

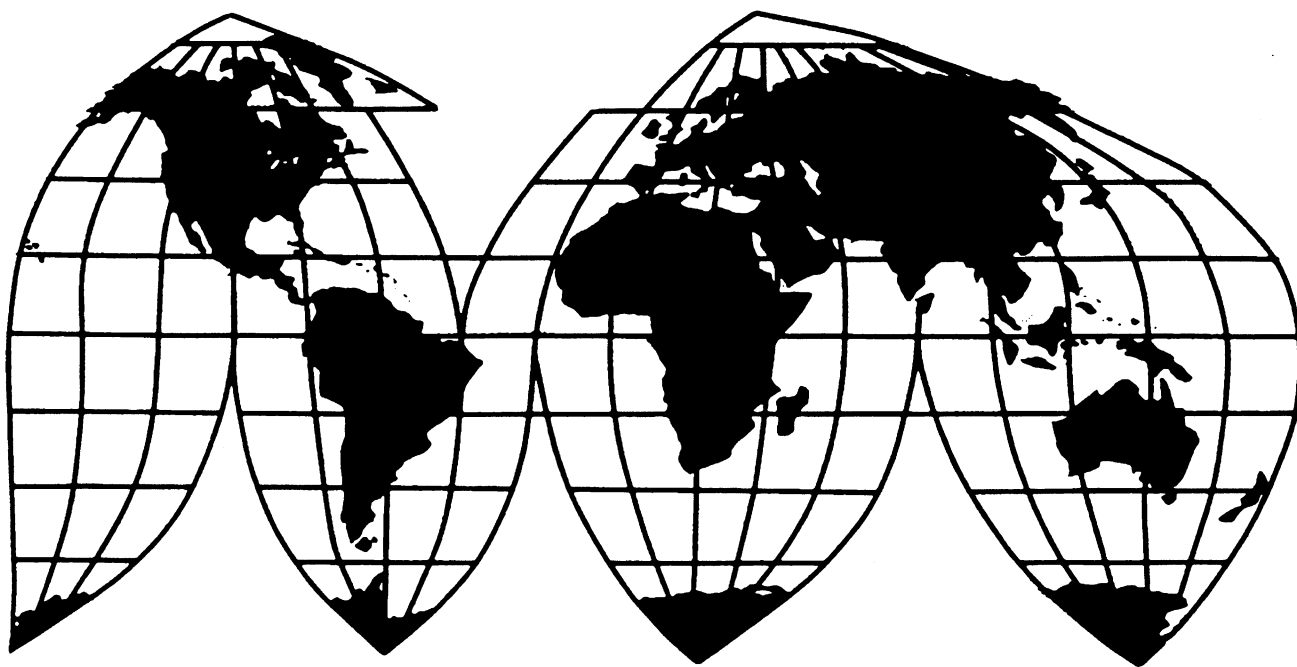
Magnesium From Canada

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

Publication 3542

October 2002

U.S. International Trade Commission



U.S. International Trade Commission

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

U.S. International Trade Commission

Washington, DC 20436

www.usitc.gov

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In July 2000, the U.S. International Trade Commission (“Commission”) determined that revocation of the countervailing duty orders covering pure magnesium and alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission also determined that revocation of the antidumping duty order covering pure magnesium from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission’s determinations were subsequently challenged before a United States-Canada Binational Panel (“Panel”), and on July 16, 2002, the Panel remanded the Commission’s determinations. The attached views were submitted to the Panel in response to the remand.

CONTENTS

	<i>Page</i>
Views of the Commission	1

Note.—Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this publication.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

VIEWS OF THE COMMISSION

By decision and Order dated July 16, 2002, a United States-Canada Binational Panel remanded the Commission's determination in *Magnesium from Canada*, Invs. Nos. 701-TA-309-A-B and 731-TA-528 (Review), USITC Pub. 3324 (July 2000) ("Original Sunset Views"). Upon consideration of the remand order we determine that under section 751(c) of the Tariff Act of 1930, as amended ("the Act"), revocation of the countervailing duty orders covering pure magnesium and alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. We also determine that revocation of the antidumping duty order on pure magnesium from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

I. INTRODUCTION

In remanding the Commission's five-year review determination, the Panel, among other things, stated that the Commission found that subject and nonsubject imports are not substitutable,¹ and that the record lacks substantial evidence to support this finding.² The Panel further found that the essential facts of this case are the same as those in *Gerald Metals*³ in that both involve "substitutable subject and nonsubject goods being simultaneously imported into the United States."⁴ In light of the Panel's conclusions regarding substitutability, the Panel instructed the Commission on remand "to establish the extent to which likely injury will be attributable to revocation of the orders" and "the extent to which material injury that might be likely to occur within a reasonably foreseeable time following revocation of any of the orders, would be attributable to revocation of the orders."⁵

The Panel has misunderstood our findings regarding substitutability, and therefore has misapplied *Gerald Metals*. With respect to both pure and alloy magnesium, we reiterate that subject imports, nonsubject imports, and the domestic like product, each are physically substitutable for one another.⁶ Notwithstanding this general substitutability, the record demonstrates important market considerations and real world market behavior that limit the commercial substitutability of nonsubject imports for either subject imports or the domestic like product. Thus, although subject imports of pure magnesium and the domestic like product are highly substitutable for one another, nonsubject imports of pure magnesium are less substitutable in comparison. Similarly, although subject imports of alloy magnesium and the domestic like product are highly substitutable for one another, nonsubject imports of alloy magnesium are less substitutable in comparison. We have taken into account these important disparities in substitutability between subject imports and the domestic like products on the one hand, and nonsubject imports on the other, in our assessment of the likelihood of continuation or recurrence of material injury to the domestic industries producing pure and alloy magnesium in the event the orders are revoked.

¹ *Magnesium from Canada (Injury)*, NAFTA Secretariat File NO. USA-CDA-00-1904-09 (July 16, 2002) ("Panel Decision") at 9-11.

² Panel Decision at 11.

³ *Gerald Metals, Inc. v. United States*, 132 F.2d 716 (Fed. Cir. 1997).

⁴ Panel Decision at 11.

⁵ Panel Decision at 12, 15 (emphasis omitted).

⁶ See Original Confidential Sunset Views at 18-19, 27, n.113 (pure) and 33-34, 39, n.171 (alloy); USITC Pub. 3324 at 11-12, 16, n.113 (pure) and 20, 23, n.171 (alloy).

The foregoing disparities distinguish the essential facts uniquely evident in *Gerald Metals* where subject and nonsubject imports were perfect substitutes for one another, both physically and commercially. While, as discussed below, *Gerald Metals* is not directly applicable in a five-year review, the panel has required us to reconsider nonsubject imports in light of *Gerald Metals*. However, due to the factual differences between these reviews and *Gerald Metals*, the conclusions we set forth in the Original Sunset Views are the same. As elaborated upon below, engaging in the analysis required by the panel, we find that revocation of the orders on pure magnesium from Canada likely would result in significant volume and price effects in the U.S. market in part because U.S. purchasers demonstrate a commercial preference for subject imports over nonsubject imports. Similarly, revocation of the order on alloy magnesium from Canada will magnify to a significant degree the likely impact of Magnola's entry into the market. We therefore find that the record continues to provide support consistent with our affirmative determinations in these reviews.

II. BACKGROUND

In July 2000, the Commission determined that revocation of the countervailing duty orders covering pure magnesium and alloy magnesium from Canada and of the antidumping duty order covering pure magnesium from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁷ The Gouvernement du Québec ("GOQ") subsequently challenged the Commission's final determinations before a United States-Canada Binational Panel.⁸ The parties briefed and argued the case before the Panel, and on July 16, 2002, the Panel issued its decision. The Panel affirmed in part and remanded in part the Commission's determinations. With respect to the remand, the Panel instructed the Commission to--

EXAMINE the likely impact of substitutable nonsubject imports sufficiently to establish the extent to which material injury that might be likely to occur within a reasonably foreseeable time following revocation of any of the orders, would be attributable to revocation of the orders;

PRESENT the price and volume implications of revocation of the countervailing duty order on alloy magnesium with sufficient analysis to show how the record supports the Commission's finding that revocation of this order would be likely to lead to Magnola [Metallurgy] entering the market either by underselling, or with volumes that would be significant in relation to the anticipated demand increases; and

PRESENT the price and volume implications of revocation of the antidumping or countervailing duty orders on pure magnesium with sufficient analysis to show how the record supports the Commission's findings that revocation of these orders would be likely to lead either to significant underselling, or to price levels for subject goods that would have significant depressing or suppressing effects.⁹

⁷ *Magnesium from Canada*, Inv. Nos. 701-TA-309-A-B and 731-TA- 528 (Review), USITC Pub. 3324 (July 2000).

