² Confidential Report at I-105 (Table 41).

⁸³ Confidential Report at C-3 (Table C-1).

⁸⁴ Domestic capacity to produce pure magnesium was *** metric tons in 1991. Production was *** metric tons; therefore, excess capacity amounted to over *** metric tons. Subject imports of pure magnesium amounted to *** metric tons in 1991. Confidential Report at I-96 (Table 38) and Memorandum INV-P-138.

⁸⁵ Confidential Report at I-96 (table 38).

⁸⁶ Confidential Report at I-105 (Table 41).

⁸⁷ Confidential Report at C-4 (Table C-1).

⁸⁸ *Id.*

and value from approximately *** percent of the domestic pure magnesium market in 1989 to less than *** percent in 1991.⁸⁹

At the same time that volume and market share of subject imports increased massively, prices for both U.S.- and Canadian-produced commodity-grade pure magnesium steadily declined.⁹⁰ Thus, producers' contract prices of pure magnesium from Canada sold to aluminum manufacturers decreased *** percent, from an initial price of *** per pound in January-March 1990 to *** per pound in October-December 1991;⁹¹ prices for similar sales of U.S.-produced pure magnesium decreased *** percent, from *** per pound during the first quarter of 1989 to *** per pound at the end of 1991.⁹² Producers' contract prices of pure magnesium sold to granule producers likewise declined, by *** percent and *** percent for Canadian and U.S. pure magnesium, respectively.⁹³ Pricing data obtained from purchasers showed similar trends, with the price of pure magnesium from Canada declining *** percent, from *** per pound in the first quarter of 1989 to *** per pound at the end of 1991, while pure magnesium purchased from U.S. producers decreased *** percent, from *** per pound to *** per pound during the same period.⁹⁴ Moreover, the value data regarding imports of pure magnesium from Canada demonstrate a dramatic decline in average unit values of subject imports. The unit value of commodity-grade pure magnesium from Canada dropped from *** per pound to *** per pound from 1989 to 1991.⁹⁵

As noted above, the high degree of substitutability between U.S. and Canadian pure magnesium is a particularly significant condition of competition in the pure magnesium industry. Most purchasers of pure magnesium found few, if any, differences between the U.S. and Canadian products.⁹⁶ Moreover, the U.S. and

⁸⁹ *Id.*

⁹⁰ Confidential Report at I-120-123 and I-138 (Tables 43, 44, and 47). In light of the frequency of price changes, the high degree of substitutability, and the tendency of all producers to match price reductions, including through the use of "meet or release" clauses, the price comparisons of the largest sale in each quarter obtained in these investigations are not particularly useful for evaluating whether there was underselling. Therefore, we do not find these quarterly price comparisons particularly useful to determine whether any underselling was significant. See Economic Memorandum at 8. We note that a finding of underselling is not a necessary prerequisite to an affirmative determination. *Florex v. United States*, 705 F. Supp. 582, 593 (Ct. Int'l Trade 1989); *Alberta Pork Producers' Mktg. Bd. v. United States*, 669 F. Supp. 445, 465 (Ct. Int'l Trade 1987). In these investigations, we have found that the large volume of highly substitutable imports in this price sensitive market, as well as the widespread use of "meet or release" clauses, otherwise depressed prices. See 19 U.S.C. § 1677(7)(C)(ii)(I) & (II).

⁹¹ Confidential Report at I-120-121 (Table 43).

⁹² *Id.*

⁹³ Confidential Report at I-120-123 (Table 44).

⁹⁴ Confidential Report at I-137-138 (Table 47).

⁹⁵ Confidential Report at I-96-99 (Table 38).

⁹⁶ Economic Memorandum at 21-23.

Canadian products sell at similar prices.⁹⁷ Price changes by one firm are often followed by equivalent changes by other producers, in some instances due to contractual meet-or-release clauses.⁹⁸ Accordingly, the effect of subject import prices on U.S. prices is significant.

