BINATIONAL PANEL REVIEW

PURSUANT TO ARTICLE 1904 OF
NORTH AMERICA FREE TRADE AGREEMENT

In the Matter of:	)	
	)	
	)	
Magnesium From Canada	)	**Secretariat File No.:**
(Injury)	)	**USA-CDA-00-1904-09**
	)	
Full Sunset Review of Antidumping Duty and Countervailing Duty Orders	)	**NON-PROPRIETARY**
	)	

DECISION OF THE PANEL REVIEWING THE DECISION OF THE INTERNATIONAL TRADE COMMISSION ON REMAND

January 17, 2006

Before:

E. Neil McKelvey, Chairman
W. Roy Hines
James R. Holbein
Gérald A. Lacoste
Mark R. Sandstrom

APPEARANCES:

On behalf of the Gouvernement du Québec:
Paul, Hastings, Janofsky & Walker, LLP
(Hamilton Loeb, A. Jeff Ifrah)

On behalf of the United States International Trade Commission:
Lyn M. Schlitt
James M. Lyons
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On behalf of U.S. Magnesium LLC:
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On behalf of Norsk Hydro Canada:
Steptoe & Johnson
(Eric C. Emerson, Gregory S. McCue)

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1. INTRODUCTION

By its decision dated July 16, 2002, this United States – Canada Binational Panel remanded the Determination of the United States International Trade Commission (the Commission) in *Magnesium from Canada*, in a five-year sunset review pursuant to section 751(c) of the *Tariff Act*, 19 U.S.C. § 1675(c), as to whether revocation of the antidumping Order covering pure magnesium or of the countervailing duties Orders covering pure magnesium and alloy magnesium imported from Canada would likely lead to continuation or recurrence of material injury to the U.S. industry On October 15, 2002, the Commission issued its Views on Remand.

All of the members of the original Panel, except W. Roy Hines and E. Neil McKelvey, resigned since the Panel's 2002 decision, resulting in replacements - causing extensive delays and a further public hearing in March, 2004 to enable new Panel members to study the record. The present members of the Panel are as listed on the front page of this decision.

In reviewing the Remand Determination of the Commission, the Panel also received and considered submissions from the Gouvernement du Québec, the Commission, U.S. Magnesium LLC, and Norsk Hydro Canada Inc. (NHCI).

2. JURISDICTION AND STANDARD OF REVIEW

The Panel's jurisdiction arises from chapter 19 of the North American Free Trade Agreement under which Panels replace judicial review of final antidumping and countervailing duty determinations by the Commission and apply United States laws, rules and the standard of review relating to decisions of administrative tribunals.

The standard of review requires a Panel to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law".[1] "Substantial evidence" has been described by the United States Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] In a sunset determination, the Commission is required to determine whether "revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time".[3] U.S. courts have declared that the word "likely" means "probable".[4] This standard of review was applied by the Panel in 2002 and is again being applied in this instance. However, in reviewing the Commission's Determination dated October 15, 2002, the Panel is not sitting as an appellate body of its first decision nor as a Panel reviewing the issues *de novo*. The Remand Order was very precise in stating what the Commission was required to do. Thus, the standard of review as described above is being applied to the responses provided by the Commission to the Panel Orders. Consequently, our decision focuses on the analysis and conclusions of the Commission as they relate to evidence on the record that is pertinent to the Orders of the Panel.