⁸ See Article 1904 of the United States-Canada Free-Trade Agreement (FTA). Canadian producer Norsk Hydro Canada, Inc. ("NHCI") did not file a separate brief, but submitted a letter indicating that it "joins in the brief of the Gouvernement du Québec."

⁹ Panel Decision at 15.

We have considered the record as a whole in light of the instructions in the Panel's opinion. Having considered the Panel's order and having examined the record consistently with that order, we again determine that revocation of each of the orders would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Because the Panel did not remand the issues of the domestic like product and domestic industry, we did not reconsider those issues and we adopt our prior views on those issues in their entirety. We also incorporate in full our discussion of the background of the reviews and the legal standard for five-year reviews.

With respect to both the pure and alloy magnesium industries, we incorporate in full our prior findings, analysis and conclusions on the conditions of competition, likely volume, likely price effects, and likely impact, as supplemented and further explained below in response to the Panel's instructions.

III. SUBSTITUTABILITY

A. Commission Findings

The Panel instructions seemingly stem from the Panel's apparent belief that the Commission found that subject imports and nonsubject imports were not substitutable to any degree. In particular, the Panel characterized the Commission as having found that subject and nonsubject imports are *not substitutable* in the present case.¹⁰ However, as we clarify below, we found and continue to find that with respect to both pure and alloy magnesium, subject imports and nonsubject imports *generally are* substitutable, although there is a greater degree of substitutability between U.S. and Canadian magnesium than there is between either Canadian or U.S. magnesium and nonsubject magnesium.¹¹

The analysis of substitutability varies according to the context of its application.¹² In analyzing material injury, either in an original investigation or for the purpose of addressing the likelihood of continuation or recurrence of injury in a five-year review, substitutability is one factor we consider in evaluating volume and price effects of the subject imports.¹³ Essentially, the Commission considers the degree to which non-price factors limit the substitutability of one product for another. Substitutability often is not an absolute "either/or" condition, but rather reflects a range based upon considerations such as quality, existence and stringency of certification requirements, differences in sales terms and contractual terms, availability, delivery times, and any other factors that limit or enhance competition between the products in the U.S. market.¹⁴

¹⁰ Panel Decision at 9-11.

¹¹ See Original Confidential Sunset Views at 18-19, 27, n.113 (pure) and 33-34, 39, n.171 (alloy); USITC Pub. 3324 at 11-12, 16, n.113 (pure) and 20, 23, n.171 (alloy).

¹² See *R-M Industries, Inc. v. United States*, 848 F. Supp. 204, 210, n.9 (Ct. of Int'l Trade 1994). The statute does not specifically refer to "substitutability."

¹³ See, e.g., *Committee of Domestic Steel Wire Rope and Specialty Cable Mfrs v. United States* 201 F. Supp.2d 1287 (Ct. Int'l Trade 2002); *Far Eastern Textile Ltd v. USITC*, 2002 WL 915252 (Ct. Int'l Trade Aug. 14, 2001); *R-M Indus, Inc. v. United States*, 848 F.Supp. 204, 210 n.9 (1994).

¹⁴ See, e.g., *Altix, Inc. v. United States*, 2002 WL 1560884 at 2-5 (Ct of Int'l Trade 2002) (upholding Commission's finding of "at least a moderate level of substitutability" between the subject imports and the domestic like product); *Kern-Liebers USA, Inc. v. United States*, 19 CIT 87, 99, 102 (1995), *aff'd sub nom, United States Steel Group v. United States*, 96 F.3d 1352 (Fed. Cir. 1996) (upholding Commission's finding of "limited" substitutability.) See also *Cemex, S.A. v. United States*, 790 F.Supp. 290, 296 (Ct Int'l Trade 1992), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993) ("there is no real contradiction between [a Commissioner's] findings that cement is 'quite' substitutable for purposes of the regional injury determination and her conclusion that it is not 'perfectly'").

Our evaluation of substitutability as a factor in addressing likely volume and price effects has two components. First, we consider the degree to which the subject imports and the domestic like product are substitutable for one another. Second, where appropriate to consider the role of nonsubject imports, we consider the degree of substitutability between the subject imports and the nonsubject imports.¹⁵

With respect to the first inquiry, we found and continue to find that, for both pure and alloy magnesium, the domestic and Canadian products are highly substitutable. The Panel affirmed this finding,¹⁶ and we have not revisited it except as necessary to explain the differences in degrees of substitutability among domestic products, subject imports, and nonsubject imports. With respect to the second inquiry, we find that the subject imports from Canada and the nonsubject imports in general are substitutable, but that there are limitations on their practical substitutability because they do not compete in the U.S. market on the same terms.¹⁷ In other words, although subject imports, nonsubject imports, and the domestic products are physically substitutable for one another, the exact degree of commercial substitutability between nonsubject imports and U.S. magnesium or imports from Canada is less than the degree of substitutability between U.S. and Canadian products.¹⁸ We discuss these findings further in our respective analyses below of the separate pure and alloy magnesium markets.

B. Legal Considerations Regarding the Applicability of Gerald Metals

The Panel concluded that the decision of the Federal Circuit in *Gerald Metals* is factually and legally on point to these reviews.¹⁹ To the extent the Panel has instructed the Commission to reexamine the role of nonsubject imports that generally are substitutable for the subject imports in order to ascertain whether revocation of the antidumping and countervailing duty orders would be likely to lead to continuation or recurrence of injury to the respective domestic industries within the reasonably foreseeable future, we have done so and further explain our findings below.

In *Gerald Metals*, the court was reviewing the Commission's determination in an original investigation. As found by the *Gerald Metals* court, in an original investigation the Commission must determine whether the subject imports are a non-tangential cause of the *existing* injury or threat thereof to the domestic industry.²⁰ In a five-year review, however, the Commission focuses on whether material injury *in the future* will be likely if the existing antidumping and countervailing duty orders are revoked. That inquiry by its very nature focuses on the likely future effects of removing constraints upon the subject imports, and therefore any likely injury found by the Commission is necessarily linked to the subject imports. Thus, these two types of inquiries are conceptually distinct.²¹

substitutable for purposes of the elasticities analysis.)

¹⁵ See *Gerald Metals, Inc. v. United States*, 132 F.2d 716 (Fed. Cir. 1997).

¹⁶ The Panel found that these findings were "overwhelmingly confirmed" by the questionnaires. Panel Decision at 40, n.13.

¹⁷ Since we have found that the domestic product and the Canadian product are highly substitutable, our findings with respect to the comparison of subject and nonsubject imports applies equally to any comparison of domestic products and nonsubject imports.

¹⁸ See Original Confidential Sunset Views at 18-19, 27, n.113 (pure) and 33-34, 39, n.171 (alloy); USITC Pub. 3324 at 11-12, 16, n.113 (pure) and 20, 23, n.171 (alloy).

¹⁹ Panel Decision at 7-9, 11-12.

²⁰ See *Gerald Metals*, 132 F.3d at 719-720, 722.

²¹ With respect to the Panel's concerns that the Commission did not consider the impact of other factors, such as nonsubject imports, to establish "the extent" to which likely injury is attributable to subject imports, we note that

In light of the Panel's reliance on *Gerald Metals* and the URAA Statement of Administrative Action (SAA) as the basis for its instruction that the Commission examine other factors (*i.e.*, nonsubject imports) to ensure that the Commission did not attribute injury from other sources to the subject imports, we have responded to these instructions in a manner consistent with the U.S. statute and the cited authorities. We discuss our examination of the role of nonsubject imports in each of the domestic magnesium industries in the respective volume and price effects discussions below.

C. Factual Considerations Regarding the Applicability of Gerald Metals

In these reviews, we find that subject and nonsubject imports (which are produced in a number of countries, including China, Israel and the Commonwealth of Independent States ("CIS")) are not *identical*; in contrast the Commission majority in the *Gerald Metals* remand found that the subject CIS and nonsubject CIS products were identical and perfect substitutes for one another, given that the unfairly and fairly traded imports were the same product produced by the same two Russian producers and only differed in terms of which company traded the magnesium.²² Further, the facts of the present reviews differ from those in the *Gerald Metals* investigation in the additional aspect that in the *Gerald Metals* remand the Commission majority found there to be only a moderate degree of substitutability between the subject imports and the domestic like product.²³

Thus, the factual setting in these reviews is in important ways the inverse of those in the *Gerald Metals* investigation. In these reviews, the domestic product and subject Canadian imports are highly substitutable with one another, but the nonsubject imports are less substitutable with both the subject imports and the domestic product. In *Gerald Metals*, the Commission majority found that the domestic product and subject pure magnesium imports from Ukraine were only moderately substitutable for one another, whereas the nonsubject CIS imports were nearly perfect substitutes for the subject imports from the Ukraine.