Respondents argued that non-price factors, such as quality and technical support and service, make the products less substitutable and account fully for the increase in Canadian sales. We find that these factors do not negate the significance of prices in the purchasing decisions of magnesium buyers. First, the vast majority of purchasers of pure magnesium found no quality differences between the U.S. and Canadian products.⁹⁹ Second, all of the purchasers of commodity grade pure magnesium that replied to the Commission questionnaire rated the U.S. and Canadian products as being identical in terms of availability and reliability of supply.¹⁰⁰

Due to the prohibitive costs of recharging the electrolytic cells, U.S. producers are willing to reduce prices to maintain production levels.¹⁰¹ Demand for pure magnesium is inelastic, however,¹⁰² and therefore price reductions do not increase total consumption. Viewed in this context, the substantial increases in Norsk Hydro Canada's share of the slightly declining market resulted in increased domestic inventories and placed significant pressure on the domestic producers to lower their prices. In addition, the U.S. plants producing pure magnesium are dedicated to primary magnesium production, with little flexibility to produce other products. Industry-wide price declines thus cause a direct reduction in revenues, as reflected in the financial data collected in these investigations.

Further evidence of the significant price depressing effects of imports from Canada is the *** percent decline in the *quantity* of U.S. producers' U.S. shipments of pure magnesium as compared to the approximately *** percent decline in the *value* of U.S. producers' U.S. shipments of pure magnesium.¹⁰³ We determine that the rapid increase in Canadian market share and concurrent decrease in prices of those imports significantly depressed domestic prices, and led to a decline in domestic producers' U.S. shipments, causing an even sharper decline in revenues. The decline in revenue contributed directly to a rapid decline in profitability for the domestic industry.

Furthermore, in considering the impact of the subject imports on the U.S. operations of domestic producers, the nature of the subsidies here is significant. These subsidies include exemption from payment of water bills and preferential

⁹⁷ Economic Memorandum at 22.

⁹⁸ Economic Memorandum at 22-23.

⁹⁹ Among sixteen purchasers of pure magnesium, fourteen found no quality differences, while two reported small quality differences based upon product shape or size. Economic Memorandum at 21-22.

¹⁰⁰ These purchasers represented approximately 79 percent of domestic shipments and virtually all Canadian shipments in 1991. Economic Memorandum at 21, note 52.

¹⁰¹ Tr. 37-38.

¹⁰² See Economic Memorandum at 31-34.

¹⁰³ See Confidential Report at C-4 (Table C-1).

electric rates—the very types of subsidies that are likely to reduce Norsk Hydro Canada's costs of production. As noted in our discussion of the relevant conditions of competition, this industry is characterized by high energy costs, and any reduction in these costs is likely to lead to a competitive advantage. Given the exceptionally high cost of energy in the magnesium production process,¹⁰⁴ the subsidies received by Norsk Hydro Canada clearly enhance its competitive position in relation to the U.S. industry.

Given the high degree of substitutability between subject imports and the like product, the rapid and dramatic increase in unfairly traded imports, and the concurrent declines in domestic market share, prices, and financial condition, we determine that the domestic industry producing pure magnesium is materially injured by reason of the subject imports of pure magnesium.¹⁰⁵

C. Material Injury to the Domestic Alloy Magnesium Industry by Reason of the Subsidized Imports

As with subject pure magnesium imports, the volume of subsidized imports of alloy magnesium, measured by both quantity and value, is significant, and increased manyfold during the period of investigation.¹⁰⁶ Imports of Norsk Hydro Canada's alloy magnesium increased from *** in 1989 to *** metric tons in 1990 and then to *** metric tons in 1991.¹⁰⁷ The value of imports of Norsk Hydro Canada's alloy magnesium similarly increased from *** in 1989 to *** in 1990 and then to *** in 1991.¹⁰⁸

¹⁰⁴ See Confidential Report at I-70 (Table 21) and I-82 (Table 29).

¹⁰⁵ Commissioners Brunsdale and Crawford find that, because subject imports and the like product are close substitutes, the price of unfairly traded imports plays a crucial role in purchasing decisions. The dumping and subsidy margins—31.33 and 21.61 percent, respectively—make it improbable that the subject imports would have been purchased in the U.S. market if they had been sold at the price Commerce calculated would be fair. If subject imports had been sold at fairly traded prices, the domestic industry would have used its excess capacity to increase significantly its output and sales, and therefore its revenue. Therefore, Commissioners Brunsdale and Crawford determine that the domestic industry would have been materially better off if the subject imports had been fairly traded. They reach the same conclusion based on Commerce's revised dumping margin of 21.0 percent, which was upheld by a U.S.-Canada Binational Panel. *Pure Magnesium and Alloy Magnesium from Canada*, USA-92-1904-04 (October 6, 1993). The rate of subsidy was not changed by Commerce on remand. The current subsidy rate of 7.61 percent resulted from a changed circumstances review by Commerce that reflects actions taken by Norsk Hydro Canada, regarding its power contract with Hydro-Quebec, after the period of investigation. Therefore the 21.61 rate of subsidy is the appropriate rate for the purposes of this remand. See *Pure Magnesium and Alloy Magnesium from Canada*, USA-92-1904-03 (August 16, 1993) (upholding Commerce final CVD determination).

