

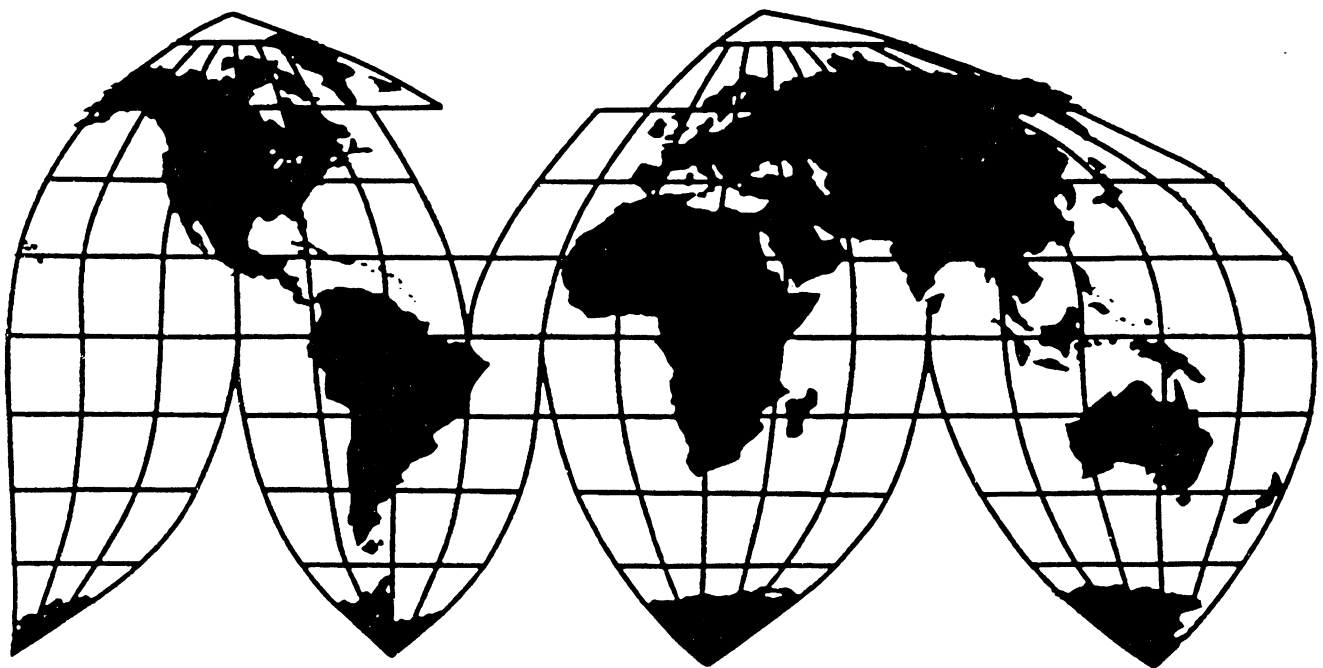
# **Magnesium From Ukraine (Views on Remand)**

Investigation No. 731-TA-698 (Remand)

**Publication 3113**

**June 1998**

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

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**Washington, DC 20436**

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## **Magnesium From Ukraine (Views on Remand)**



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In May 1995, the U.S. International Trade Commission made a determination in investigations Nos. 731-TA-696-698 (Final) that an industry in the United States was materially injured by reason of imports from China, Russia, and Ukraine of pure magnesium. The Commission further determined that an industry in the United States was not materially injured or threatened with material injury by reason of imports from China and Russia of alloy magnesium. USITC Pub. No. 2885 (May 1995). The determination with respect to Ukraine was appealed to the U.S. Court of International Trade (CIT). The CIT affirmed the Commission's decision, which was then appealed to the U.S. Court of Appeals for the Federal Circuit. On December 23, 1997, the Federal Circuit vacated and remanded the Commission's determination. In April 1998, the CIT ordered the Commission to reconsider its original determination in a way consistent with the legal standard articulated by the Federal Circuit and that takes into account the existence and substitutability of fairly traded Russian imports of pure magnesium and the increase in the market share of such imports during the period of investigation. Gerald Metals, Inc. v. United States Int'l Trade Comm'n, Slip Op. 98-56 (Apr. 28, 1998). By a vote of 2-1, the Commission determines in response to the order of April 28, 1998, that an industry in the United States was not materially injured or threatened with material injury by reason of imports of pure magnesium from Ukraine.<sup>1</sup>

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<sup>1</sup> Vice Chairman Miller and Commissioner Crawford reach negative determinations on remand and Chairman Bragg reaches an affirmative injury determination in this remand investigation.



## CONTENTS

	<i>Page</i>
Views of Vice Chairman Marcia E. Miller .....	1
Views of Commissioner Carol T. Crawford .....	11
Dissenting Views of Chairman Lynn M. Bragg .....	15

### **Appendixes**

1. Staff memorandum
2. *Federal Register* notice





## VIEWS OF VICE CHAIRMAN MARCIA E. MILLER

Pursuant to the order of the U.S. Court of International Trade (CIT) in Gerald Metals, Inc. v. United States Int'l Trade Comm'n, Ct. No. 95-06-00782,<sup>1</sup> and based on the evidence in the record, I determine in this remand investigation that the industry in the United States producing pure magnesium is not materially injured, or threatened with material injury, by reason of imports of pure magnesium from Ukraine that the Department of Commerce (Commerce) has determined are sold at less than fair value (LTFV).

### I. Procedural Background

The Commission originally issued an affirmative determination in this investigation in May 1995.<sup>2 3</sup> Respondent Gerald Metals, Inc. subsequently appealed the Commission's determination to the CIT. The CIT affirmed the Commission's decision. Respondent then appealed that ruling to the Court of Appeals for the Federal Circuit (CAFC). On Dec. 23, 1997, the CAFC vacated and remanded the CIT's determination<sup>4</sup> and on April 28, 1998, the CIT remanded the investigation to the Commission. The CIT ordered the Commission to reconsider its determination in a way that is consistent with the legal standard articulated by the CAFC and that takes into account the existence and substitutability of fairly traded imports of pure magnesium from Russia and the increase in the market share of such imports during the period of investigation.<sup>5</sup>

The Commission reopened the record on remand to seek clarification of data in importer questionnaires in the final investigation, and to permit parties to file briefs.<sup>6</sup>

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<sup>1</sup> Slip Op. 98-56 (CIT Apr. 28, 1998).

<sup>2</sup> Documents contained in List 1 of the Administrative Record forwarded to the CIT are identified as "Pub. Doc. No. x," and documents contained in List 2 of the Administrative Record are identified as "Conf. Doc. No. x."

<sup>3</sup> Magnesium from China, Russia, and Ukraine, Invs. Nos. 731-TA-696-698 (Final), USITC Pub. 2885 (May 1995) (Pub. Doc. No. 106, herein referred to as "Magnesium Final"). The Commission made an affirmative determination by a 3-3 vote. Commissioners Rohr, Newquist, and Bragg determined that the domestic industry was materially injured by reason of the subject imports, and Chairman Watson, Vice Chairman Nuzum, and Commissioner Crawford made negative determinations. I was not a member of the Commission at the time of the original determination and in order to comply with the Court's remand order, I have considered the record *de novo*.

<sup>4</sup> Gerald Metals, Inc. v. United States, 132 F. 3d 716 (Fed. Cir. 1997).

<sup>5</sup> The CIT also noted that the CAFC required reconsideration of the effect of the increase in the supply of pure magnesium on the global market as the cause for the closure of the plant of one of the domestic producers -- Dow Chemical Company -- and the penal or remedial nature of the duties imposed. Order, Gerald Metals, Inc. v. United States Int'l Trade Comm'n, No. 98-56, Slip Op. at 2 (CIT Apr. 28, 1998). The Dow Chemical plant closure is discussed below. I note that it is well-established that antidumping duties are intended to be remedial, not punitive, in nature. See Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990), *citing* S. Rep. No. 1221, 92d Cong., 2d Sess. 8 (1972). In light of the Commission's negative determination, I consider this issue to be moot.

<sup>6</sup> See 63 Fed. Reg. 30513 (June 4, 1998) (Appendix 2). This investigation was commenced prior to the effective date of the Uruguay Round Agreements Act (URAA) amendments to the Tariff Act of 1930 (the Act) and, thus, this remand investigation remains subject to the substantive and procedural rules of the pre-existing law. See P.L. 103-465, approved December 8, 1994, 108 Stat. 4809, at § 291.

## **II. Like Product and Domestic Industry**

The Commission's original findings concerning the like product and domestic industry were not affected by the Court's remand order. Upon *de novo* review of the record, I concur with the like product and domestic industry determinations of the Commission as set forth in its original determinations.<sup>7</sup>

## **III. Conditions of Competition and Condition of the Domestic Industry**

In its original determination, the Commission discussed at length the condition of the domestic industry, including the conditions of competition in the industry.<sup>8</sup> These views were not affected by the Court's remand order, and upon *de novo* review of the record, I adopt the original views for purposes of this remand investigation. I discuss below additional conditions of competition that I find relevant to my determination in this investigation.

Although apparent consumption of pure magnesium remained relatively stable throughout the period of investigation, domestic producers and purchasers of magnesium reported instances in which the producers were unable to supply quantities of magnesium demanded that exceeded contractual obligations.<sup>9</sup>

Further, I note that the supply of magnesium on the world market increased significantly during the period of investigation. This significant increase largely resulted from the liquidation of stockpiles of magnesium that had been maintained by the Soviet Union.<sup>10</sup>

## **IV. Cumulation**

In the original determination, the Commission cumulated subject imports from China, Russia, and Ukraine.<sup>11</sup> These views were not affected by the Court's remand order. Upon *de novo* review of the record, I adopt the Commission's discussion of cumulation for purposes of my analysis of present material injury and threat of material injury.