IV. REVOCATION OF THE ANTIDUMPING AND COUNTERVAILING DUTY ORDERS ON PURE MAGNESIUM FROM CANADA IS LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

A. Conditions of Competition

We adopt in its entirety our discussion of the Conditions of Competition relevant to our evaluation of the pure magnesium industry in the Original Sunset Views.²⁴ We note that, with the exception of the substitutability question, our findings on conditions of competition remain undisturbed by the Panel. With respect to the question of substitutability, we further clarify our findings in response to the Panel's concerns.

As we noted in our Original Sunset Views, subject imports of pure magnesium and the domestic

nothing in the statute or judicial precedent (including *Gerald Metals*) requires such an analysis by the Commission even in an original determination.

²² See *Gerald Metals, Inc. v. United States*, 27 F. Supp.2d 1352, 1358, 1364 (Ct Int'l Trade 1998) (affirming ITC's remand determination).

²³ See *Gerald Metals*, 27 F. Supp.2d at 1362.

²⁴ Confidential Views at 14-19, USITC Pub. 3324 at 9-12.

like product consistently have been,²⁵ and continue to be, very close substitutes. Most purchasers reported few differences between U.S.-produced and subject Canadian pure magnesium, and all responding purchasers rated both products comparable in terms of technical support and service, scrap recycling programs, reliability of supply, product range, product form, shape and size, product consistency, packaging, and delivery terms.²⁶

Nonsubject imports of pure magnesium are subject to the same qualification requirements as U.S.- and Canadian-produced pure magnesium,²⁷ and therefore generally are substitutable for the latter once qualified.²⁸ However, as a practical matter, there are some important limitations on the actual commercial substitutability between nonsubject imports and both the domestic products and subject imports. Both U.S. and Canadian producers indicated to varying degrees that differences in price and quality, the availability of scrap recycling programs, and the desire to have a North American supplier limit the extent to which nonsubject imports are substitutable for U.S. or Canadian products.²⁹

For example, *** maintained that there are significant price and quality differences between nonsubject imports and both U.S. and Canadian magnesium.³⁰ *** indicated that nonsubject imports of pure magnesium from Russia, China, Kazakhstan, Brazil and to a certain extent Israel are considered to be of lower quality than U.S. and Canadian pure magnesium.³¹ The perceptions reflected in *** questionnaire response have translated into some practical differences in competitive conditions in the

²⁵ See *Magnesium from Canada*, Inv. Nos. 701-TA-309 and 731-TA-528 (Final) (Remand), USITC Pub. 2696 (Oct. 1993) (“Original Remand Determination”) at 6.

²⁶ CR and PR at Figure II-1. We note that the Panel did not question the Commission’s findings of close substitutability between domestic pure magnesium and subject imports of pure magnesium.

²⁷ CR at II-14-15 and II-17, PR at II-9. Nearly all responding purchasers require their suppliers to become certified or prequalified and most buy pure magnesium only from certified suppliers. CR at II-13, PR at II-7. Factors considered by pure magnesium producers in their qualification process include quality, price, reliability, delivery, size and shape of the ingot, and commitment to the market. *Id.* In addition to conformity with ASTM standards, purchasers judge the quality of a supplier’s pure magnesium based on purity, surface characteristics, metal chemistry and cleanliness, oxides, and ingot format and size. CR at II-12, PR at II-7.

²⁸ As we noted in our Original Sunset Views, in the five years following the original investigation and the consequent imposition of the antidumping and countervailing duty orders on pure magnesium from Canada, there was an increase in U.S. imports of pure magnesium from third countries. See CR and PR at Table I-1. Since 1995, there were antidumping duty orders on imports of pure magnesium from China and Russia. However, the order on imports from Russia excluded the major Russian producers and exporters of pure magnesium, and thus imports from those producers and exporters continued to enter the U.S. market without restraint.

²⁹ See CR at II-17, PR at II-9. The Panel appears to have overlooked the Commission’s discussion of the views of the U.S. and Canadian producers that there are constraints on the degree of substitutability between subject imports and nonsubject imports. See *Panel Decision* at 10-11. We find that these views are the most probative on this issue in the context of these reviews because of the U.S. and Canadian producers’ agreement at some level that the degree of substitutability between nonsubject imports and both U.S. and Canadian product is less than the degree of substitutability between U.S. and Canadian products. We note that the responses to the purchasers’ questionnaires confirm this view. We regret the Panel’s impression that “scattered references” in the purchasers’ questionnaires to “distinctions material to substitutability” and “a few contrary comments on the importers’ questionnaires” constitute “scant evidence.” *Panel Decision* at 11. As noted, those responses merely confirm the views expressed by both U.S. and Canadian producers. As the fact-finder in these reviews, we have determined to place more weight on the questionnaire responses, including in particular those of *** that demonstrated there are valid commercial limitations on the substitutability between nonsubject imports and both domestic pure magnesium and the subject imports from Canada.

³⁰ CR at II-16-17, PR at II-9.

³¹ CR at II-15, PR at II-9.

market. Thus, ***.³² Under these terms, *** will lower its prices to meet those of a competitor only if that competitor ***.

*** disagreed with *** as to the existence of significant physical differences between U.S./Canadian magnesium and nonsubject imports.³³ Nonetheless, *** noted that the U.S. and Canadian product hold some advantages over nonsubject imports in sales to U.S. purchasers because of their scrap recycling programs and the purchasers' desire to have access to a North American supplier in order to assure availability and reliability of delivery.³⁴

B. Likely Volume of Subject Imports³⁵

In the original underlying investigation, the Commission found that the volume of dumped and subsidized imports, measured by both quantity and value, was significant, and increased substantially during the period of investigation.³⁶ The Commission further found that market penetration of subject imports of pure magnesium, by both quantity and value, increased dramatically during the period of the investigation.³⁷ Since the period examined in the original investigations, the volume and market share of subject imports of pure magnesium from Canada have been well below the levels they had attained by 1991.³⁸ While the volume of subject imports rose in 1999 as compared to 1998, the volume remained relatively low.³⁹ Given the dramatic decline in subject import volume immediately following the imposition of the antidumping and countervailing duty orders in 1992, we find that the low volume of subject imports since then can be attributed to the effect of those orders.⁴⁰

We find that subject Canadian producers have the capability to increase shipments of subject pure magnesium to the United States significantly within a reasonably foreseeable time. As of the date of our review determination in June 2000, Magnola was positioned to enter the U.S. market commercially within the next year with the capacity to produce 63,000 metric tons per annum of magnesium by the end of 2001, more than any other Canadian or U.S. producer currently can produce.⁴¹ Using Magnola's own estimates, the company intended to produce *** metric tons of pure magnesium in

³² CR at V-4 & n.3, PR at V-4 & n.3.

³³ CR at II-17, PR at II-9.

³⁴ CR at II-17, PR at II-9. *** indicated that the pure magnesium imported from Russia and China was produced with lower labor and environmental standards. *Id.*

³⁵ We note that the Panel upheld the Commission's consideration of Magnola's likely exports, a critical factor in the Commission's evaluation of the likely volumes of subject pure magnesium imports if the orders are revoked. The Panels' remand regarding the pure magnesium determination appears to focus on concerns about our findings regarding likely price effects, and we have responded to those concerns in the discussion of prices that follows. We here reiterate our findings concerning the likely volume of subject imports in order to present the full picture of the likely impact of revocation of the orders on the domestic industry producing pure magnesium.

³⁶ Original Remand Determination at 15. From 1989 to 1990, the quantity of subject pure magnesium imports increased from *** metric tons to *** metric tons. CR and PR at Table I-1. In 1991, these subject imports increased another *** percent, to *** metric tons. *See id.*

³⁷ Original Remand Determination at 15. From 1989 to 1990, subject import market share increased from *** percent to *** percent. *See* CR and PR at Table I-1.

³⁸ CR and PR at Figure I-1.

³⁹ CR and PR at Table I-1. Subject import market share went from *** percent market share in 1998 to *** percent in 1999. *Id.*

⁴⁰ *See* CR and PR at Figure I-1.

⁴¹ *See* CR and PR at Table IV-3; CR at III-1-2, IV-6-7, PR at III-1, IV-4.

2001 and *** metric tons of pure magnesium in 2002.⁴² We find that the additional available capacity attributable to Magnola by itself indicates that Canadian producers as a whole have the capability to increase significantly their shipments of pure magnesium to the United States.