¹⁰⁶ Confidential Report at I-96-99 (Table 38).

¹⁰⁷ Confidential Report at I-96 (Table 38).

¹⁰⁸ Confidential Report at I-97 (Table 38).

Market penetration of subject imports, by both quantity and value, also increased dramatically during the period of investigation.¹⁰⁹ Thus, by both quantity and value, imports of subject alloy magnesium accounted for *** share of domestic consumption in 1989, but captured approximately *** percent of the market in 1991.^{110 111}

As with pure magnesium, we reject respondents' argument that the increase in the imports of alloy magnesium from Canada is explained by the inability of the domestic industry to supply the market in 1988. That explanation does not account fully for the large increase in subject imports from 1989 to 1990, or for the continued increase in 1991, particularly as demonstrated by the decrease in U.S. production and capacity utilization from 1989 to 1991 as the subject imports increased market share substantially.¹¹²

We likewise reject respondents' argument that the increased shipments of alloy magnesium imports from Canada merely replaced shipments of alloy magnesium from Norway. This argument ignores the data showing that, from 1989 to 1990, when the imports of alloy magnesium from Norsk Hydro Canada surged from *** to *** metric tons, the imports of alloy magnesium from other sources remained fairly stable, at *** metric tons in 1989 and *** metric tons in 1990.¹¹³ Therefore, subject alloy magnesium imports from Canada represented additional imports; they did not merely replace imports from Norway.

While the quantity of subsidized imports of alloy magnesium increased from *** in 1989 to *** metric tons in 1991, U.S. producers' domestic shipments declined slightly during that period.¹¹⁴ At the same time, the value of these subsidized imports increased dramatically concurrent with an overall decrease of *** percent in the value of U.S. producers' U.S. shipments.¹¹⁵ Correspondingly, U.S. producers' market share of the domestic alloy magnesium market decreased steadily from 1989 to 1991, by quantity from *** percent to *** percent, and by value from *** to *** percent.¹¹⁶

¹⁰⁹ Confidential Report at I-106 (Table 42).

¹¹⁰ *Id.*

¹¹¹ Commissioner Brunsdale clarifies that her initial determination that the U.S. alloy magnesium industry is being materially injured by Canadian subsidization depended in substantial part on this 1991 market share being "far from trivial." She further notes that the Economic Memorandum (EC-P-056) calculated revenue, price, and volume effects using the subsidized imports' much smaller 1990 share. She did her own estimate, using the more recent number.

¹¹² See Confidential Report at I-47 (Table 11).

¹¹³ See Confidential Report at I-96 (Table 38).

¹¹⁴ Confidential Report at I-106 (Table 42).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

At the same time that volume and market share of subject imports increased, prices for both U.S.- and Canadian-produced alloy magnesium steadily declined.¹¹⁷ Thus, Canadian producers' prices for contract sales of alloy magnesium sold to U.S. diecasters declined *** percent, from *** per pound in January-March 1990 to ***.¹¹⁸ U.S. producers' prices for the same product declined *** percent, from *** per pound during the first quarter of 1989 to ***.¹¹⁹ Pricing data obtained from purchasers showed similar trends, with the price of alloy magnesium from Canada declining *** percent, from *** per pound in July-September 1989 to ***, and the price of the U.S.-produced product declining *** percent, from *** in the first quarter of 1989 to *** in the last quarter of 1991.¹²⁰ Moreover, the unit value of alloy magnesium from Canada dropped from *** per pound in 1990 to *** per pound in 1991.¹²¹

There is a high degree of substitutability between U.S. and Canadian alloy magnesium. Most purchasers of alloy magnesium found few, if any, differences between the U.S. and Canadian products.¹²² Moreover, the U.S. and Canadian products sell at similar prices.¹²³ Price changes by one firm are often followed by equivalent changes by other producers, in some instances due to contractual meet-or-release clauses.¹²⁴ Accordingly, the effect of subject import prices on U.S. prices is significant.