## **V. Material Injury by Reason of LTFV Imports**

In a final injury investigation under section 731 of the Act, the Commission determines whether an industry in the United States is materially injured "by reason of" the imports under investigation.<sup>12</sup> The statute defines "material injury" as "harm which is not inconsequential, immaterial or unimportant."<sup>13</sup> In making this determination, the Commission must consider the volume of subject imports, their effect on prices for the like product, and their impact on domestic producers of the like

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<sup>7</sup> Magnesium Final, at 7 and 10.

<sup>8</sup> Magnesium Final, at 10-13.

<sup>9</sup> Conf. Doc. No. 37, at I-18, I-19, I-55.

<sup>10</sup> Magnesium Final, at 19-20.

<sup>11</sup> Magnesium Final, at 14-18.

<sup>12</sup> 19 U.S.C. § 1673d(b).

<sup>13</sup> 19 U.S.C. § 1677(7)(A).

product.<sup>14</sup> The Commission “may consider such other economic factors as are relevant to the determination.”<sup>15</sup>

In Gerald Metals, the Federal Circuit held that the Commission had applied “an incorrect legal test for the amount of contribution to material harm by LTFV goods necessary to satisfy the ‘by reason of’ standard.”<sup>16</sup> The Federal Circuit emphasized that “evidence of de minimis (e.g., minimal or tangential) causation of injury does not reach the causation level required under the statute.”<sup>17</sup> I have not applied a “minimal or tangential” contribution test in my prior determinations of material injury. I agree that the “by reason of” test requires evidence that subject imports contribute more than “minimally or tangentially” to any material harm being suffered by the industry. Thus, I do not believe that Gerald Metals requires me to change my analysis of the level of causation necessary to find material injury by reason of subject imports.

The Federal Circuit also emphasized that “[g]iven the unique circumstances of this case,” the Commission’s analysis must take into account the presence of fairly traded imports from Russia and the substitutability of those imports for LTFV imports.<sup>18</sup> I agree that the presence of a large and increased quantity of fairly traded imports, and the ease with which they may be substituted for LTFV imports, is a uniquely important and relevant fact in this case and, pursuant to the Court’s remand order, I have taken this fact into account in my analysis. I anticipate, however, that in other investigations where this issue arises, it may be difficult to differentiate the impact of fairly traded imports from unfairly traded imports, particularly when, as in this case, the Commission learns of this distinction late in its investigation.

For the reasons discussed below and based on the evidence in the record including information obtained during the remand investigation, I find that the domestic industry producing pure magnesium is not materially injured by reason of LTFV imports from Ukraine, Russia, and China.

#### **A. Volume of Imports**

The statute provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”<sup>19</sup>

Apparent consumption of pure magnesium was relatively stable over the period of investigation.<sup>20</sup> The volume of cumulated LTFV imports increased sharply from 1992 to 1993, with a corresponding increase in market share, from \*\*\*.<sup>21</sup> The record indicates that much of this increase resulted from the sell off of magnesium stockpiles held in Russia and Ukraine following the dissolution of the Soviet Union. In 1994, the volume of subject imports fell significantly, decreasing by over one-

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<sup>14</sup> 19 U.S.C. § 1677(7)(B)(i).

<sup>15</sup> 19 U.S.C. § 1677(7)(B)(i).

<sup>16</sup> Gerald Metals 132 F. 3d at 722.

<sup>17</sup> Id.

<sup>18</sup> Id. at 722-23.

<sup>19</sup> 19 U.S.C. § 1677(7)(C)(i).

<sup>20</sup> Conf. Doc. No. 37, at Table 24.

<sup>21</sup> Conf. Doc. No. 37, at Table 24.

half in absolute terms, and by more than seven percentage points by share, to \*\*\*.<sup>22 23</sup> The value of LTFV imports followed a similar trend, increasing overall over the period of investigation, but decreasing sharply towards the end of the period.<sup>24</sup> During this same period, the share of apparent consumption held by the domestic industry followed contrasting trends, decreasing sharply from 1992 to 1993, and then regaining considerable market share in 1994.<sup>25</sup>

In light of the decrease in subject imports in the most recent period, I conclude that the volume of subject imports, either absolutely or relative to production or consumption, is not, at present, significant. In my view, the large increase in subject imports in 1993 reflects the liquidation of the Soviet stockpiles in that year, which appears to have been an unusual, short-term event. The influx of imports also appears to reflect the inability of the domestic industry to fully meet domestic demand. As noted above, in 1994, the volume of subject imports decreased substantially. Although the pending antidumping investigation may have contributed to this decline, I find other reasons for this decline to be more compelling. First and foremost, the sell off of the Soviet stockpile appears to have been largely completed by 1994.<sup>26</sup> In addition, it appears that selling terms in other markets, such as in Europe, improved considerably in 1994, so that exports from Russia and Ukraine were shifted to those markets.<sup>27</sup> In the case of Ukraine, it appears that power shortages and the decision of the Ukrainian Government to allocate more magnesium production to domestic consumption contributed to the decline in imports from that country.<sup>28</sup>

As required by the Federal Circuit's opinion and the Court's order, I have also taken into account the presence of a large and growing volume of fairly traded imports from Russia. This case involves a unique situation in that, as noted by the Federal Circuit, all Russian magnesium is produced by two producers, and whether the imports are LTFV or fairly traded depends solely on the identity of the trading company rather than the Russian producer.<sup>29</sup>

The record overall indicates that these fairly traded imports from Russia are readily substituted for LTFV imports from Russia or Ukraine.<sup>30</sup> This is reconfirmed by the import volumes evidenced in the record. At the beginning of the period of investigation, the volume of imports from LTFV Russian sources was \*\*\*, whereas the volume from fairly traded Russian sources was only \*\*\*. By the end of the period of investigation, the volume of imports from LTFV Russian sources was \*\*\*, or \*\*\* of U.S. consumption, whereas the volume from fairly traded Russian sources was \*\*\*, or \*\*\* of U.S. consumption. Cumulated LTFV imports were \*\*\* in 1994, or \*\*\* of U.S. consumption.<sup>31</sup> These facts

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<sup>22</sup> Conf. Doc. No. 37, at Table 24.

<sup>23</sup> LTFV imports increased from \*\*\*, then decreased to \*\*\*. Conf. Doc. No. 37, at Table 1.

<sup>24</sup> The value of LTFV imports rose from \*\*\* in 1992 to \*\*\* in 1993, then decreased to \*\*\* in 1994. Conf. Doc. No. 37, at Table 1.

<sup>25</sup> Domestic producers shipped \*\*\* of pure magnesium in 1992, \*\*\* in 1993 and \*\*\* in 1995. Conf. Doc. No. 37, at Table 3. Domestic market share decreased from \*\*\* percent between 1992 and 1993, then increased to \*\*\* percent between 1993 and 1994. Conf. Doc. No. 37, at Table 24.

<sup>26</sup> Conf. Doc. No. 37, at I-8.

<sup>27</sup> Conf. Doc. No. 18, at 13, 17 (n.13), and 26.

<sup>28</sup> Conf. Doc. No. 37, at I-43 and Pub. Doc. No. 73, at 186-87.

<sup>29</sup> Gerald Metals, 132 F. 3d at 721.

<sup>30</sup> Gerald Metals, 132 F. 3d, at 720.

<sup>31</sup> Conf. Doc. No. 37, Table 24.

suggest that the significance of LTFV imports diminished during the period of investigation and further supports the conclusion that the volume of LTFV imports is not significant.

**B. Effects of LTFV Imports on Domestic Prices**

The statute provides that in evaluating the price effects of the subject imports, the Commission must consider whether (i) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products, and (ii) the effect of imports of such merchandise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.<sup>32</sup>

Domestic prices increased strongly during 1992, following the Commission's affirmative determination against imports of pure magnesium from Canada and their subsequent exit from the U.S. market. Domestic prices rose to their highest levels in 1993, and remained high in 1994.<sup>33</sup> LTFV imports undersold domestic pure magnesium in 17 of 21 possible comparisons on sales to aluminum producers, by margins ranging from 2.7 to 17.6 percent.<sup>34</sup> Fairly traded imports from Russia also generally undersold the domestic product by similar margins.<sup>35</sup>

While significant underselling could suggest price suppression by reason of the subject imports, I do not find this to be the case. The significance of this underselling is mitigated by product differentiation, quality differences and other non-price factors.

While the quality of subject imports of pure magnesium varied, the LTFV imports and domestic product are only moderately interchangeable. Parties noted some differences in quality between the subject imports from China and the Ukraine compared to the domestic product, and reported fewer differences comparing imports from Russia to the domestic magnesium. Much of the variation occurred with the lower quality stockpiled pure magnesium, which was in an oxidized state, and frequently covered with potassium bichromate solutions, viewed by the Environmental Protection Agency as a waste material, or paraffin wax or wax paper, contributing to melt and handling problems.<sup>36</sup> Many purchasers indicated that the smaller size of the LTFV pure magnesium ingots was a disadvantage because of ensuing melt loss.<sup>37</sup> In addition, purchasers noted that there were supply and delivery problems on the part of importers, as well as a lack of flexibility to meet quick delivery times. As a result, several purchasers paid higher prices for the domestic product to ensure that they would be able to obtain magnesium.<sup>38</sup>

The significance of underselling is further mitigated by the fact that, while there were a number of confirmed lost sales and revenues allegations, most pertained to the magnesium liquidated from the former Soviet stockpiles, and largely depleted by 1994.<sup>39</sup>

Regarding alleged price depression, I note that domestic prices increased in 1993, when LTFV and fairly traded imports were at their highest levels, and remained high in 1994, when the volume of

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<sup>32</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>33</sup> Conf. Doc. No. 37, at Tables 25-26.