While NHCI was operating during the period examined for the review at effectively full capacity, we note that it carried increasing and *** amounts of its production in inventory.⁴³ Moreover, the company publicly announced its intention to double its capacity in two stages, with first stage construction (adding *** metric tons to total magnesium capacity) originally scheduled to begin in 1998.⁴⁴ Although NHCI has not yet broken ground on this project, this substantial new capacity requires only 18 months to two years after construction begins to become operational,⁴⁵ a prospect that we find would be even more likely if the orders were revoked. In addition, only *** percent of NHCI's 1999 capacity was committed pursuant to pure magnesium contracts for 2000 and beyond, which leaves considerable capacity available to produce additional pure magnesium destined for the U.S. market.⁴⁶

We further find it likely that significant volumes of Magnola's production, as well as any increased capacity by NHCI, will be targeted to the U.S. pure magnesium market. While the demand for pure magnesium is essentially flat, it is likely that Magnola and NHCI will produce and sell significant quantities of pure magnesium because demand for that product remains significant.⁴⁷ NHCI's home-market shipments of pure magnesium are *** and out of proportion with capacity, at less than *** percent of NHCI's primary magnesium capacity.⁴⁸ As evidenced by NHCI's marketing efforts prior to the imposition of the antidumping and countervailing duty orders, the United States is the logical market for Canada's pure magnesium output, given the size and proximate location of the U.S. market and the fact that the demand in other major export markets is already largely met by nonsubject imports.⁴⁹ Most importantly, Magnola indicated that it expected to sell approximately *** metric tons of pure magnesium to purchasers in the United States in 2001.⁵⁰ This would be equivalent to approximately *** percent of apparent U.S. consumption in 1999.⁵¹

NHCI's inventories in Canada of pure magnesium *** from 1998 to 1999, to a level equivalent to *** percent of NHCI's pure magnesium production and *** percent of subject Canadian exports of pure magnesium to the United States for the period.⁵² In fact, NHCI's current inventory levels alone

⁴² See CR at IV-6-7 & n.4, PR at IV-4, n.4. See also Tr. at 27.

⁴³ CR and PR at Table IV-3.

⁴⁴ See Magcorp's Prehearing Brief at Exhibit 33.

⁴⁵ Tr. at 108, 170-71.

⁴⁶ CR at V-4, PR at V-3. NHCI also has *** accounting for a substantial portion of 1999 capacity. See CR at V-5, PR at V-3. However, as stated above, NHCI has publicly announced plans to increase capacity when market conditions are favorable; revocation certainly would improve market conditions for exports from Canada to the United States.

⁴⁷ See CR at II-7-8, nn. 10, 11, & 12, PR at II-4-5, nn. 10, 11 & 12; Tr. at 95, 185-86. In 1999, pure magnesium accounted for *** percent of total magnesium demand. See CR and PR at Tables C-1 and C-3. Even as the share accounted for by pure magnesium declines as the demand for alloy magnesium grows, pure magnesium will continue to account for a significant portion of magnesium demand in the reasonably foreseeable future. See CR at II-7-8, PR at II-4-5, CR and PR at Tables C-1, C-2 and C-3.

⁴⁸ See CR and PR at Table IV-3.

⁴⁹ See Tr. at 44, 152, 187-88.

⁵⁰ CR at IV-6-7, PR at IV-4.

⁵¹ See CR and PR at Table I-4.

⁵² CR and PR at Table IV-3.

would be equivalent to *** percent of apparent U.S. consumption of pure magnesium in 1999.⁵³ These *** inventories further indicate the state of demand in Canada, as well as NHCI's ability to increase its exports to the United States separate and apart from the impact of substantial increases in capacity within a reasonably foreseeable time upon revocation of the order.

In addition, from a production and supply perspective, Canadian producers have substantial flexibility to switch production between pure magnesium and alloy magnesium.⁵⁴ Thus, NHCI and Magnola could redirect or shift production from alloy magnesium to pure magnesium by retooling their equipment to forgo the addition of alloying elements prior to casting the magnesium into ingot form.⁵⁵

NHCI's rapid acquisition of significant U.S. market share prior to the imposition of the antidumping and countervailing duty orders on pure magnesium, the substantial additional capacity expected to be added by Magnola and NHCI, their ability to shift production from alloy magnesium to pure magnesium, increasing inventory levels in their home market, their ability and incentive to increase exports to the U.S. market significantly given its size and proximate location, and the limited demand in Canada, all indicate that NHCI and Magnola are likely to export significant volumes of pure magnesium to the United States within the reasonably foreseeable future if the orders are revoked. Consequently, based on the record in these reviews, we conclude that the volume of subject imports likely would increase to a significant level and would regain significant U.S. market share if the orders were revoked.⁵⁶

C. Likely Price Effects of Subject Imports

The Panel stated that "[a]s pricing is a significant factor involved in this case, it is important that the Commission clearly identify how it concluded that the revocation of these orders would be likely to lead to significant underselling, and to price levels for subject goods that would have significant price depressing or suppressing effects."⁵⁷ We explain further below the basis for our finding concerning likely price effects.

⁵³ See CR and PR at Table I-4 (1999 apparent U.S. consumption was *** metric tons) and Table IV-3 (NHCI end of 1999 inventories were *** metric tons).

⁵⁴ CR at I-15-16, PR at I-8-9; See, e.g., Tr. at 53-53, 62, 114.

⁵⁵ See CR at I-16, PR at I-8-9; Tr. at 53-54, 62, 184-85.

⁵⁶ In the original final 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. The Commission rejected that argument, with explanation, in its original determinations, and performed one combined analysis of the effects of all unfairly traded imports of pure magnesium from Canada. *Magnesium from Canada*, Inv. Nos. 701-TA-309 and 731-TA-528 (Final), USITC Pub. 2550 (August 1992) at 16-17, note 60. That issue was not challenged before the 1992 U.S.-Canada Panel, and was not raised in these reviews, in which the Commission, consistent with its long-standing approach, considered the combined effects of the dumped and subsidized imports of pure magnesium.

In these reviews respondents, however, urged the Commission not to assume that subject merchandise manufactured by Magnola has or will benefit from countervailable subsidies. GOQ's Posthearing Brief at 5-8; Tr. at 145-47. For the reasons explained in our Original Sunset Views, we rejected that argument. See, e.g., Confidential Views at 25, n.106, USITC Pub. 3324 at 15, n.106. The Panel upheld our conclusions regarding this issue. We incorporate in full our previous discussions and findings relating to this issue.

⁵⁷ Panel Decision at 14.

1. *The Original Investigations*

The starting point for our consideration of the likely price effects of revocation of the orders is the period examined in the original investigation, during which there were no orders exerting restraint on the subject imports. Consideration of that period is particularly important in these five-year reviews, because it enables us to ascertain the role and prices of the subject imports in the U.S. market during the last period in which they were not so restrained.

In the original investigations, the Commission found that, 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.⁵⁸ The Commission further noted the significance of the high degree of substitutability between U.S. and Canadian pure magnesium, a condition of competition that continues to apply. During the original investigations, as during these reviews, most purchasers of pure magnesium found few, if any, differences between the U.S. and Canadian products. Prior to the imposition of the antidumping and countervailing duty orders, the U.S. and Canadian products sold at similar prices, with price changes by one firm often followed by equivalent changes by other producers. The high substitutability and historic price alignment between U.S. and Canadian pure magnesium indicates that now, as during the original investigations, any changes in subject import prices likely would have significant effects on prices for the domestic like product.⁵⁹

2. *The Likely Use of Price to Increase Sales Volume*

In these reviews, the U.S. market is faced with the prospect of massive volumes of subject imports from subject Canadian producers. Due to the small size of the Canadian home market and the proximity of the United State to Canada, Canadian producers must rely heavily on sales in the U.S. market, as evidenced by market behavior prior to imposition of the orders. Given the high degree of substitutability between U.S. and Canadian product and the price sensitivity of this market, it is highly likely that, absent the orders, these producers will undersell or use other price incentives to sell these large and increasing volumes of pure magnesium in the U.S. market.

Absent the orders, given the nature of this market, there is a substantial likelihood that Magnola would offer its product at low prices in order to obtain new customers. We find it likely that this large new entrant selling a highly substitutable product in the pure magnesium market in which demand is stagnant would need to offer price incentives in order to gain new customers. This would exert pressure

⁵⁸ Original Remand Determination at 17. The Commission found that quarterly price comparisons were not particularly useful to determine whether any underselling was significant, 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. *Id.* at n.90. Likewise, we do not find the limited quarterly price comparisons obtained during these reviews to be particularly probative of current or likely future price effects. As discussed, *infra*, however, we have examined further the average unit values for the subject imports, nonsubject imports, and the domestic product, in an effort to respond to the Panel's concerns.

⁵⁹ Respondents argued that the degree of captive consumption is high enough to shield the industry from any adverse effects from the subject imports. GOQ's Prehearing Brief at 4. As we noted in the Original Sunset Views, a significant percentage--approximately ***--of domestic production of pure magnesium is sold in the merchant market. CR and PR at Table III-2. Moreover, that evidence in the record of these reviews indicates that Northwest's shipments of pure magnesium to its corporate parent, Alcoa, does not fully shield it from the effects of the subject imports. *See* CR at II-2, PR at II-1. As reported by ***, the transfer price for shipments from Northwest to Alcoa is ***, but instead is ***, and has been based on ***. CR at II-2, III-26, PR at II-1, III-8. The Panel did not disturb these findings and we incorporate them in full in these remand views.

on the U.S. and Canadian producers selling a highly substitutable product to lower their prices in order to keep their customers, or alternatively to sacrifice market share.