¹¹⁷ Confidential Report at I-124 and 140 (Tables 45 and 48). As with pure magnesium, in light of the frequency of price changes, the high degree of substitutability, and the tendency of all producers to match price reductions, including through the use of "meet or release" clauses, the price comparisons of the largest sale in each quarter obtained in these investigations are not particularly useful for evaluating whether there was underselling. Therefore, we do not find these quarterly price comparisons particularly useful to determine whether any underselling was significant. See Economic Memorandum at 8. As we have already noted, a finding of underselling is not a necessary prerequisite to an affirmative determination. In this investigation, we have found that the large volume of highly substitutable imports of alloy magnesium in this price sensitive market, as well as the widespread use of "meet or release" clauses, otherwise depressed prices. See 19 U.S.C. § 1677(7)(C)(ii)(I) & (II).

¹¹⁸ Confidential Report at I-122-123 (Table 45). The pricing data for alloy magnesium reflects the prices for AZ91D, which reportedly accounts for approximately 90 percent of the total diecasting alloy magnesium market. Confidential Report at I-10 and I-119; Public Report at I-8.

¹¹⁹ Confidential Report at I-122-123 (Table 45).

¹²⁰ Confidential Report at I-139-140 (Table 48).

¹²¹ Confidential Report at C-7 (Table C-2).

¹²² Economic Memorandum at 24-28. Respondents argued that the degree of substitutability between domestic and Canadian alloy magnesium is limited because magnesium alloys generally are not interchangeable with one another, and that there are notable differences in the U.S. and Canadian product mix. However, since one type of alloy--AZ91D--accounts for about 90 percent of the diecasting market, we find that product mix differences do not have a significant impact on substitutability. See Economic Memorandum at 29; Confidential Report at I-10; Public Report at I-8.

¹²³ Economic Memorandum at 30; Confidential Report at I-124 and 140 (Tables 45 and 48).

¹²⁴ Economic Memorandum at 26-27; Confidential Report at I-114; Public Report at I-73.

As with pure magnesium, we find that non-price factors had, at most, a minimal effect on purchasing decisions and do not account for the large increase in the volume and market share of the subject imports from Canada. While most purchasers of alloy magnesium ranked quality, rather than price, as the most important consideration in choosing a supplier, eight of ten responding purchasers found the quality of domestic and Canadian products to be identical, with the remaining two differing as to whether the U.S. or Canadian product was superior.¹²⁵ Most of these purchasers also found the domestic and Canadian supplier to be identical with regard to availability and reliability of supply.

Respondents also argued that the existence of Norsk Hydro Canada's scrap repurchase program for alloy magnesium makes the U.S. and Canadian products less substitutable and accounts for the increase in Canadian sales. However, these programs are not distinctive to Norsk Hydro Canada, given that both U.S. producers of alloy magnesium instituted similar programs.¹²⁶ Moreover, by offering a rebate in the form of scrap repurchase programs, these programs essentially provide additional services for the same price, effectively offering a discount, and adding to the overall price competition.

Due to the prohibitive costs of recharging the electrolytic cells, U.S. producers are willing to reduce prices to maintain production levels.¹²⁷ Demand for alloy magnesium is relatively inelastic, however,¹²⁸ and therefore price reductions do not increase total consumption. Viewed in this context, the substantial increases in Norsk Hydro Canada's share of the relatively stable market resulted in increased domestic inventories and placed significant pressure on the domestic producers to lower their prices. In addition, the U.S. plants producing primary magnesium are dedicated to primary magnesium production, with little flexibility to produce other products. Industry-wide price declines thus cause a direct reduction in revenues, as reflected by the financial data collected in these investigations.

Furthermore, in considering the impact of the subject imports on the U.S. operations of domestic producers, the nature of the subsidies here is especially significant. These subsidies include exemption from payment of water bills and preferential electric rates, the very types of subsidies that are likely to reduce Norsk Hydro Canada's costs of production. As noted in our discussion of the relevant conditions of competition, this industry is characterized by high energy costs, and any reduction in these costs is likely to lead to a competitive advantage. Given the exceptionally high cost of energy in the magnesium production process,¹²⁹ the subsidies received by Norsk Hydro Canada clearly enhance its competitive position in relation to the U.S. industry.