<sup>34</sup> Conf. Doc. No. 37, at Table 27.

<sup>35</sup> Conf. Doc. No. 37, at Table 25.

<sup>36</sup> Conf. Doc. No. 37, at I-54.

<sup>37</sup> Conf. Doc. No. 37, at I-54.

<sup>38</sup> Conf. Doc. No. 37, at I-55.

<sup>39</sup> See Conf. Doc. No. 37, at I-68 - I-75.

LTFV and fairly traded imports declined.<sup>40</sup> I conclude from these facts that LTFV imports did not depress domestic prices.

Regarding price suppression, the statute instructs the Commission to evaluate whether the effect of subject imports is to prevent price increases, which otherwise would have occurred to a significant degree.<sup>41</sup> I conclude that competitive conditions in the domestic market restrained the ability of the domestic industry to raise prices and, therefore, LTFV imports did not suppress prices to a significant degree. Most significantly, I find that the presence of a large and increased volume of fairly traded imports restrained the domestic industry's ability to raise prices.

As discussed above, the amount of fairly traded imports from Russia was sizeable.<sup>42</sup> The large volumes of these fairly traded imports from Russia, especially during the latter part of the period examined, showed generally similar price trends to, and were sold at or near prices for, LTFV imports.<sup>43</sup> The evidence in the record indicates that these fairly traded imports are nearly perfect substitutes for LTFV imports from Russia, inasmuch as the same goods may be obtained from a trading company assigned a dumping margin as from one not assigned a margin. There are only two producers of magnesium in Russia, and pure magnesium produced by both producers is imported into the United States as LTFV and fairly traded product.<sup>44</sup> In this case, we have the unique circumstance that the only difference between fair and unfair imports from Russia is the identity of the individual trading companies exporting the pure magnesium to the United States. Fairly traded imports from Russia are also readily substitutable for LTFV imports from Ukraine.<sup>45</sup>

Information gathered from importers during this remand proceeding confirmed that there are no constraints, with respect to supply contracts or agreements, on their ability to switch among trading companies dealing in pure magnesium from Russia or Ukraine.<sup>46</sup> Similarly, the one responding Russian producer of pure magnesium during the period examined \*\*\*.<sup>47</sup>

Despite petitioner's assertions that no importer switched from LTFV to fairly traded Russian imports during the period of investigation, at least some firms did shift their purchase source. In addition, several firms reported that they did not switch because they already imported fairly traded pure magnesium from Russia.<sup>48</sup>

In these unique circumstances, I find that fairly traded imports are playing a significant role in the domestic market and the presence of this large and increased volume constrained the domestic industry's ability to increase prices during the period of investigation.

I also note that changes in the industry's cost of goods sold (COGS) suggest that further price increases in 1993 and 1994 were unlikely. While unit COGS increased between 1992 and 1993, they

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<sup>40</sup> Compare Conf. Doc. No. 37, Tables 25-26 with Table 1.

<sup>41</sup> 19 U.S.C. § 1677(7)(C) (ii).

<sup>42</sup> Conf. Doc. No. 37, at Table 23.

<sup>43</sup> Conf. Doc. No. 37, at Tables 25-26.

<sup>44</sup> Conf. Doc. No. 37, at I-39, I-45, and I-61.

<sup>45</sup> Conf. Doc. No. 38, at 28-29.

<sup>46</sup> INV-V-047 (June 15, 1998), see Appendix 1.

<sup>47</sup> Id.

<sup>48</sup> Id.

decreased between 1993 and 1994.<sup>49</sup> In contrast, the ratio of COGS to net sales declined between 1992 and 1993, then rose in 1994, when imports declined, to a level below that in 1992.<sup>50</sup> Thus, there is not clear evidence of a cost-price squeeze. This fact further supports the conclusion that price suppression cannot be attributed to LTFV imports to any significant degree.

In view of the foregoing, I do not find that the underselling of the domestic product by the LTFV imports of pure magnesium was significant, or that LTFV imports depressed or suppressed prices for the domestic product to a significant degree.

### C. Impact

The statute provides that in assessing the impact of subject imports on the domestic industry, the Commission shall consider all relevant economic factors that bear on the state of the industry in the United States.<sup>51</sup> 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.<sup>52</sup> No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>53</sup>

During the period of investigation, the domestic industry experienced declines in production,<sup>54</sup> shipments,<sup>55</sup> employment<sup>56</sup> and net sales<sup>57</sup> as the volume of LTFV imports increased.<sup>58</sup> However, the industry also exhibited improved financial performance overall.<sup>59</sup> I note that the domestic industry’s financial performance improved when LTFV imports increased and prices fell, then worsened as LTFV imports declined and prices increased.<sup>60</sup> Moreover, of the three domestic producers, two showed healthy

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<sup>49</sup> Unit cost of goods sold increased from \*\*\* between 1992 and 1993, then decreased to \*\*\* between 1993 and 1994. Conf. Doc. No. 37, at Table 10.

<sup>50</sup> The ratio of COGS to net sales fell from \*\*\* percent between 1992 and 1993, then rose somewhat to \*\*\* percent in 1994. Conf. Doc. No. 37, at Table 9.

<sup>51</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Domestic production of pure magnesium decreased from \*\*\* in 1992 to \*\*\* in 1994. Conf. Doc. No. 37, at Table 2.

<sup>55</sup> U.S. shipments (commercial shipments and company transfers) of pure magnesium decreased from \*\*\* in 1992 to \*\*\* in 1993, then increased to \*\*\* in 1994. Conf. Doc. No. 37, at Table 1.

<sup>56</sup> The number of U.S. production and related workers manufacturing pure magnesium decreased from \*\*\* in 1992 to \*\*\* in 1994. Conf. Doc. No. 37, at Table 5.

<sup>57</sup> In terms of quantity, the domestic industry’s total net sales of pure magnesium fell from \*\*\* in 1992 to \*\*\* in 1993, then increased to \*\*\* in 1994. In addition, the value of these net sales decreased from \*\*\* in 1992 to \*\*\* in 1993, then increased to \*\*\* in 1994. Conf. Doc. No. 37, at Table 9.

<sup>58</sup> The volume of LTFV imports of pure magnesium increased from \*\*\* in 1992 to \*\*\* in 1993, then decreased to \*\*\* in 1994. Conf. Doc. No. 37, at Table 1.

<sup>59</sup> Gross profit \*\*\* over the period, rising from \*\*\* in 1992 to \*\*\* in 1993, then declining to \*\*\* in 1994. While the domestic industry \*\*\* throughout the period, aggregate industry losses declined substantially by 1994. \*\*\* Conf. Doc. No. 37, at Table 9.

<sup>60</sup> Compare Conf. Doc. No. 37, Table 9, with Tables 1 and 25-26.

and significantly improved financial performance in 1993, when LTFV import volumes were at their highest levels and lowest prices, with the improved performance carrying into 1994. The third company, \*\*\*.<sup>61</sup>

In light of my findings regarding the volume and price effects of LTFV imports, I conclude that the domestic industry suffered no significant adverse impact by reason of LTFV imports. In reaching this conclusion, I have considered Dow Chemical's allegation that it decided to close one of its two plants because of competition from LTFV imports.<sup>62</sup> I find the evidence on this point is mixed. Dow's assertions at the Commission's hearing are undercut by the firm's press releases, which indicated that its decision to close the plant was tied to the company's long-term projections of the magnesium industry, not the short-term conditions confronting the company. Further, Dow stated that it was expanding the capacity of its other plant.<sup>63</sup>

Thus, it is not clear that the decision to close this facility was based on competition from subject imports. Moreover, to the extent the decision was related to import competition, the decision appears to have been based on competition from all imports, LTFV and fairly traded. Given the large volume of fairly traded imports from Russia, and the ease with which these fairly traded imports could be substituted for LTFV imports, I conclude that the decision to close the plant should not be attributed, to any significant degree, to the LTFV imports.

## **VI. No Threat of Material Injury by Reason of LTFV Imports**

The statute directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of subject imports on the basis of evidence that the threat of material injury is real and actual injury is imminent. The statute sets forth a number of factors that the Commission must consider in making its determination.<sup>64</sup> The presence or absence of any single factor is not dispositive.<sup>65</sup> The Commission is not to make such a determination "on the basis of mere conjecture or supposition."<sup>66</sup>

As noted above, for purposes of my threat determination, I cumulate imports of pure magnesium from China, Russia, and Ukraine.

For several reasons, I do not find that there will be any rapid increase in market penetration of LTFV imports in the United States, or that the volume of subject imports will increase to an injurious

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<sup>61</sup> \*\*\*. Conf. Doc. No. 37, at Table 11.

<sup>62</sup> Pub. Doc. No. 73, at 31-32.

<sup>63</sup> Conf. Doc. No. 37, at I-18.

<sup>64</sup> 19 U.S.C. § 1677(7)(F)(i)(I)-(X). In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class or kind of merchandise suggest a threat of material injury to the domestic industry. 19 U.S.C. § 1677(7)(F)(iii)(I). I note that during the period of investigation there was a pending European Union antidumping investigation of primary magnesium imports from Russia, Ukraine, and Kazakhstan, and a Brazilian antidumping investigation of primary magnesium imports from Russia, Ukraine, and the United States. However, these investigations were not concluded during the period of investigation and no dumping findings had been made or antidumping remedies ordered.