The two U.S. producers, Magcorp and Northwest, ***, and at the time of the five-year review, Magnola already had made sales approaches to U.S. purchasers, including essentially all of Magcorp's customers.⁶⁰ The record evidence further indicates that Magnola's marketing team consists of a number of former Dow employees, who are experienced in selling magnesium in the United States and have purchaser contacts throughout the country.⁶¹ Thus, the evidence demonstrates the ability and intent of Magnola to move quickly into the U.S. market as it begins commercial production. Magnola's own projections called for the export of *** metric tons of pure magnesium to the U.S. market in 2001;⁶² we find that in order to achieve this goal, Magnola would engage in aggressive price competition for sales of a commodity product in a flat market. This strategy is consistent with the pre-order behavior of the subject imports. Indeed, the record establishes that at the time of the five-year review Magnola was already seeking sales to U.S. customers who purchase from other producers, including Magcorp.⁶³

In addition, Magnola's entry likely would put pressure on NHCI, which also competes for the same customers and sells a highly substitutable product, to lower prices in the U.S. market. In order for NHCI or Magnola to take customers away from each other or from U.S. producers, they likely would reduce their prices below those of their competitors, in turn forcing U.S. producers and nonsubject producers or importers to reduce their prices if they choose to maintain their market shares.

The likelihood of this scenario is confirmed by the price-sensitive nature of the existing contracts used by Magnola's most likely competitors. *** NHCI's pure magnesium contracts contained ***.⁶⁴ Even slight declines in prices offered by the Canadian producers are likely to have adverse effects for the domestic producers. *** Magcorp's pure magnesium contracts contained ***.⁶⁵ Given the *** duration of Magcorp's contracts, purchasers can easily force Magcorp to lower its *** negotiated prices to meet lower prices offered by its Canadian competitors for highly substitutable and readily available pure magnesium.⁶⁶

3. Nonsubject Imports

The Panel stated that it did "not appear that the Commission took into account the impact of pricing of nonsubject imports on U.S. market prices for pure magnesium."⁶⁷ We find that it is likely that nonsubject imports would also be drawn into the spiral of declining prices that is likely to result from revocation of the orders. However, this does not detract from our finding that revocation of the orders

⁶⁰ Tr. at 27- 28, 35. *See also* Purchasers' Questionnaire Responses of ***, Magcorp's Prehearing Brief at Exhibit 30.

⁶¹ Tr. at 38.

⁶² CR at IV- 6-7, PR at IV-4. *** metric tons is (*** percent of the *** metric tons that Magnola projected for sales of pure magnesium in the U.S. market in 2001).

⁶³ Tr. at 27-28, 35.

⁶⁴ CR at V-3-4, PR at V-3; NHCI's Posthearing Brief at Attachment 1, pp. 1-2, Conf. Doc. 24.

⁶⁵ USITC Pub. 3324 at 16, n.114, Confidential Determination at 27, n.114, *citing* Magcorp's Posthearing Brief at 2, Conf. Doc. 25, and Magcorp's Producers' Questionnaire Response at 29-A, Conf. Doc. 93.

⁶⁶ The likelihood of price depression in this market is highlighted by the information on the record regarding the first quarter of 2000, showing a trend towards contracts of no more than one year in duration that ***, and a shift from ***. Even without the increased pressure that would prevail were the orders revoked, these contract trends have already resulted in ***. CR and PR at Table V-1.

⁶⁷ Panel Decision at 14.

itself would be likely in the first instance to have adverse price effects for the domestic product. First, the record indicates that at the time of the five-year reviews Magnola already had employed an experienced sales force that was soliciting business from *** major customers.⁶⁸ We find this evidence significant for these reviews because it indicates that Magnola intends to compete directly with the U.S. producers for the business of many of the major U.S. purchasers.

Second, as we have noted, the Canadian product is the most directly competitive with the domestic product in the U.S. market, largely because Canadian production is in closer physical proximity to the purchasers, consequently providing supply reliability and product availability advantages. The greater degree of competitiveness between U.S. and Canadian product than between U.S./Canadian and nonsubject imports is reflected in ***. The way in which the U.S. and Canadian product compete in the U.S. market leads us to find that any lower prices offered by Magnola in its efforts to enter the market and by NHCI in response to Magnola's price offerings likely would have direct adverse effects on prices for the domestic product.

Moreover, given that subject imports and nonsubject imports physically are substitutable, as are the domestic product and nonsubject imports, the increased presence of subject imports offered at lower prices likely would force down prices of the nonsubject imports or result in a loss of market share for nonsubject imports. This in turn would reinforce the price depression cycle and result in additional adverse price effects for the domestic industry.

Finally, the average unit value ("AUV") data for the respective products illustrate that there is more than a tangential relationship between the Canadian products and prices in the U.S. market.⁶⁹ During the 1998-1999 period examined for purposes of the five-year review, the shipment quantities as well as the market shares of both domestic and nonsubject pure magnesium declined.⁷⁰ At the same time, despite the antidumping and countervailing duty orders, subject import volume increased, as those imports gained market share in this flat and price-sensitive market at the expense of nonsubject and domestic products.⁷¹ Coincident with the increases in subject imports' absolute volume and market share, the AUVs for U.S. pure magnesium and subject Canadian pure magnesium declined by *** percent and *** percent, respectively.⁷² The AUVs for the nonsubject non-Canadian imports declined an insignificant amount (*** percent), but those imports lost market share.⁷³ These data demonstrate the trade-off confronting producers, whether subject or nonsubject, who face low-priced competition – they must either cut prices or lose market share. Significantly, although all unit values declined or remained stable during this period, only the subject Canadian product increased in volume and market share.⁷⁴

⁶⁸ See *supra*, note 60.

⁶⁹ The Commission generally uses caution when relying on average unit values, but finds them to be a useful measure of comparative average prices in cases such as this where precise pricing information is unavailable and the products are generally fungible. The AUVs in these reviews reflect the same basic type of product, and concerns about product mix that sometimes arise in other cases are not present here.

⁷⁰ CR at C-3 and C-4, Table C-1.

⁷¹ *Id.* The subject imports gained *** percentage points in market share, which in an absolute sense would appear to be a small share. However, as discussed, we find the fact that subject imports alone gained market share at the expense of nonsubject and domestic product to be indicative of the likely effects that revocation of the orders would have.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

This pattern is similar to that observed in the original investigations,⁷⁵ and is similarly indicative of the relationship between subject imports and prices in the U.S. market.

4. *Economic Model Estimates*

In its decision, the Panel noted that the Commission did not take into account in its analysis the COMPAS presentation contained in Appendix D of the Staff Report.⁷⁶ The Commission's findings regarding likely volume and price effects are fully supported by the record in these reviews. We have examined the empirical data in the record closely and determined them to be more useful than conclusions based on the results of the COMPAS model. While COMPAS has been a tool available to the Commission, it is not a substitute for considering the factors specified in the statute and the data on the record.⁷⁷

The Court of International Trade has recognized repeatedly that the Commission may reasonably reach a conclusion based upon facts in the record that vary from a theoretical economic model.⁷⁸ In fact, it is well settled that economic models "based on a set of assumptions, may be outweighed by real world data."⁷⁹ This is particularly so in the context of a five-year review, given that the model is dependent upon variables that are themselves affected by the existence of the orders.⁸⁰ Indeed, the model employs market share data reflective of the current levels of subject imports, which in a five-year review may be deflated precisely because the orders are having a restraining effect. In these reviews we find this to be the case; given the role these imports played in the U.S. market during the original investigations, we do not find the levels upon which the economic model is based to accurately reflect likely volumes were the orders to be revoked.

5. *Conclusion Regarding Likely Price Effects*

For the foregoing reasons, we find that, without the antidumping and countervailing duty orders, NHCI and Magnola likely would decrease prices in order to gain market share in a market in which demand is projected to remain flat, likely recreating the type of significant price depression evidenced during the original investigations. We therefore find that revocation of the antidumping and countervailing duty orders on pure magnesium from Canada would be likely to lead to significant

⁷⁵ See Table I-1, CR at I-3.

⁷⁶ Panel Decision at 14. We note that no party suggested to the Commission that it should rely on the COMPAS model, and no party appealed the Commission's failure to rely on this model. As the Panel implicitly recognized in its discussion of the belatedly-raised "likely" issue (Decision at 7), under U.S. law the courts will rule only on arguments properly and timely raised by counsel.

⁷⁷ In fact, the Commission does not generally rely on the COMPAS model even in making present material injury determinations in original investigations.

⁷⁸ *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1058-59 (1995); see *Alberta Pork Producers' Mktg. Bd. v. United States*, 683 F. Supp. 1398, 1401 (Ct. Int'l Trade 1988) (Commission not "handcuffed" to consideration of economic model and is free to consider evidence in the record); *Maine Potato Council v. United States*, 617 F. Supp. 1088, 1090 (Ct. Int'l Trade 1985) ("[t]he Commission is not required to accept data which in the course of ordinary scientific research could properly be rejected").