¹²⁵ Economic Memorandum at 26.

¹²⁶ Economic Memorandum at 26.

¹²⁷ Tr. 37-38.

¹²⁸ See Economic Memorandum at 31-34.

¹²⁹ See Confidential Report at I-70 (Table 21) and I-82 (Table 29).

Given the high degree of substitutability between subject imports and the like product, the rapid and dramatic increase in unfairly traded imports, and the concurrent declines in domestic market share, prices, and financial condition, we determine that the domestic industry producing alloy magnesium is materially injured by reason of the subject imports.¹³⁰

V. Industry Support

The Panel reserved judgment on respondents' objections to the Commission not giving weight in its injury determination to alleged lack of industry support for the petition. Although we believe, as argued by counsel during the Panel proceedings, that respondents' argument was not raised in a timely fashion, we take this opportunity to address this issue.

Whether or not a company supports an antidumping or countervailing duty petition is not, in itself, a statutory factor the Commission is required to consider.¹³¹ Neither is lack of express support necessarily indicative of what impact imports may have on the domestic industry. It may, for example, reflect that industry members are reluctant to express support for relief because of possible negative reactions by customers that benefit from dumped or subsidized imports. Or some companies may be multinational corporations with common projects or economic ties with respondents or interests in other industries, or whose corporate parents are opposed to trade relief laws generally because of their effects on other inter-dependent subsidiaries. Or, in some cases, other companies in the domestic industry may

¹³⁰ Commissioners Brunsdale and Crawford find that, because subject imports and the like product are close substitutes, the price of unfairly traded imports plays a crucial role in purchasing decisions. The 21.61 percent subsidy margin makes it unlikely that the subject imports would have been purchased in the U.S. market if they had been sold at the price Commerce calculated would be fair. If subject imports had been sold at fairly traded prices, the domestic industry would have used its excess capacity to increase significantly its output and sales, and therefore its revenues. Therefore, Commissioners Brunsdale and Crawford determine that the domestic industry would have been materially better off if the subject imports had been fairly traded. As they have noted with respect to pure magnesium imports, the rate of subsidy applicable during the period of investigation was not changed by Commerce, and the 21.61 rate is therefore the appropriate rate for the purposes of this remand. See *supra*, note 105.

¹³¹ The Commission is required to consider the significance of the volume of imports, their effect on domestic prices and their impact on the domestic industry. See 19 U.S.C. § 1677(7)(C). In assessing the latter, the Commission is directed to consider several economic factors in making its determination. See 19 U.S.C. § 1677(C)(iii). The Commission also is directed to consider several other economic factors in determining whether there is a threat of material injury by reason of imports. See 19 U.S.C. § 1677(F)(I-X). Industry support or lack thereof does not appear among any of these specified factors.

decline to support a petition because they do not share the petitioner's view of the state of the marketplace.¹³²

In light of such possibilities, the Commission does not believe it is *required* to consider the level of support for the petition within the domestic industry in its material injury analyses. While some Commissioners may find lack of express support or stated opposition relevant in certain specific cases depending on the nature of the information received, in the final analysis Commissioners rely foremost on the actual record data concerning material injury by reason of subject imports rather than the position of each individual producer regarding the petition.¹³³ Certain Commissioners have concluded that requiring them to give weight to the lack of express support takes them too far afield from the analysis of economic factors required by the statute.¹³⁴

In the absence of an explicit statutory requirement, whether lack of express industry support is probative is for each Commissioner to decide. There is extensive case law holding that Commissioners are neither required to consider nonenumerated factors nor limited by the enumerated factors.¹³⁵ The decision of the Court of International Trade (CIT) in *Minebea Co., Ltd. v. United States*,¹³⁶ specifically affirms Commission practice in this regard. In affirming an affirmative material injury determination in that case, the CIT held that industry support or lack thereof "is not

¹³² In such a case, the lack of support itself is not relevant to the material injury analysis, although the facts and evidence presented by the particular company regarding the state of the marketplace might be relevant.

¹³³ We are aware of no case out of the over 1,000 Title VII decisions issued by the Commission since 1980 in which the Commission majority considered the lack of express support for the petition in its injury analysis. Even in the unusual situation in which a Commission majority considered the *expressed opposition* of a major industry member, such opposition did not lead the Commission to find no material injury. *Heavy Forged Handtools from the People's Republic of China*, Inv. No. 731-TA-457 (Final), USITC Pub. 2357 at 25 (Feb. 1991), *aff'd after remand sur nom. Tianjin Machinery Import & Export Corp. v. United States*, 820 F. Supp. 1456 (Ct. Int'l Trade 1993).