<sup>65</sup> See, e.g., Rhone Poulenc, S.A. v. United States, 8 CIT 47, 52 n. 18, 592 F. Supp. 1318, 1324 n.18 (1984).

<sup>66</sup> 19 U.S.C. § 1677(7)(F)(ii). "An affirmative threat determination must be based upon 'positive evidence tending to show an intention to increase the levels of importation'." Metallwerken Nederland B.V. v. United States, 14 CIT 481, 488, 744 F. Supp. 281, 287 (1990), citing American Spring Wire Corp. v. United States, 8 CIT 20, 28, 590 F. Supp. 1273, 1280 (1984), *aff'd*, 760 F.2d 249 (Fed. Cir. 1985).



level. The capacity of the cumulated foreign producers rose slightly over the period of investigation<sup>67</sup> and capacity utilization was high.<sup>68</sup> Although capacity utilization in Ukraine was well below that in China and Russia, Ukrainian production had decreased throughout the period examined, and was expected to decline further due to power supply shortages.<sup>69</sup>

Absolute levels of subject imports and market penetration in the United States by the subject imports increased over the period, but declined substantially in the latter part, reduced by more than half between 1993 and 1994.<sup>70</sup> This decrease in import levels and penetration appears to reflect the depletion of the Soviet stockpiles, and does not suggest any likelihood of a rapid increase in market penetration in the imminent future. The availability of fairly traded imports from Russia is likely to act as a further constraint on any potential increase in LTFV imports. The fairly traded imports are close, if not perfect, substitutes, differentiated from the LTFV imports from Russia by the identity of the trading company exporting the magnesium. And, as seen in 1994, while the market penetration of fairly traded imports remained stable, that of LTFV imports fell. As discussed above, the record demonstrates that purchasers can and have shifted imports from unfair to fair Russian sources during the investigation period.<sup>71</sup> I find that it is the fairly traded imports from Russia that are likely to increase, not the LTFV imports.

I note that LTFV import inventories were small at the onset of the period of investigation, and decreased significantly throughout the remainder of the period.<sup>72</sup>

I have also considered the fact that pure magnesium is produced on the same equipment using the same workers as alloy magnesium.<sup>73</sup> I do not find this factor to be evidence of a threat of material injury that is real or imminent, however, in light of the decrease in alloy production over the period of investigation.<sup>74</sup>

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<sup>67</sup> Chinese capacity was \*\*\* throughout the period of investigation, and was projected to remain at that level in 1995. Conf. Doc. No. 37, at Table 19. Russian capacity to produce pure magnesium was \*\*\* in 1992, then increased to \*\*\* in 1993 and increased further to \*\*\* in 1994, with a capacity of \*\*\* projected in 1995. Conf. Doc. No. 37, at Table 20. However, Ukrainian capacity was \*\*\* throughout the period and was projected to remain at that level in 1995. Conf. Doc. No. 37, at Table 22.

<sup>68</sup> Capacity utilization for China increased from \*\*\* percent in 1992 to \*\*\* percent in 1994, and was projected to remain stable at \*\*\* percent in 1995. Conf. Doc. No. 37, at Table 19. Capacity utilization for Russia rose from \*\*\* percent in 1992 to \*\*\* percent in 1994, and was projected to remain stable at \*\*\* percent in 1995. Conf. Doc. No. 37, at Table 20. While Ukrainian capacity utilization fell from \*\*\* percent in 1992 to \*\*\* percent in 1994, and was projected to fall further to \*\*\* percent in 1995, I do not view this single factor to justify an affirmative threat determination, especially in view of the decreased Ukrainian production over the period of investigation and the further projected decrease in 1995. Conf. Doc. No. 37, at Table 22.

<sup>69</sup> Conf. Doc. No. 37, at I-43.

<sup>70</sup> In terms of the quantity of U.S. consumption, LTFV import market share increased from \*\*\* percent in 1992 to \*\*\* percent in 1993, then declined to \*\*\* percent in 1994. Conf. Doc. No. 37, at Table 24.

<sup>71</sup> See Appendix 1.

<sup>72</sup> China's end-of-period inventories declined from \*\*\* in 1992 to \*\*\* in 1994, and were projected to decline further to \*\*\* in 1995. Conf. Doc. No. 37, at Table 19. Russia's end-of-period inventories decreased from \*\*\* in 1992 to \*\*\* in 1994, and were projected to decrease to \*\*\* in 1995. Conf. Doc. No. 37, at Table 20. Ukraine's end-of-period inventories fell from \*\*\* in 1992 to \*\*\* in 1994, and were projected to increase only slightly to \*\*\* in 1995. Conf. Doc. No. 37, at Table 22.

<sup>73</sup> Conf. Doc. No. 37, at I-12.

<sup>74</sup> Russian production of alloy magnesium decreased from \*\*\* in 1992 to \*\*\* in 1994, and was projected to rise to \*\*\* in 1995, a level still below 1992 production. Conf. Doc. No. 37, at Table 21.

I also find little likelihood of significant price suppressing or depressing effects from subject imports in the imminent future, especially in light of the lack of significant adverse price effects of the subject imports during the period of investigation. As noted above, prices were at their highest levels when subject import volumes were at their highest levels in 1993, and remained high in 1994.<sup>75</sup> Further, the continued presence of fairly traded imports, which were generally sold at prices at or near LTFV prices during the period examined, will continue to constrain the ability of the domestic industry to raise prices.

I also do not find any indication that LTFV imports have had actual negative effects on the existing development and production efforts of the domestic industry, or that they will have such potential effects in the immediate future.<sup>76</sup>

### **Conclusion**

For the foregoing reasons, I determine that the domestic industry producing pure magnesium is not materially injured, or threatened with material injury, by reason of LTFV imports of pure magnesium from Ukraine.

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<sup>75</sup> LTFV imports increased from \*\*\* in 1992 to \*\*\* in 1993, then decreased to \*\*\* in 1994. Conf. Doc. No. 37, at Table 1.

<sup>76</sup> As indicated in my discussion on the impact of subject imports, I am not persuaded that the closure of Dow's plant is attributable to any significant degree to the subject imports.

## VIEWS OF COMMISSIONER CAROL T. CRAWFORD

In accordance with the opinion of the Court of Appeals for the Federal Circuit (CAFC) in Gerald Metals, Inc. v. United States<sup>1</sup> the Court of International Trade (CIT) has ordered the U.S. International Trade Commission ("Commission") to reconsider its final determination in Magnesium from Ukraine.<sup>2</sup> The CIT's instructions order the Commission to "reconsider its material injury finding in a way that is consistent with the legal standard articulated by the CAFC and that takes into account the existence and substitutability of fairly-traded Russian imports of pure magnesium and the increase in the market share of said imports during the period of investigation . . ."<sup>3</sup> Pursuant to the order of the CIT and based on the evidence on the record, I determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports of magnesium from Ukraine that the Department of Commerce has determined are sold at less-than-fair-value ("LTFV"). My determination upon reconsideration is the same as my determination in the original investigation.<sup>4</sup>

In conducting this remand, the Commission voted to reopen the record to collect additional information concerning the substitutability of LTFV Russian imports, fairly traded Russian imports, and LTFV Ukrainian imports. I opposed reopening the record, as it was for the purpose of collecting information on an issue for which the CAFC found substantial evidence already exists. The CAFC's opinion provides no basis for reopening the record. The Court specifically stated that the facts about fairly-traded Russian imports were "undisputed".<sup>5</sup> Furthermore, the Court held that "only one reasonable conclusion can be drawn from the record: other than differences in the trading company, the Russian imports -- both fairly-traded and LTFV -- were perfect substitutes for each other, if not the exact same product."<sup>6</sup> Thus, the Court found no facts in issue that would justify reopening the record to collect new facts, and doing so was an attempt to convert a legal question into a factual question, when no such factual question existed. In my view therefore reopening the record was contrary to the Court's holding and a direct affront to the Court.

In my determination in the original investigation, I gave the domestic industry the benefit of the doubt and assumed that subject imports from China, Russia, and Ukraine are close substitutes for each other. In addition, I found that LTFV Russian imports and fairly traded Russian imports are close, if not perfect, substitutes for each other. The additional information collected in this remand proceeding does not change my findings concerning substitutability. In fact, the information collected confirms my assumption and finding.<sup>7</sup> Consequently, for this determination I adopt my findings, analysis and views in the original investigation and incorporate them herein by reference.<sup>8</sup>

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<sup>1</sup> 132 F.3d 716 (Fed. Cir. 1997).

<sup>2</sup> Inv. No. 731-TA-698 (Final), USITC Pub. 2885 (May 1995).

<sup>3</sup> Gerald Metals, Inc. v. United States Int'l Trade Commission, No. 98-56, Slip Op. at 2 (CIT Apr. 28, 1998).

<sup>4</sup> See Magnesium from China, Russia, and Ukraine, Inv. Nos. 731-TA-696-698 (Final), USITC Pub. 2885 at 39 (May 1995) (Views of Commissioner Carol T. Crawford).

<sup>5</sup> 132 F.3d at 720.

<sup>6</sup> Id.

<sup>7</sup> See INV-V-047 (June 15, 1998), see Appendix 1.