⁷⁹ *Maine Potato Council v. United States*, 613 F. Supp. 1237, 1244 n.8 (Ct. Int'l Trade 1985).

⁸⁰ In addition, the COMPAS model estimates the possible effect on sales, but not profitability or other financial data.

underselling by the subject imports of the domestic like product, as well as significant price depression, within a reasonably foreseeable time.⁸¹

D. Likely Impact

Having responded to the Panel's concerns, and explained in fuller detail the basis for our findings on substitutability and the consequent likely volume and price effects of revocation of the orders, the Commission adopts in its entirety its findings in the Original Sunset Views concerning likely impact. Accordingly, we conclude that, if the antidumping and countervailing duty orders are revoked, subject imports of pure magnesium from Canada would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

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

A. Conditions of Competition

We adopt in its entirety our discussion in the Original Sunset Views of the Conditions of Competition relevant to our evaluation of the alloy magnesium industry.⁸² We note that, with the exception of the substitutability question, our findings on conditions of competition remain undisturbed by the Panel. With respect to the question of substitutability, we further clarify our findings in response to the Panel's concerns.

We find that the domestic product and subject imports of alloy magnesium have remained very close substitutes, as they were during the original investigations.⁸³ *** U.S. and Canadian producers as well as most purchasers reported few differences between U.S.-produced and subject Canadian alloy magnesium, and all responding purchasers rated both products comparable in terms of reliability of supply, product range, product consistency, minimum quantity requirements, U.S. transportation costs, and transportation networks.⁸⁴

The market for alloy magnesium continues to be price competitive.⁸⁵ Most responding alloy magnesium purchasers reported that their purchasing patterns have not changed significantly since 1992.⁸⁶ Alloy magnesium purchasers reported a variety of purchasing practices, ranging from weekly to

⁸¹ As we stated in the Original Sunset Views, we decline to look behind Commerce's countervailing duty findings concerning pure magnesium. Confidential Views at 13-14 n.45, 25 n.106, USITC Pub. 3324 at 9, n.45, 15, n.106. Although the statute directs us to consider information concerning the nature of the subsidy, it does not provide us with the authority to ignore Commerce's determination of the likely existence of a countervailable subsidy.

⁸² Confidential Views at 31-34, USITC Pub. 3324 at 18-20.

⁸³ See Original Remand Determination at 11.

⁸⁴ CR at II-14-15, PR at II-9; CR and PR at Figure II-2. We note that the Panel has not questioned the Commission's findings concerning the close substitutability between the domestic product and subject imports of alloy magnesium.

⁸⁵ See CR at II-9-10 and V-3, PR at II-6 and V-2.

⁸⁶ CR at II-10, PR at II-6.

annual purchases.⁸⁷ Before making a purchase, most alloy magnesium purchasers contact between one and eight suppliers.⁸⁸ Most change suppliers only infrequently.⁸⁹ However, *** and *** indicated that they expect these patterns to change in the next two years, in *** case, as it seeks out additional suppliers who are more price competitive, and, in *** case, as it develops other suppliers to meet additional demand.⁹⁰

Contracts play an even more important role in the alloy magnesium industry than they do in the pure magnesium industry. Magcorp's ***.⁹¹ During the time-frame of the review, NHCI had ***.⁹² NHCI's largest contract, ***, and its ***.⁹³

During the period examined in these five-year reviews and as seen during the original investigations, nonsubject imports maintained a sizable presence in the U.S. alloy magnesium market.⁹⁴ Unlike pure magnesium, there are no outstanding antidumping duty orders on imports of alloy magnesium from countries other than Canada. While nonsubject imports of alloy magnesium are subject to the same qualification requirements as U.S.- and Canadian-produced alloy magnesium, there are several instances of nonsubject imports failing qualification for certain producers.⁹⁵ In addition to these instances of qualification failures, there are some important practical limitations on the commercial substitutability between nonsubject imports and both the domestic product and imports from Canada. Both U.S. and Canadian producers agree that factors such as quality, availability of scrap recycling programs, and the desire to have a North American supplier limit the extent to which nonsubject imports are substitutable for U.S. or Canadian products.⁹⁶

⁸⁷ CR at II-10, PR at II-6.

⁸⁸ CR at II-10, PR at II-6.

⁸⁹ CR at II-10, PR at II-6.

⁹⁰ CR at II-10, PR at II-6.

⁹¹ CR at V-3, PR at V-2.

⁹² CR at V-5, PR at V-3. The ***. *Id.*

⁹³ CR at V-5, PR at V-2; NHCI's Posthearing Brief at Attachment 1, pp. 1-2.

⁹⁴ CR and PR at Table I-2.

⁹⁵ CR at II-13, n.30, PR at II-8, n.30. All responding alloy magnesium purchasers require their suppliers to be certified or prequalified. CR at II-13, PR at II-8. Factors considered by alloy magnesium purchasers in their qualification process include quality, price, reliability, delivery, packaging, and recycling support. *Id.* In addition to conformity with ASTM standards, purchasers judge the quality of a supplier's alloy magnesium on the basis of surface characteristics, metal chemistry, oxides, non-metallic inclusions, and propensity to burn in the furnace upon melting. CR at II-12, PR at II-7.

⁹⁶ See CR at II-17, PR at II-9. The Panel appears to have overlooked the Commission's discussion of the unanimous views of all producers that there are some constraints on the degree of substitutability between subject imports and nonsubject imports. See *Panel Decision* at 10-11. We find that these views are the most probative on this issue in the context of these reviews because of the U.S. and Canadian producers' agreement at some level that the degree of substitutability between nonsubject imports and U.S./Canadian product is less than the degree of substitutability between U.S. and Canadian products. We note that responses to the purchasers' questionnaires confirm our view. See CR at II-12, PR at II-7. We regret the Panel's impression that "scattered references" in the purchasers' questionnaires to "distinctions material to substitutability" and "a few contrary comments on the importers' questionnaires" constitute "scant evidence." *Panel Decision* at 11. As noted, those responses merely confirm the views expressed by both U.S. and Canadian producers. As the fact-finder in these reviews, we have determined to place more weight on the questionnaire responses, including in particular those of *** that demonstrate there are valid commercial limitations on the substitutability between nonsubject imports and both domestic alloy magnesium and the subject imports from Canada.

For example, *** maintained that there are significant price and quality differences between nonsubject imports and both U.S. and Canadian magnesium.⁹⁷ *** indicated that nonsubject imports of alloy magnesium from Russia, China, Brazil and to a certain extent Israel are considered of lower quality than U.S. and Canadian alloy magnesium.⁹⁸ The perceptions reflected in *** questionnaire response have translated into some practical differences in competitive conditions in the market. Thus, ***.⁹⁹

*** disagreed with *** as to the existence of significant physical differences between U.S./Canadian magnesium and nonsubject imports.¹⁰⁰ Nonetheless, *** noted that the U.S. and Canadian product hold some advantages over nonsubject imports in sales to U.S. purchasers because of their scrap recycling programs and the purchasers' desire to have access to a North American supplier in order to assure availability and reliability of delivery.¹⁰¹

B. Likely Volume of Subject Imports

In the original underlying investigation, the Commission found that the volume of subsidized imports of alloy magnesium was significant and increased manyfold during the period of investigation.¹⁰² The Commission also found that the market penetration of subject imports increased dramatically during the period of investigation.¹⁰³ Even with the order in place, NHCI has shipped an increasing volume of subject alloy magnesium into the U.S. market since the original investigation, capturing an increasing market share.¹⁰⁴

As with pure magnesium, we find that Canadian producers have the capability to increase significantly shipments of subject alloy magnesium to the United States within the reasonably foreseeable future. While NHCI was operating during the period examined for the review at effectively full capacity,¹⁰⁵ the company publicly announced its intention to double its capacity in two stages, with first stage construction (adding *** metric tons to total magnesium capacity) originally scheduled to begin in 1998.¹⁰⁶ Although NHCI has not yet broken ground on this project, this substantial new capacity

⁹⁷ CR at II-16-17, PR at II-9.

⁹⁸ CR at II-15, PR at II-9.

⁹⁹ CR at V-5, PR at V-2; NHCI's Posthearing Brief at Attachment 1, pp.1-2.

¹⁰⁰ CR at II-17, PR at I-9.

¹⁰¹ CR at II-17.

¹⁰² Original Remand Determination at 22. Imports of NHCI's alloy magnesium increased from *** in 1989 to *** metric tons in 1991. See CR and PR at Table I-2.

¹⁰³ Original Remand Determination at 22. Imports of subject alloy magnesium accounted for *** percent of domestic consumption in 1989, but captured approximately *** of the market in 1991. See CR and PR at Table I-2.