In some circumstances in which there has been overwhelming opposition to the petition and a severe lack of industry participation, resulting in insufficient data to assess injury, the Commission may consider whether to take an adverse inference against the domestic industry. See, *Certain Fresh Atlantic Groundfish from Canada*, Inv. No. 701-TA-257, USITC Pub. 1844 at 18 (May 1986). Unlike *Groundfish*, however, *** and all fully cooperated in the investigation, providing lost sales and lost revenues information resulting from price competition with subject imports from Canada. See Public Report at I-89.

¹³⁴ See *Certain Electrical Conductor Aluminum Redraw Rod from Venezuela*, Inv. Nos. 701-TA-287 and 731-TA-378 (Final) (Remand) at 4-5 (May 1993).

¹³⁵ See, e.g., *Encon Industries, Inc. v. United States*, Slip Op. 92-164 (Ct. Int'l Trade 1992); *Alberta Pork Producers' Mktg. Bd. v. United States*, 669 F. Supp. 445, 465-66 (Ct. Int'l Trade 1987); *Hyundai Pipe Co. v. U.S. International Trade Commission*, 670 F. Supp. 357, 360 (Ct. Int'l Trade 1987).

¹³⁶ 794 F. Supp. 1161 (Ct. Int'l Trade 1992).

something which the ITC is required to consider."¹³⁷ Although another judge of the CIT has purported to distinguish *Minebea*, requiring the Commission to give weight to lack of express industry support in a threat determination,¹³⁸ the Commission has appealed that decision.¹³⁹ We believe these decisions directly conflict with one another and that the *Minebea* decision is the correct one, but note as well that *Suramerica* does not by its own terms apply here, since that decision was explicitly limited to threat, not, as here, material injury determinations.^{140 141}

CONCLUSION

Based on our analysis of the record and statutory factors, we determine that the domestic industry producing pure magnesium is materially injured by reason of the LTFV and subsidized imports of pure magnesium from Canada. We also determine that the domestic industry producing alloy magnesium is materially injured by reason of the subsidized imports of alloy magnesium from Canada.

¹³⁷ 794 F. Supp. at 1165.

¹³⁸ *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 818 F. Supp. 348 (1993), appeal docketed, No. 94-1021 (Oct. 15, 1993).

¹³⁹ That appeal is currently pending.

¹⁴⁰ See *Suramerica*, 818 F. Supp. at 364.

¹⁴¹ While all Commissioners joining these Views believe it is unnecessary for the Commission to consider, and for the Panel to review, the positions of the various industry members, Vice Chairman Watson and Commissioner Nuzum further note that, even if the Commission were to find that ***, there still exists on the record compelling evidence of material injury. As the Court noted in *Suramerica*, "[t]here may be circumstances warranting a finding of injury, even where the majority either does not support or actively opposes the initiating petition, if the independent data clearly support a finding of threat of injury". 818 F. Supp. at 364. As set forth above in Parts III and IV, Vice Chairman Watson and Commissioner Nuzum find that, regardless of the position of *** regarding the petition, there is substantial and overwhelming evidence of material injury to the domestic industries producing both pure and alloy magnesium by reason of the subject imports from Canada. See Additional Views of Vice Chairman Watson and Commissioner Nuzum.

ADDITIONAL VIEWS OF VICE CHAIRMAN WATSON AND COMMISSIONER NUZUM

For the reasons expressed in the majority's views on remand, we believe that it is unnecessary for the Panel to reach the issue of whether the ITC must consider the position of the domestic industry in making its material injury determination. First, the issue was not raised by complainants in a timely manner. Second, the decision in *Suramerica* concerned an affirmative determination of threat of material injury and not present material injury. Third, even limited to a threat context, we believe that the *Suramerica* decision misinterprets the statute. Accordingly, we are appealing that decision to the Court of Appeals for the Federal Circuit and choose to follow *Minebea* in the interim.