<sup>8</sup> In the original investigation, I specifically evaluated the existence and substitutability of fairly traded Russian imports of pure magnesium and their market share during the period of investigation in making my negative determination. See Magnesium from China, Russia, and Ukraine, USITC Pub. 2885 at 48 and 50. I also considered information concerning the increase in the supply of pure magnesium on the global market as the purported cause

The legal question before the Commission is the application of the CAFC's interpretation of the statutory standard that the domestic industry must be materially injured "by reason of" the LTFV imports. The legal standard "by reason of" has been an integral part of the law since 1921, and, although the statute has been subsequently amended, Congress has never amended this legal standard. However, when the statute has been amended, report language has been added that has been used to support certain interpretations of the "by reason of" legal standard. The Court stated that the "[CIT's] review of the record propagates the Commission's misapplication of the 'by reason of' test by relying on the broad language in the Senate Report".<sup>9</sup> Furthermore, the Court found that the "[CIT] erred by applying an incorrect legal test for the amount of contribution to material harm by LTFV goods necessary to satisfy the 'by reason of' standard."<sup>10</sup> Consequently, the CAFC has for the first time specifically interpreted the "by reason of" legal standard.

The Court clearly and concisely articulated the Commission's statutory responsibility, which is to determine "whether LTFV imports materially injure a domestic industry."<sup>11</sup> After stating that evidence of *de minimis* (e.g., minimal or tangential) causation does not reach the causation level required under the statute, the Court held that the statute requires a showing that material injury "occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to" material injury.<sup>12</sup> In my view, the plain meaning of the legal standard articulated by the Court is that LTFV imports *themselves* must be causing material injury. This does not mean that LTFV imports must be the only cause of material injury to an industry or that the Commission is to weigh different causes of material injury. Such characterizations, while simplistic, actually obfuscate the issue. Injury to an industry often occurs as a result of a number of different causes, and each of those causes separately may result in material injury. Therefore, an industry's *overall* injury may consist of a number of different material injuries. So long as one of the material injuries is caused by LTFV imports, there is material injury "by reason of" the LTFV imports, and the statutory standard is satisfied.<sup>13</sup>

I believe that my analysis of whether there is material injury by reason of LTFV imports comports with the Court's interpretation of the legal standard.<sup>14</sup> My analysis seeks to use "careful

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for the closure of Dow's plant. However, my determination is based on the effects of the subject imports on the domestic industry as a whole, not the effects of the subject imports on an individual member of the domestic industry.

<sup>9</sup> 132 F.3d at 722. This report language has been cited as prohibiting the Commission from weighing causes and determining if the LTFV imports are the principal, a substantial or a significant cause of material injury.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 719.

<sup>12</sup> *Id.* at 722. In my view it is important not to complicate the Court's holding by confusing the quantum of causation required to meet the "by reason of" standard with the quantum of injury required to meet the statutory definition of material injury. The CAFC addressed only the former standard, not the latter.

<sup>13</sup> Shortly after its opinion in Gerald Metals, the CAFC decided an appeal of another Commission decision involving LTFV imports. See Angus Chemical Co. v. United States, App. No. 97-1166 (Fed. Cir. Apr. 9, 1998). In my view, Angus Chemical does not affect the Court's holding in Gerald Metals because each interprets a different provision of the statute. Angus Chemical interprets the statutory requirement that the Commission "shall consider" the volume, price effects, and impact of the LTFV imports. Gerald Metals, on the other hand, articulates the legal standard for meeting the statutory requirement that material injury occurred "by reason of" the LTFV imports.

<sup>14</sup> The statute requires that the Commission determine whether a domestic industry is "materially injured by reason of" the LTFV imports. In my view, the clear meaning of the statute is to require a determination of whether the domestic industry is materially injured by reason of LTFV imports, not by reason of the LTFV imports among

economic evidence and analysis”<sup>15</sup> to evaluate the effects of the LTFV imports on the domestic industry. In my analysis I compare the state of the industry when imports were dumped with what the state of the industry would have been if the imports had not been dumped. This analysis recognizes that there may be a number of different causes of material injury and avoids weighing causes by seeking to isolate the effects of the LTFV imports. Rather, by isolating the effects of the LTFV imports, I am able to determine whether the LTFV imports themselves are causing material injury to the domestic industry. Because I believe that my analysis comports with the Court’s opinion, I respectfully submit that no change in my analysis is required to implement properly the Court’s articulation of the “by reason of” standard.<sup>16</sup>

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other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently are causing material injury to the domestic industry. It is assumed in the legislative history that the “ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports.” S. Rep. No. 96-249 at 75 (1979). However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. *Id.* at 74; H.R. Rep. No. 96-317 at 46-47 (1979). The Commission is not to determine if the LTFV imports are “the principal, a substantial or a significant cause of material injury.” S. Rep. No. 96-249 at 74. Rather, it is to determine whether any injury “by reason of” the LTFV imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. “When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry.” S. Rep. No. 100-71 at 116 (1987) (emphasis added).

<sup>15</sup> 132 F.3d at 721.

<sup>16</sup> As discussed above, for this determination I have incorporated by reference my findings, analysis and views from the original investigation.



## DISSENTING VIEWS OF CHAIRMAN LYNN M. BRAGG

### I. Issues Raised on Remand

In the original Commission determinations, in Magnesium from China, Russia, and Ukraine,<sup>1</sup> I, along with two of my colleagues, determined that LTFV imports of pure magnesium from Russia, Ukraine, and China had materially injured the domestic industry producing pure magnesium. Gerald Metals, an importer of Russian and Ukrainian magnesium, appealed the Commission's affirmative finding with respect to imports from Ukraine to the Court of International Trade (CIT), which upheld the Commission's determination. Gerald Metals then appealed the CIT's decision to the Court of Appeals for the Federal Circuit (CAFC), which reversed the CIT's holding and remanded the investigation back to the CIT.

The CIT's subsequent remand order directs the Commission to "reconsider its material injury finding in a way that is consistent with the legal standard articulated by the CAFC and that takes into account the existence and substitutability of fairly-traded Russian imports of pure magnesium and the increase in the market share of said imports during the period of investigation."<sup>2</sup> Pursuant to the order of the CIT in Gerald Metals,<sup>3</sup> I reaffirm in this remand investigation that an industry in the United States producing pure magnesium is materially injured by reason of cumulated imports of pure magnesium from China, Ukraine, and Russia that the Department of Commerce (Commerce) has determined are sold at less-than-fair-value (LTFV).

#### A. Legal Standard Articulated by the Federal Circuit in Gerald Metals

To reach a determination in an antidumping duty investigation, the statute directs the Commission to determine if a domestic industry is materially injured by reason of the subject imports. The statute then defines "material injury" as "harm which is not inconsequential, immaterial or unimportant."<sup>4</sup> It is my view that the CAFC's requirement, articulated in Gerald Metals, that the cumulated subject imports be more than a "minimal or tangential" cause of material injury is consistent with my previous interpretations of the statutory requirements. In my analysis, I have taken special care to avoid attributing to LTFV imports any injurious effects arising from causes other than those imports. I also recognize, however, that situations may arise in which both LTFV and fairly-traded imports contribute more than tangentially to an industry's ills.

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<sup>1</sup> Inv. Nos. 731-TA-696 through 698 (Final), USITC Pub. 2885 (May 1995).

<sup>2</sup> Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997). The CIT also noted that the CAFC required reconsideration of the effect of the increase in the supply of pure magnesium on the global market as the cause of the closure of the plant of one of the domestic producers--Dow Chemical Company--and the penal or remedial nature of the duties imposed. Order, Gerald Metals, Inc. v. United States, No. 95-06-00782, Slip Op. 98-56 at 2 (CIT April 28, 1998). I note that antidumping duties were intended to be solely remedial, not punitive, in nature. See Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990), citing S. Rep. No. 92-1221 at 8 (1972).

<sup>3</sup> Gerald Metals v. United States, No. 95-06-00782, Slip op. 98-56 (CIT April 28, 1998).

<sup>4</sup> In making its determination, the Commission must consider the volume of imports, their effect on prices for the like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations. See 19 U.S.C. § 1677(7)(A).

For the reasons explained below, I find that any injurious impact attributable to the imports from Russia determined by Commerce to have been sold at less-than-fair-value must be included in my assessment of injury “by reason of the subject imports.” Nevertheless, as the CAFC correctly stressed in its opinion, there was also a large and increasing volume of fairly-traded Russian imports present in the market over the period examined. Like the imports found to be sold at LTFV, these additional imports clearly had some effect on the domestic market for magnesium. I also determine that these fairly-traded imports, which preceded the entry of LTFV imports in the U.S. market, had the effect of rendering the domestic industry more vulnerable to any adverse price or volume effects attributable to LTFV imports.<sup>5</sup>

## **B. The Existence and Substitutability of Fairly-Traded Imports from Russia as a Condition of Competition**

The CAFC’s decision in Gerald Metals also directed the Commission to consider the issue of whether all of the imports from Russia found by Commerce to have been sold at LTFV could have been easily “converted” to fairly-traded imports because all Russian magnesium was manufactured by two companies and differed only by the trading company through which it was sold. I do not interpret the CIT’s admonition to consider the economic effects of fairly-traded imports from Russia as a mandate to “weigh” the relative impact of fairly-traded versus LTFV imports as a cause of material injury, because to do so would be contrary to CAFC opinions such as Hyundai Electronics Industries v. United States.<sup>6</sup> In making a material injury determination, the Commission must consider all relevant economic factors that bear on the state of the industry “within the context of the business cycle and conditions of competition that are distinctive to the affected industry,”<sup>7</sup> but no single factor is dispositive. Therefore, I interpret the CAFC’s direction to the Commission as requiring us to analyze the record evidence concerning the complicated operation of this market in more detail.