¹⁰⁴ See CR and PR at Figure I-2 and Table I-2. The Panel apparently misunderstood the Commission's discussion of this point in the Original Sunset Views. The Commission did not find that demand in the U.S. market could not be met from domestic sources. See Panel Decision at 13. Taking total magnesium capacity into account, domestic producers could meet demand even at current capacity levels. More importantly, as we explained in our discussion of likely impact in the Original Sunset Views, Magcorp has invested in new cell technology in anticipation of increasing its production capacity. See Original Confidential Sunset Views at 44, USITC Pub. 3324 at 24. However, the loss of sales volume and the price depression likely to result from revocation of the countervailing duty order would jeopardize the implementation of Magcorp's new electrolytic cell technology, complicating its efforts to increase efficiency and capacity.

¹⁰⁵ Although NHCI is currently operating at effectively full capacity, we note that *** amounts of its production are being carried in inventory. See CR and PR at Table IV-3.

¹⁰⁶ See Magcorp's Prehearing Brief at Exhibit 33.

could be added within 18 months to two years,¹⁰⁷ a prospect that we find would be likely if the orders were revoked. While approximately *** of NHCI's current magnesium production capacity is *** and other contracts account for additional commitments, NHCI's expanded capacity will increase its ability to capture U.S. clients in the alloy market, where NHCI has chosen to focus its U.S. sales.¹⁰⁸

The Panel stated that the Original Sunset Views do not show that Magnola's supply intentions in relation to demand for alloy magnesium were taken into account as a factor in the Commission's analysis.¹⁰⁹ We explain further below how we took that factor into account. At the time of the Commission's sunset determination, Magnola was positioned to enter the U.S. market commercially within the next year or two with a large quantity of alloy magnesium. According to Magnola's own revised estimates, it intended to produce *** metric tons of alloy magnesium in 2001 and *** metric tons of alloy magnesium in 2002.¹¹⁰ Magnola unequivocally represented that *** it would have the total capacity to produce 63,000 metric tons of magnesium, more than the capacity of any other Canadian or U.S. producer. In fact, this capacity introduced by Magnola will be *** the year 1999 annual U.S. alloy magnesium consumption of *** metric tons.¹¹¹ We find that the additional available capacity attributable to Magnola by itself indicates that Canadian producers have the capability to increase significantly their shipments of alloy magnesium into the United States.¹¹²

Thus, within the year following the sunset determination, Magnola intended to increase Canadian production of alloy magnesium by an amount equal to approximately *** percent of U.S. apparent domestic consumption for 1999.¹¹³ Then in 2002, it expected to increase its alloy magnesium production by approximately an additional *** percent of its 2001 production, representing a far greater rate of increase than the predicted *** percent annual growth in U.S. demand.¹¹⁴ Notwithstanding the growth in demand for alloy magnesium, Magnola by itself would be able to overshadow all other producers as a source of supply for the U.S. market. Given the feasibility of shifting production from pure magnesium to alloy magnesium, Magnola likely would focus an even greater share of its capacity on the alloy magnesium market if the predictions for stagnation in the pure magnesium sales were borne out.

We further find it likely that significant volumes of Magnola's production, as well as any increased capacity by NHCI, will be targeted at the growing U.S. alloy magnesium market. Magnola has indicated that it expects to sell approximately *** metric tons of alloy magnesium to purchasers in the United States in 2001,¹¹⁵ a number that we find rather conservative in light of the extent of *** sales of its alloy magnesium in the United States.¹¹⁶ Still, this would account for over *** percent of 1999

¹⁰⁷ Tr. at 108, 170-71.

¹⁰⁸ See, e.g., Tr. at 124.

¹⁰⁹ Panel Decision at 13.

¹¹⁰ See CR at IV-6-7 & n.4, PR at IV-4 & n.4.

¹¹¹ CR and PR at Table I-2.

¹¹² Again, we note the ease with which purchasers may switch between the production of pure and alloy magnesium.

¹¹³ As noted, apparent domestic consumption in 1999 was *** metric tons. CR and PR at Table I-2. *** percent of that amount would be *** metric tons; Magnola expressed its intent to produce *** metric tons of alloy magnesium in 2001, the first year it would make commercial shipments. CR at IV-6-7 & n.4, PR at IV-4 & n.4.

¹¹⁴ See CR at II-7, nn.10 & 11, PR at II-4, nn.10 & 11.

¹¹⁵ CR at IV-6-7, PR at IV-4 (*** percent of the ***).

¹¹⁶ Magnola indicated that only *** metric tons of its *** metric tons projected alloy production in 2001 would be sold in North America. CR at IV-6-7 & n.4, PR at IV-4 & n.4. Although we accept Magnola's estimates for the purposes of our findings, we note that this percentage appears to be unduly low in light of the factors we discuss *infra* and given that its Canadian competitor NHCI ships *** of its alloy magnesium production to U.S. and

apparent U.S. consumption.¹¹⁷

NHCI already has shown its proclivity to focus its sales on the U.S. alloy magnesium market, and likely would be as or more active in this effort if the countervailing duty order is lifted. In addition, as with pure magnesium, the United States is the logical market for Canada's alloy magnesium output, given the size and proximate location of the U.S. market and the fact that the demand in other major export markets is met largely by nonsubject imports.¹¹⁸ Although Canadian home market demand grew from 1998 to 1999, that demand remains low in relation to Canadian producers' capacity, production and shipments to the United States.¹¹⁹

NHCI maintained *** inventories in Canada of alloy magnesium throughout the review period.¹²⁰ In 1999, NHCI's inventories were at levels equal to *** percent of Canadian alloy magnesium exports to the United States.¹²¹ These *** inventories further indicate NHCI's ready ability to increase its exports to the United States, separate and apart from the impact of substantial increases in capacity, within a reasonably foreseeable time upon revocation of the order.

As we have also noted, from a production perspective, Canadian producers have substantial flexibility to switch production between pure magnesium and alloy magnesium.¹²² Thus, if the countervailing duty order on alloy magnesium were revoked while the orders on pure magnesium were retained, NHCI and Magnola could easily redirect or shift additional production from pure magnesium to alloy magnesium. Moreover, Magnola alone could convert its 63,000 metric ton capacity entirely to production of alloy magnesium, an amount that could saturate the Canadian and U.S. markets despite the growth in demand.

The already substantial market presence of subject imports from Canada, the stated focus by NHCI and Magnola on the alloy magnesium market, the substantial additional capacity expected to be added by Magnola and NHCI, their ability to shift production from pure magnesium to alloy magnesium, their ability to increase significantly exports to the U.S. market given its size and proximate location, the limited demand in Canada and NHCI's *** inventory levels all indicate that subject Canadian producers are likely to export significant additional volumes of alloy magnesium from Canada to the United States within the reasonably foreseeable future if the countervailing duty order on alloy magnesium is revoked. Consequently, based on the record in this review, we conclude that the volume and market share of subject imports likely would increase significantly from their already high levels.¹²³

Canadian customers. See CR and PR at Table IV-3.

¹¹⁷ CR and PR at Table I-2. As noted, apparent U.S. consumption is expected to grow at most by *** percent, and by conservative estimates only *** percent, annually. CR at II-7, nn.10 & 11, PR at II-4, nn.10 & 11.

¹¹⁸ See Tr. at 44, 152, 187-88.

¹¹⁹ See CR and PR at Table IV-3. Table IV-3 contains data for NHCI, which in 1999 accounted for *** percent of Canadian production of alloy magnesium. See CR at IV-7, PR at IV-4.

¹²⁰ CR and PR at Table IV-3.

¹²¹ See *id.* NHCI exported *** metric tons of alloy magnesium to the United States in 1999, and at the end of that year held *** metric tons of alloy magnesium in inventory.

¹²² CR at I-16, PR at I-9; See, e.g., Tr. at 53-53, 62, 114.

¹²³ As we stated in the Original Sunset Views, we decline to look behind Commerce's countervailing duty findings concerning alloy magnesium. Confidential Views at 13-14 n.45, 38 n.166, USITC Pub. 3324 at 9, n.45, 22, n.166. Although the statute directs us to consider information concerning the nature of the subsidy, it does not provide us with the authority to ignore Commerce's determination of the likely existence of a countervailable subsidy.

C. Likely Price Effects of Subject Imports

The Panel stated that the Original Sunset Views do not show that the impact of the countervailing duty order or the pricing of nonsubject imports were taken into account “as factors affecting the prevailing or anticipated U.S. market prices” for alloy magnesium.¹²⁴ The Panel also questioned whether the record supported the Commission’s finding that Magnola is likely to enter the market by underselling.¹²⁵ We respond to these inquiries and explain further below the bases for our findings concerning likely price effects.