Nonetheless, in the event that the Panel determines that the Commission must follow *Suramerica* and must consider the issue of domestic industry support for the petition, we set forth herein the basis for our finding that the record evidence does not indicate a lack of support for the petition by domestic producers. In doing so, we note that the Court of International Trade's opinion in *Suramerica* merely states that the ITC may not infer that industry members support a petition privately where those companies have declined to indicate their support for a petition on the ITC questionnaire.¹ It is unnecessary and inappropriate to make further inferences based on this or other language in *Suramerica*. We decline, therefore, to find that those producers who ***, did not support the petition.

In this case, the *** on the part of *** is equivocal and not probative. *** the petition nor the imposition of antidumping and countervailing duties. *** suggested that there was no material injury to the domestic industry by reason of unfairly traded imports from Canada. Rather, ***. The rest of the *** contained economic data that, when aggregated with the data from MagCorp, forms the basis of our determination that the domestic pure magnesium and alloy magnesium industries, respectively, are materially injured by reason of subject imports from Canada. In sum, the *** of *** indicate that *** the subject imports have negatively impacted on their financial condition.²

Specifically, *** indicated that ***.³ In response to Commission requests for specific instances of price competition with imports from Canada, *** provided ***. In each instance *** identified ***.⁴ Not surprisingly, *** attributed its *** to ***.⁵

¹ *Suramerica de Aleaciones Laminadas, C.C. v. United States*, 818 F. Supp. 348, 366 (CIT 1993).

² We note that, in response to the Commission's request that U.S. producers describe any actual or anticipated negative effects of imports of primary magnesium from Canada and Norway on existing development and production efforts, growth, investment, and ability to raise capital, ***. Confidential Report at D-3. That response does not, however, negate the fact that, as discussed herein, ***. In any event, we have considered *** *entire* questionnaire response, as well as all of the other evidence of record, in making our determination.

³ *** at 57.

⁴ *Id.* at 58-59.

Further, with regard to the U.S. market, we note that the principal increase in worldwide supplies during the period of investigation was the addition of Norsk Hydro's new plant in Canada.⁶ We also note that other evidence in the record indicates that ***.⁷

***, in response to a similar Commission request for information regarding price competition with imports from Canada, indicated that ***.⁸ Furthermore, *** reported ***.⁹ Thus, in the ***, *** indicated that imports were one of several factors that led to ***.¹⁰

Even if we were to find that ***, there still exists on the record compelling evidence of material injury. As the Court noted in *Suramerica*, "(t)here may be circumstances warranting a finding of injury, even where the majority either does not support or actively opposes the initiating petition, if the independent data clearly support a finding of threat of injury".¹¹ As set forth in the majority's views on remand, we find that there is substantial and overwhelming evidence of material injury to the domestic industries producing both pure and alloy magnesium by reason of the subject Canadian imports such that affirmative determinations are warranted.

⁵ (...continued)

⁵ Confidential Report at I-61.

⁶ See Report at I-91, Table 35.

⁷ Telephone communication between an ITC investigator and Counsel for ***, July 30, 1982, Panel Record No. 32H, ***.

⁸ *** at 57.

⁹ *Id.* at 58.

¹⁰ *Id.* at 44.

¹¹ *Suramerica* at 364.

VIEWS OF COMMISSIONER DAVID B. ROHR

In these remand investigations, I determine that industries in the United States are materially injured by reason of imports from Canada of pure magnesium and alloy magnesium that have been found by the Department of Commerce to be subsidized and sold at less than fair value. I further find that critical circumstances, under section 735(b)(4)(A), do not exist with regard to the subject imports. In support of these determinations, I readopt the views that I expressed in the original investigations.¹

In readopting these views, I note that, in my original views, I incorrectly stated on page 31 that apparent domestic consumption of alloy magnesium had declined slightly from 1989 to 1991. Actually, as the Commission's Report shows, 1991 consumption of alloy magnesium, while declining from the level of 1990, remained above the 1989 consumption level.² This change actually provides additional support for an affirmative determination in light of the decrease in the quantity of U.S. alloy producers' shipments and the increase in shipments of alloy magnesium from Canada.³ I have therefore made affirmative determinations.

¹ See Magnesium from Canada, Investigations Nos. 701-TA-309 (Final) and 731-TA-528 (Final), USITC Pub. 2550 (August 1992), Views of Commissioner Rohr at 25-37.

² See Confidential Report at I-30-31, Table 5.

³ Confidential Report at I-30-31, Table 5.