In explaining the basis for my affirmative determination on remand, I would like to call attention to several important aspects of my framework of analysis. First, I do not find that the subject Russian imports were entirely “convertible” to fairly-traded imports. I note that in previous CAFC cases the fact of substitutability of LTFV and fairly-traded imports was not dispositive.<sup>8</sup> Moreover, the record in this investigation shows that business practices in this industry do not support the convertibility thesis. For example, there is little evidence of either magnesium producers or end-users in fact switching trading companies over the period examined.<sup>9</sup> Regardless of the theoretical economic incentives, without record evidence regarding “real world” switching of trading companies, I do not find that the companies could have switched from a producer or trading company found to be selling at LTFV to fairly-trading sources of imports. Any such a conclusion for me would be entirely speculative and not grounded in record

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<sup>5</sup> See Trade Agreements Act of 1979, Statements of Administrative Action, H. Doc. No. 96-153, Part II, at 434; H.Rep. No. 96-249 at 57 (1979). See also Bando Chemical Industries, v. United States, 17 CIT 198 (1993), aff’d, 26 F.3d 139 (Fed. Cir. 1994); Trent Tube Div. v. United States, 975 F.2d 807 (Fed. Cir. 1992), aff’g, 752 F.Supp. 468 (CIT 1990); Iwatsu Electric Company v. United States, 758 F.Supp. 1506, 1512 (CIT 1991).

<sup>6</sup> No. 93-06-00319, Slip Op. 97-53 (CIT 1997).

<sup>7</sup> 19 U.S.C. § 1677(7)(B).

<sup>8</sup> See e.g., Grupo Industrial Camesa v. United States, 85 F.3d 1577 (Fed. Cir. 1996).

<sup>9</sup> Respondents argue that over the period of investigation, most purchasers and producers had no incentive to switch trading companies because no one knew which trading companies or producers would be found to be selling at LTFV. However, this is not an unexpected result of the application of Title VII.



evidence.<sup>10</sup> Second, I note the fact that some of the trading companies sell primarily to granule manufacturers while another distinct group sells to aluminum manufacturers. This strongly suggests that all trading companies do not behave in exactly the same manner.

Additional dubious assumptions regarding the operation of this complex, multi-level market are required in order for the Commission to conclude that LTFV imports could have been “converted” to fairly-traded imports. For example, the record reveals that the domestic industry did in fact lose specific sales and market share to LTFV imports. In order to find that these confirmed sales lost to LTFV Russian imports would have been made by fairly-traded Russian imports rather than by other LTFV imports, or the domestic like product, the Commission would be required to assume not just that some purchasers could switch, but that virtually all of them not only could, but would do so. In order for the assumption to be compelling, the companies selling fairly-traded Russian magnesium also must have had access to a sufficient supply of Russian magnesium at the same price to replace LTFV imports as well as the staff and other resources to take on all of the sales of the companies selling at LTFV.

Finally, the Commission would have to assume that the trading companies found to have zero margins would necessarily choose to take over all the business of the trading companies found to be selling at LTFV, rather than adopt some other competitive strategy, such as raising their prices. Significantly, the record indicates that companies selling fairly-traded Russian imports did indeed raise their prices as LTFV imports shipments to aluminum producers ceased in 1994. Before the cessation, both LTFV and non-LTFV Russian imports undersold the U.S. product; after LTFV imports ceased, non-LTFV Russian import prices rose to meet or exceed domestic price, and domestic prices rose significantly.<sup>11</sup> In sales to aluminum manufacturers, where the bulk of fairly-traded volumes were placed, non-LTFV trading companies entered the market earlier than LTFV trading companies and did not leave the market in 1994. Thus, despite the similarity of the products sold through the different sets of trading companies, I find, after reexamining the record in greater detail as the Court has required, that those companies operated in quite different ways during the relevant period and the record does not support the hypothesis of convertibility.

I also note that the statute requires the Commission to accept at face value the Commerce determination that certain Russian imports were in fact sold at LTFV.<sup>12</sup> It does not allow the Commission to “convert” LTFV imports into fairly-traded imports for purposes of its causation analysis. Moreover, under the statute, the Commission is required to cumulate imports found by Commerce to have been sold at LTFV if those imports compete with one another and with the domestic like product. In the original investigation, I cumulated LTFV Russian imports with LTFV imports from China and

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<sup>10</sup> Respondent Gerald Metals seems to suggest in its brief that given the presence of fairly-traded imports and evidence of a particular degree of substitutability, the Commission is required to make the counter-factual assumption that the domestic industry “would have been” confronted with the very same volume of lower priced imports even in the absence of LTFV imports. I disagree. In U.S. Steel, the CAFC refused to find that there was a single methodology, applicable to each Commissioner, for determining whether a domestic industry is injured or threatened with injury, by reason of subsidized and/or LTFV imports, or even to recognize that the Court had the power to impose a single “correct” methodology on the Commission. See U.S. Steel Group v. United States, 96 F.3d 1352, 1361-62 (Fed. Cir. 1996).

<sup>11</sup> Confidential Staff Report (List 2, Doc. 37) at Table 25.

<sup>12</sup> Iwatsu, 758 F. Supp. at 1510 (This court has held that the statutory language [does not] require that the ITC demonstrate that dumped imports, through the effects of particular margins of dumping, are causing injury. Rather, the ITC must examine the effects of imports of a class or kind of merchandise which is found to be sold at LTFV [by Commerce]).

Ukraine. I then considered the volume, price, and impact of the cumulated imports on the domestic industry. In my view, any attempt by the Commission to “convert” subject imports into non-subject imports has the effect of “disaggregating” the price and volume effects of cumulated subject imports. While the CAFC did not speak in terms of finding a separate causal link for imports from different countries that are cumulated, its opinion might be construed as suggesting a willingness to treat Russian LTFV imports differently from other imports found by Commerce to have been sold at LTFV. To do so, however, would be contrary to the spirit, if not the letter, of the cumulation provision of the statute, as the Court has elsewhere explained it.<sup>13</sup> Such an application of the law would suggest that the Commission must prove causation separately with respect to each country. I am reluctant to interpret the Federal Circuit as having taken such a step.

## **II. Like Product and Domestic Industry**

My original findings concerning the like product and domestic industry were not affected by the Court’s remand order. I therefore reaffirm my original findings regarding like product. I also readopt my original finding that there is one domestic industry producing the product at issue in this remand, pure magnesium, consisting of all U.S. companies that produce pure magnesium.

## **III. Conditions of Competition and Condition of the Domestic Industry**

As in the original investigations, I find that several conditions of competition, in addition to the presence of fairly-traded imports from Russia, are relevant to my consideration of material injury to this industry. First, the demand for pure magnesium is a derived demand arising largely as a result of the demand for the downstream products it is used to produce, such as aluminum sheet and steel. Demand for pure magnesium is not likely to be influenced by changes in the price of pure magnesium because pure magnesium has very few substitutes and comprises a relatively small proportion of the total cost of the downstream products.

Second, electrolytic cells used to produce pure magnesium deteriorate if they are not kept running constantly. The costs of rebuilding these cells are so high that producers must try to keep the cells in constant operation.<sup>14</sup> The technology and the capital-intensive cost structure of pure magnesium production require a high sustained level of capacity utilization for efficient operation. Thus, at times there is a strong incentive for producers to reduce their prices or to build up inventory in order to maintain production volumes. A producer who can avoid shutting down production will tend to do so, in order to spread its high fixed costs over a larger production volume.<sup>15</sup>

Third, each of the three domestic producers of magnesium conducts its business differently; for example, Northwest sells virtually all of its production to a related company that produces aluminum, while Dow and Magcorp both sell magnesium under contracts on the merchant market. Therefore Dow and Magcorp compete more directly with the subject imports. Dow is a diversified, multinational

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<sup>13</sup> See Bingham & Taylor Div. v. United States, 815 F.2d 1482, 1485 (Fed. Cir. 1987) (Congress intended to eliminate discretion concerning cumulation whenever statutory criteria are met) Hosiden Corp. v. Advanced Display Manufacturers of America, 85 F.3d 1561, 1569 (Fed. Cir. 1996) (quoting USX Corp. v. United States, 12 CIT 205, 219, 682 F.Supp. 60, 73 (1988) (“the purpose of cumulation is to avoid a negative determination when unfairly-traded imports from various sources together injure an industry.”))

<sup>14</sup> List 1, Doc. 15, Transcript (Tr.) at 73-74.

<sup>15</sup> Tr. at 41-42.

corporation for which magnesium production accounts for a small portion of its overall business. Magcorp, on the other hand, is a company entirely dedicated to the production of magnesium. Thus, one can not assume that each member of the domestic industry will respond to changes in the marketplace with the same business strategy. Similarly, theoretical conclusions regarding foreign producer and importer behavior not based on record evidence therefore are not warranted.<sup>16</sup>

A careful, studied analysis of the structure of business transactions cautions against reliance on theoretical market behavior in assessing pricing data. No member of the domestic industry sells its magnesium primarily on the spot market. Both Dow and Magcorp sell the bulk of their production through contracts that vary in length from less than a year to five years. Rather than set a fixed price, these contracts typically contain meet or release clauses.<sup>17</sup> These clauses allow a customer who receives an offer for goods of like quality at a price less than the contract price to request that the producer meet the lower price or be released from all or a portion of its contract.<sup>18</sup> While both Dow and Magcorp market magnesium using contracts with meet or release provisions, the details of the operation of those contracts appear to differ in important ways that appear to have affected the impact of LTFV imports on their businesses and consequently influenced their divergent business strategies. For example, there is evidence that when confronted by customers invoking the meet or release provisions of their contracts, Dow was more \*\*\*, while Magcorp's contracts appear to have been structured in such a way that they encouraged buyers to maintain purchasing volumes.