1. *The Original Investigation*

The starting point for our consideration of the likely price effects of revocation of the countervailing duty order is the period of the original investigation, during which there were no restraints on the subject imports. Consideration of that period is particularly important in these five-year reviews, because it enables us to ascertain the role and prices of the subject imports during the last period in which they were not restrained.

In the original investigation, the Commission found that 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.¹²⁶ The Commission noted that Canadian and U.S. producers’ prices for contract sales of alloy magnesium declined as did the unit value of alloy magnesium from Canada. The Commission further noted the high degree of substitutability between U.S. and Canadian alloy magnesium, a condition of competition that still continues to apply. Prior to the imposition of the countervailing duty order, the U.S. and Canadian products sold at similar prices, with price changes by one firm often followed by corresponding changes by other producers.

2. *The Likely Use of Price to Increase Sales Volume*

In these reviews, the U.S. market is faced with the prospect of massive volumes of subject imports from subject Canadian producers. Due to the small size of the Canadian home market and the proximity of the United State to Canada, Canadian producers must rely heavily on sales in the U.S. market. Given the near perfect substitutability and absence of non-price distinctions between U.S. and Canadian product in this price sensitive market, it is highly likely that, absent the order, these producers will use price incentives to sell these large new volumes of alloy magnesium into the U.S. market.

We find it likely that the increased volumes of imports of alloy magnesium from Canada that would enter the United States if the order were revoked would have significant adverse price effects for the U.S. product. Prices for alloy magnesium have recently been declining.¹²⁷ Magnola’s own projections called for the export of *** metric tons of alloy magnesium to the U.S. market in 2001.¹²⁸ We find that in order to achieve this goal Magnola would engage in aggressive price competition for sales, and that such aggressive pricing would significantly increase if the order were revoked. This strategy is consistent with the pre-order behavior of the subject imports. Indeed, at the time of the five-year review, Magnola already had made sales approaches to U.S. purchasers, including essentially all of

¹²⁴ Panel Decision at 13

¹²⁵ Panel Decision at 13.

¹²⁶ Original Remand Determination at 25.

¹²⁷ See CR and PR at Tables I-2 and V-2.

¹²⁸ CR at IV-6-7, PR at IV-4. *** metric tons is *** percent of the ***.

Magcorp's customers.¹²⁹ These sales approaches have been made by Magnola's experienced marketing team, which consists of a number of former Dow employees with purchaser contacts throughout the U.S. market.¹³⁰

The record thus indicates that Magnola intended to sell substantial volumes of its product in the United States and that, in order to establish itself, Magnola was already seeking sales to U.S. customers who currently purchased from other producers, including Magcorp. Further, the likelihood that Magnola will offer low prices to obtain customers is increased by the stated intentions of some purchasers to seek out new suppliers.¹³¹

In addition, Magnola's entry likely would put pressure on NHCI, which also competes for the same customers and sells a highly substitutable product, to lower prices in the U.S. market. In order for NHCI or Magnola to take customers away from each other or from U.S. producers, they likely would reduce their prices below those of their competitors, in turn forcing U.S. producers and nonsubject producers or importers to reduce their prices if they choose to maintain their market shares.

The likelihood of this type of scenario is accentuated by the prevalence of *** in alloy magnesium contracts. *** provisions, which are included in Magcorp's *** and ***.¹³² In addition, NHCI's ***.¹³³ Thus, Magnola's likely efforts to enter the U.S. market by offering low prices likely would result not only in NHCI and Magcorp having to lower prices to their customers to meet competitors' prices, but would also force them to ***. In light of the existing pricing practices, even a seemingly small change in price likely would have a *** effect on prices for *** of NHCI's, and consequently, Magcorp's alloy magnesium sales.

Given the highly competitive nature of the alloy magnesium market and the need to establish and maintain contractual relationships, Magnola's entry likely would put pressure on NHCI to lower its prices further in the U.S. market. In order for NHCI or Magnola to take customers away from each other or from Magcorp, they likely would reduce their prices below those of their competitors, in turn forcing Magcorp and nonsubject producers and importers to reduce already declining prices in order to maintain their customers.

3. Nonsubject Imports

We find that it is likely that nonsubject imports would also be drawn into the spiral of declining prices that is likely to result from revocation of the order. However, this does not detract from our finding that revocation of the order itself would be likely in the first instance to have adverse price effects for the domestic product if U.S. producers are to maintain market share. First, the record indicates that at the time of the five-year reviews Magnola already had employed an experienced sales force that was soliciting business from Magcorp's major customers. We find this evidence significant for this review because it indicates that Magnola intends to compete directly with the U.S. producers for the business of many of the major U.S. purchasers. Nonsubject imports are largely excluded from competition for sales to at least one of these major purchasers, *i.e.*, *** which indicated that *** alloy magnesium have failed to meet its qualification standards.¹³⁴

¹²⁹ Tr. at 27- 28, 35. *See also* Purchasers' Questionnaire Responses of ***; Magcorp's Prehearing Brief at Exhibit 30.

¹³⁰ Tr. at 38.

¹³¹ CR at II-10 & n.21, PR at II-6 & n.21.

¹³² CR at V-3-5, PR at V-2-3.

¹³³ CR at V-5, PR at V-3; NHCI's Posthearing Brief at Attachment 1, pp. 1-2.

¹³⁴ CR at II-13, n. 30, PR at II-8, n.30.

Second, as we have noted, the U.S. and Canadian product are the most directly competitive in the U.S. market, largely because of their closer physical proximity to the purchasers and consequent supply reliability and product availability advantages. The way in which the U.S. and Canadian product compete in the U.S. market leads us to find that any lower prices offered by Magnola in its efforts to enter the market and by NHCI in response to Magnola's price reductions likely would have direct adverse price effects on the domestic product.

The higher degree of competitiveness between U.S. and Canadian product than between those two and nonsubject imports is plainly evidenced by ***.¹³⁵ As noted, ***,¹³⁶ ***.

Moreover, to the degree other nonsubject imports have qualified for sales to U.S. purchasers, and therefore may compete with the domestic product and subject imports, the increased presence of subject imports offered at lower prices likely would force down prices of the nonsubject imports if they are to retain their market share. This in turn would reinforce the price depression cycle and result in additional adverse price effects for the domestic industry.

4. Economic Model Estimates

In its decision, the Panel noted that the Commission did not take into account in its analysis the COMPAS presentation contained in Appendix D of the Staff Report.¹³⁷ For the same reasons we explained in addressing this point in the context of our findings concerning the orders on pure magnesium, we do not believe the COMPAS model is a useful tool generally or in this review. Moreover, with respect to our examination of the likely effects of revocation of the countervailing duty order on alloy magnesium, the economic models did not account for the effects of Magnola entering the market.¹³⁸

5. Conclusion Regarding Likely Price Effects

For the foregoing reasons, we find that, without the countervailing duty order, NHCI and Magnola will enter the U.S. market at prices likely to undersell the domestic like product to a significantly greater degree in the event of revocation; this, in turn likely would recreate the type of price depression evidenced during the original investigations.¹³⁹ ¹⁴⁰ We therefore find that revocation of the countervailing duty order on alloy magnesium from Canada would be likely to lead to significant

¹³⁵ CR at V-3, PR at V-2.

¹³⁶ See CR at II-13, n.30, PR at II-8, n.30.

¹³⁷ Panel Decision at 13. We again note that no party suggested to the Commission that it should rely on the COMPAS model, and no party appealed the Commission's failure to rely on this model.

¹³⁸ CR and PR at D-3 and D-6.

¹³⁹ In the original investigation, the Commission noted that the alloy magnesium price comparisons were mixed and irregular, but showed a significant decline for both U.S. and Canadian producers. Original Remand Determination at 24, n.114. In light of the frequency of price changes from one sale to the next, the Commission found that the price comparisons were not particularly useful for evaluating whether there was underselling. Likewise, in this review, we do not find the price comparisons useful for addressing underselling, but have given weight to the downward trends that the data show for both U.S. and Canadian product.

¹⁴⁰ Commissioner Bragg notes that where, as here, pricing information in a commodity market is communicated swiftly and efficiently, it is not surprising to find irregular evidence of underselling in quarterly pricing comparisons.

underselling by the subject imports of the domestic like product, as well as significant price depression, within a reasonably foreseeable time.

D. Likely Impact

Having responded to the Panel's concerns, and explained in fuller detail the basis for our findings on substitutability and the consequent likely volume and price effects of revocation of the order, the Commission adopts in its entirety its findings in the Original Sunset Views concerning likely impact. Accordingly, we conclude that, if the countervailing duty order is revoked, subject imports of alloy magnesium from Canada would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

CONCLUSION

For the foregoing reasons, we determine that revocation of the antidumping and countervailing duty orders on imports of pure magnesium from Canada would be likely to lead to continuation or recurrence of material injury to the domestic pure magnesium industry within a reasonably foreseeable time. We also determine that revocation of the countervailing duty order on imports of alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within a reasonably foreseeable time.