The use of contracts containing "meet or release" clauses also allowed the domestic industry to segment its customers and to charge higher prices to those customers who were unable or unwilling to use the sometimes lower quality imports in their production processes. For example, aluminum manufacturers as a rule require higher and more consistent quality magnesium than do manufacturers who use it as a desulfurizing agent in steel production. In order for an end-user to invoke the meet or release provision of its contract, it must first certify that the competitive offer it receives is for goods of the same quality, which generally refers to goods of sufficiently high quality for the customer to use in its production processes.<sup>19</sup> Once the customer does so, Dow or Magcorp must meet the quoted price or lose the sale. Officials from both Dow and Magcorp testified at the Commission's hearing that they had in fact reduced their prices to some customers in order to retain their sales volumes and keep their plants running at a high level of capacity. Once Dow had decided to shut down its plant B in 1993, it made the decision to lose sales volume rather than reduce its prices.<sup>20</sup>

In sum, the complexity of the market and market relationships in the domestic magnesium industry counsels against adopting an over-simplified model of the working of market dynamics and undue reliance on the element of convertibility as a "marker" for injury. For this reason, in my analysis of material injury to the domestic industry as a whole by reason of the subject imports, I have borne in

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<sup>16</sup> A similar diversity no doubt exists among foreign producers, trading companies, and end-users. We have much less information, however, regarding those business entities in this remand investigation or in the original investigation.

<sup>17</sup> Tr. at 26.

<sup>18</sup> Tr. at 34.

<sup>19</sup> Tr. at 36.

<sup>20</sup> \*\*\*. This may explain why domestic prices were high in 1993 at a time when Dow cut production.

mind the conditions of competition discussed above, and have based my determination on the relevant evidence on the record, as it is defined by the statute.<sup>21</sup>

#### **IV. Cumulation**

In the Commission's original determination, the Commission unanimously cumulated the subject imports from China, Ukraine, and Russia for purposes of its material injury analysis. Despite the Court's references to the convertibility issue, it did not discuss the original cumulation analysis in its remand order. For purposes of this remand investigation, I therefore reaffirm my original determination to cumulate the subject imports.<sup>22</sup>

#### **V. Material Injury by Reason of LTFV Imports**

##### **A. Volume of LTFV Imports**

Contrary to the Court of Appeal's apparent assumption that only price suppression is at issue in this investigation, the petitioner's alleged that LTFV imports were significant and injurious both during the original investigation and in this remand. I find, as I did during the original investigation, that the volume of cumulated LTFV imports was both significant and increased substantially from 1992 through the first half of 1994. As I noted in the original final investigation, I do not rely on the data for the second half of 1994, because the virtual cessation of LTFV imports during that period immediately followed the Commission's May 1994 preliminary affirmative determination. From 1992 to 1993 the quantity of cumulated LTFV imports increased by more than threefold.<sup>23</sup>

Market penetration of the LTFV imports of pure magnesium, by both quantity and value, also increased significantly during the period of investigation. From 1992 to 1993, these imports increased their market share from \*\*\* percent to \*\*\* percent in 1993, more than quadrupling their share of the pure magnesium market. Due to their absence from the U.S. market in the second half of 1994, the LTFV pure magnesium imports lost some of their previously-gained market share, but still accounted for \*\*\* percent of annual<sup>24</sup> apparent consumption for that year.<sup>25</sup>

While they entered the market somewhat later than the subject imports, the volume and market share of fairly-traded imports from Russia also increased greatly over the period of investigation and peaked in 1993. The market share of fairly-traded imports increased from a meager \*\*\* percent in 1992 to \*\*\* percent in 1994, for a net increase of \*\*\* percentage points over the period examined.

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<sup>21</sup> 19 U.S.C. § 1516a(b)(2)(A)

<sup>22</sup> Because the Court did not comment on the Commission's decision to cumulate the subject imports in the original investigations, for purposes of my material injury analysis in this remand investigation, I have analyzed the impact of **all** cumulated imports found to be sold at less-than-fair-value by Commerce, including all LTFV imports from Russia.

<sup>23</sup> The value of the LTFV imports likewise increased rapidly from 1992 to 1993 and remained significant in the first half of 1994.

<sup>24</sup> List 2, Doc. 37 at Table A-1.

<sup>25</sup> By value, the share of the U.S. pure magnesium market held by the LTFV imports increased from \*\*\* percent in 1992 to \*\*\* percent in 1993, and with virtually no imports in the second half of 1994, retained \*\*\* percent of the market that year.

Respondents argue that the domestic market experienced supply shortages in late 1993 and 1994 and that the subject imports merely served to meet domestic requirements for magnesium that the domestic industry could not satisfy. On this issue, I find petitioner Dow's sworn testimony regarding the reasons for the domestic industry's failure to meet domestic demand in 1994, after the peak of subject imports in 1993, to be both credible and consistent with my understanding of the conditions of competition in this industry as discussed earlier. At the Commission's hearing an officer of Dow stated that Dow's failure to meet domestic requests for magnesium in 1994 was caused by the reduction in capacity it experienced after closure of its plant in 1993, which in turn, was due, at least in part, to the presence of LTFV imports in the market. Once Dow had taken production equipment off line in 1993, it was unable to immediately respond to changing market conditions by rebuilding capacity.<sup>26</sup> In addition, a Dow executive testified that some of the failure to supply particular end-users resulted from Dow's refusal to meet low spot prices after they had shut down plant B.

The increased volume of LTFV imports over the period of investigation thus represented lost sales for U.S. producers, who either lost existing customers, or failed to pick up additional market share now made available by Dow's capacity cut-back. The fact that LTFV imports began to flood the market just as Dow cut back its production strongly suggests that the imports had detrimental volume effects on Dow and the remaining domestic producers. Moreover, evidence in the record suggests that purchasers do not often switch magnesium suppliers, even in response to changes in price, because for most end-users of magnesium, its cost does not make up a proportionately large component of COGS.<sup>27</sup> Thus, Dow's plant closure would have represented a lost "golden opportunity" for Magcorp to pick up additional customers in the U.S. market, at the same time Magcorp was competing with increasing volumes of unfair imports.

#### **B. Effect of LTFV Imports on Domestic Prices**

The record indicates that in addition to their significant volume effect, the subject imports also had significant price effects, although given the complexity of the market, these price effects are not as apparent as in some other Commission investigations. Respondents rely on the fact that prices for domestically-produced magnesium increased between 1992 and 1993, the same period in which the LTFV imports held their largest share of the market, as evidence that the subject imports had no detrimental price effects. I disagree. I note that the increase in domestic prices reflects, in part, an increase in unit COGS experienced by the domestic industry during that same period. In the face of these rising raw material costs, the presence of LTFV imports put pressure on U.S. producers to reduce prices to maintain critical production volumes or risk shutting down capacity indefinitely, as happened to Dow. Moreover, as I noted in the original determination, in 1993, the Commission's pricing study showed that weighted average delivered domestic prices for magnesium declined through the course of the year. They began that decline only after Russian LTFV imports began to undersell U.S. products, although Russian fairly-traded goods had begun underselling earlier, and fell by the first quarter of 1994 to levels equal to (in sales to granule producers) or below (in sales to aluminum manufacturers) prices reached in 1992.<sup>28</sup> In short, the record shows not so much that U.S. producers were unable to raise their price (the issue the Court of Appeals addressed) as pressure from LTFV imports that led to a reduction of

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<sup>26</sup> Tr. at 23.

<sup>27</sup> Tr. at 40.

<sup>28</sup> List 2, Doc. 37 at Table 25.

prices that had already risen before LTFV imports entered the market. While the evidence may support the proposition that non-LTFV imports would have prevented further price increases, certainly the LTFV imports had significant price effects in the timing and extent of the lowering of U.S. price.<sup>29</sup>

Record evidence also indicates that at least some portion of both LTFV and fairly-traded imports that originated from the liquidated Russian stockpile were of lesser quality or at least less reliable in terms of quality and continuity of supply than the U.S. product.<sup>30</sup> Buyers who could use the somewhat less desirable magnesium had the option either to invoke their meet or release clauses with Dow in order to buy lower priced imports at prices that were falling due to the increased supply of such magnesium, or to bargain down domestic prices. But those end users for whom quality and reliability of supply were the most important factor were unlikely able to opt out of their contracts with either Dow or Magcorp in order to purchase relatively small quantities of LTFV imports. Thus, their prices could not move in response to imports. Moreover, Dow's plant closure should have allowed other U.S. producers to raise their prices as they picked up additional high-end customers who had previously purchased guaranteed quantities of high-quality magnesium from Dow or purchased Canadian imports before the Canadian antidumping duty order went into effect. Therefore, while there were dissimilar trends within the domestic industry and among different purchasers, I am satisfied that when taken as a whole, the record reveals that subject imports have had a detrimental effect on pricing.

### **C. Impact on the Domestic Industry**

I once again find that the significant and increasing volume of LTFV imports had a significant adverse impact on the domestic industry, particularly on its financial performance. Despite a slight increase in apparent U.S. consumption of pure magnesium, the U.S. producers' market share declined from 1992 to 1993 while the volume and market share of the subject LTFV imports increased rapidly and significantly. Thus there is evidence on the record of direct displacement of domestic producer sales by the LTFV imports. The domestic industry's loss of market share, lost sales and lost revenues to LTFV imports were injurious because the increasing volumes of LTFV imports led to increasing inventories of unsold U.S. product and eventually to a reduction in capacity.<sup>31</sup> The record evidence regarding confirmed lost sales and lost revenues further indicates that such pressure derived specifically from LTFV imports.

The domestic industry's overall net sales declined by 13.2 percent in quantity between 1992 and 1994, in a period of slightly rising demand. This drop in net sales corresponded largely with Dow's decision to close down one of its plants at the same time that the quantity of LTFV imports in the U.S. market peaked. As discussed above, Dow officials testified under oath at the Commission's hearing that LTFV imports were, at least in part, the reason for the plant closure. In response to pressures to keep capacity utilization rates high, inventories of U.S.-produced magnesium built up in 1993 as a result of the surge in both subject imports and fairly-traded imports from Russia. As the levels of imports declined in 1994 and Dow closed its plant, these domestic inventories were drawn down.

The industry as a whole increased its profits over the period examined. Nevertheless, one of the \*\*\* of the three U.S. producers, Northwest Alloys, sells its magnesium to a related company and therefore its data are somewhat misleading regarding sales in the U.S. market because they do not

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<sup>29</sup> See Pasco Terminals, Inc. v. United States, 477 F.Supp. 201 (Cust. Ct. 1979), aff'd and adopted, 634 F.2d 610 (CCPA 1980).

<sup>30</sup> See, e.g., List 2, Doc. 37 at I-54, n.90; id. at I-17.

<sup>31</sup> List 2, Doc. 37 at I-21.

represent arms-length transactions. Of the remaining two producers who sell in the open market, Dow \*\*\*, particularly when the level of subject imports was at its highest point. Magcorp \*\*\* between 1992 and 1993. Between 1993 and 1994, however, when one would have expected Magcorp to pick up many of Dow's former customers, its net sales \*\*\*, indicating that LTFV imports took market share that otherwise would have gone to the domestic industry. Indeed, Magcorp testified at the Commission's hearing that in January of 1994 it had cut production and laid off workers in response to competition from LTFV imports.<sup>32</sup>

The domestic industry's capacity declined over the period examined, as did both research and development expenses and capital expenditures. Capital expenditures dropped significantly between 1993 and 1994, falling from approximately \$\*\*\* million in 1993 to \$\*\*\* million in 1994. Magcorp testified that the reason for its failure to invest in capital expenditures was that it was not able to generate the internal cash from operations to finance either capital plant improvements or research.<sup>33</sup>

## **VI. Conclusion**

In my view, the record evidence in this investigation reveals that the cumulated subject imports from China, Ukraine, and Russia had both significant volume and price effects and a consequential detrimental impact on the domestic industry. For these reasons, I reaffirm my original determination that a domestic industry producing magnesium is materially injured by reason of cumulated imports from China, Russia, and Ukraine found by Commerce to have been sold at LTFV.

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<sup>32</sup> Tr. at 23-24.

<sup>33</sup> Tr. at 26.





**APPENDIX 1**

**STAFF MEMORANDUM**





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UNITED STATES INTERNATIONAL TRADE COMMISSION

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WASHINGTON, DC 20436

June 15, 1998

MEMORANDUM

INV-V-047

TO: THE COMMISSION

FROM: Lynn Featherstone  
Director, Office of Investigations

SUBJECT: Investigation No. 731-TA-698 (Remand): Magnesium from Ukraine--Staff  
Inquiries

Questionnaires were sent to 11 firms that had reported importing pure magnesium from Russia during the period examined in investigations Nos. 731-TA-696-698 (Final). Importers were requested to provide information on the interchangeability of pure magnesium from Russian fairly-traded sources, Russian less-than-fair-value (LTFV) sources, and Ukrainian sources during the period January 1, 1992 through April 25, 1995. All six of the firms that provided information reported that pure magnesium from Russian LTFV sources was used interchangeably with pure magnesium from Russian fairly-traded sources. Similarly, all six of the responding importers reported that pure magnesium from Russian fairly-traded sources was interchangeable with pure magnesium from Ukrainian sources.

Importers were also unanimous in their agreement that there were no differences in sales terms or delivery between pure magnesium imported from Russian LTFV and Russian fairly-traded sources. Similarly, all of the responding importers reported that there were no differences in sales terms or delivery between pure magnesium imported from Russian fairly-traded and Ukrainian sources.

Importers were asked to discuss whether or not their firm had shifted any of its imports from Russian LTFV sources to Russian fairly-traded sources during the period January 1, 1992 through April 25, 1995. Two of the responding firms reported that they had shifted imports.<sup>1</sup> Only one of these firms provided a reason for this shift; \*\*\*.

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<sup>1</sup> The three other responding firms reported that they had not shifted any imports, with all three stating that their sales were found to be fairly-traded so there was no need to shift.

Importers were also asked to discuss whether or not their firm had shifted any of its imports from Ukrainian sources to Russian fairly-traded sources during the period January 1, 1992 through April 25, 1995. Two firms reported that they had not imported any Ukrainian material. One other firm, \*\*\*. One additional firm, \*\*\*.

Finally, importers were asked whether or not there were any constraints (e.g., supply contracts or agreements) on their ability to switch suppliers of pure magnesium. All four of the importers that responded to this question stated that there were no constraints on their ability to shift suppliers.

Questionnaires also were sent to the two Russian producers of pure magnesium during the period examined in the final investigations. The one responding Russian producer, \*\*\*.

cc: Secretary  
Assigned staff

**APPENDIX 2**

***FEDERAL REGISTER NOTICE***



## INTERNATIONAL TRADE COMMISSION

[Inv. No. 731-TA-698 (Remand)]

### Magnesium From Ukraine; Notice and Scheduling of Remand Proceedings

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The U.S. International Trade Commission (the Commission) hereby gives notice of the remand of its final antidumping investigation No. 731-TA-698 (Final) for reconsideration in light of the order of the Court of International Trade.

**EFFECTIVE DATE:** June 4, 1998.

**FOR FURTHER INFORMATION CONTACT:** Olympia Hand, Office of Investigations, telephone 202-205-3193, Michael Diehl, Office of General Counsel, telephone 202-205-3095, or Rhonda M. Hughes, Office of General Counsel, telephone 202-205-3083, U.S. International Trade Commission. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

#### SUPPLEMENTARY INFORMATION:

##### Background

On April 28, 1998, the Court of International Trade issued a remand Order to the Commission in *Gerald Metals, Inc. v. United States*, Ct. No. 95-06-00782, Slip. Op. 98-56. The case involved review of the Commission's May 1995 affirmative material injury determination in *Magnesium from Ukraine*, Inv. No. 731-TA-698 (Final). The CIT ordered the Commission to reconsider its final determination in a way that is consistent with the legal standard articulated by the Court of Appeals for the Federal Circuit ("CAFC") in *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997) and that takes into account the fairly traded Russian imports of pure magnesium and the increase in the market share of those imports during the period of review.

##### Reopening Record

In order to assist it in making its determination on remand, the Commission is reopening the record on remand in this investigation to seek information regarding imports of fairly traded Russian pure magnesium, and to permit parties to file briefs.

##### Participation in the Proceedings

Only those persons who were interested parties to the original

administrative proceedings (i.e., persons listed on the Commission Secretary's service list) may participate in these remand proceedings.

### Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Information obtained during the remand investigation will be released to parties under the administrative protective order ("APO") in effect in the original investigation. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make business proprietary information gathered in the final investigation and this remand investigation available to additional authorized applicants, that are not covered under the original APO, provided that the application is made not later than seven (7) days after publication of the Commission's notice of reopening the record on remand in the *Federal Register*. Applications must be filed for persons on the Judicial Protective Order in the related CIT case, but not covered under the original APO. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO in this remand investigation.

#### Written Submissions

Briefs should be concise, and thoroughly referenced to information on the record in the original investigation or information obtained during the remand investigation. The briefs should be limited to the following issues: (1) the legal standard articulated by the CAFC in *Gerald Metals v. United States*, 132 F.3d 716 (Fed. Cir. 1997); and (2) the extent and significance of the substitutability of the fairly traded and LTFV Russian imports. Written briefs shall be limited to twenty (20) pages, and must be filed no later than close of business on June 12, 1998. No further submissions will be permitted unless otherwise ordered by the Commission.

All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain business proprietary information (BPI) must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** This action is taken under the authority of the Tariff Act of 1930, title VII. Issued: May 29, 1998.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 98-14866 Filed 6-3-98; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

[Inv. No. 337-TA-411]

### Certain Organic Photoconductor Drums and Products Containing the Same; Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Institution of investigation pursuant to 19 U.S.C. § 1337.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 30, 1998, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, on behalf of Mitsubishi Chemical Corporation, 5-2, Marunouchi, 2-chome, Chiyoda-ku, Tokyo 100 Japan, and Mitsubishi Chemical America, Inc., One North Lexington Avenue, White Plains, New York 10601. Supplements to the complaint were filed on May 18 and May 28, 1998, and a letter withdrawing the complaint as to two of the proposed respondents was filed on May 26, 1998. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain organic photoconductor drums and products containing the same that infringe claim 1 of U.S. Letters Patent 4,680,246 and claims 1, 2, 3, 5, and 7 of U.S. Letters Patent 4,396,696. The complaint further alleges that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after a hearing, issue a permanent exclusion order and permanent cease and desist orders.

**ADDRESSES:** The complaint and supplement, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Room 112, Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired individuals are