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[1] Tariff Act, 19U.S.C. 1516a(b)(1)(B)
[2] Universal Camera Corp. v. NLRB 340, U.S. 474, 477 (1951)
[3] Tariff act, 19 U.S.C. 1675(a)(1)
[4] Unisor Industeel, S.A. v. United States No 01-00006. Slip Op. 02-39 (Ct. Int'l Trade) (2002)

3. IMPACT OF NONSUBJECT IMPORTS

In its July 16, 2002 Remand, the Panel instructed the Commission to examine the impact of substitutable nonsubject imports to establish if they would contribute to a continuation or recurrence of material injury to the domestic industry following the revocation of the Orders. In its review of the record relating to this issue, the Panel was unable to determine the extent to which the Commission had examined the impact of nonsubject imports on the United States domestic market nor whether the issue had been examined in sufficient depth to determine to what extent likely material injury to the domestic industry would be attributable to the revocation of the Orders as distinct from that attributable to nonsubject imports. The Panel conducted a detailed review of the evidence on substitutability and concluded:

> Taking into consideration the scant evidence on the record supporting non-substitutability, together with the extensive evidence on the record detracting therefrom, the Panel concludes that the record lacks substantial evidence to support the Commission's finding of non-substitutability.[5]

As a result, 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.[6]

In its Determination on Remand, the Commission clarified its position to confirm that substitutability between subject and nonsubject product was, in fact, a consideration in its decision and its finding that nonsubject imports were less substitutable than Canadian goods for the domestic products. In its Views on Remand, the Commission elaborated on its original finding that nonsubject goods are not commercially substitutable for the Canadian or domestic product. It found 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. It said that "substitutability is not an absolute either/or condition, but rather reflects a range based on 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."[7]

The Commission referred to the views of U.S. and Canadian producers that there are constraints on the degree of substitutability and noted that the responses to the purchasers' questionnaire confirmed this view. It said:

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[5] Decision of the Panel, July 16, 2002, p. 11
[6] *Ibid*, p. 15
[7] Non-Proprietary Views of the Commission on Remand, October 15, 2002, p. 6

> As the fact-finder in these reviews, we have determined to place more weight on the questionnaire responses, . . . that demonstrated there are valid commercial limitations on the substitutability between nonsubject imports and both domestic pure (and alloy) magnesium and the subject imports from Canada.[8]

In this connection, the Panel was also mindful of the related question of the degree to which nonsubject imports can influence a decision in a sunset review. As decided in *Nippon*, "an affirmative material injury determination under the statute requires no more than a substantial factor showing…As long as its (dumping) effects are not merely incidental, tangential or trivial, the foreign product sold at less than fair market value meets the causation requirement."[9] Accordingly, it is clear to this Panel that the focus in a sunset review must be on the impact of revocation of the Order on subject imports, regardless of the likely injurious impact of imports on nonsubject imports. Thus, having reconsidered the question of the effect of nonsubject goods, the Panel affirms the Commission on this point.

4. PRICE AND VOLUME IMPLICATIONS AS TO PURE MAGNESIUM

The Panel noted that Canadian producers had not been a factor in the U.S. market for pure magnesium for a number of years and that U.S. price levels had been determined by factors other than prices of subject goods from Canada. As such, and because pricing was a significant factor in the case, the Panel concluded that it was important for the Commission to identify evidence in the record supporting its findings that revocation of the antidumping and countervailing duty Orders would lead to price underselling and price levels for subject goods that would have significant depressing or suppressing effects in the U.S. market. Accordingly, the Panel instructed the Commission to:

> 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.[10]

In its Determination on Remand, the Commission presented considerable detail to describe and elaborate its assessment of the combined capacity of the two Canadian producers, identified specific export intentions of Magnola for 2001 in the face of a flat market and reasonably projected expanded shipments to the United States if the two Orders were revoked. The Commission stated that the "industry's operating performance during the review period does not support a finding that the industry is vulnerable at the present time"[11]. However, other factors did support a conclusion or "weakness" or vulnerability. Views were expressed

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[8] *Ibid*, pp. 11-12
[9] *Nippon Steel Corporation v. International Trade Commission*, 345 F.3d 1379, 1381 (Fed. Cir. 2003)
[10] Decision of the Panel, July 16, 2002, p. 15
[11] Sunset Views of the Commission, July 28, 2000, p. 28

concerning NHCI's past record of dumping and its receipt of countervailable subsidies as well as current competitive conditions in the market and how Magnola was expected to price its product on entry into the market. However, the Commission failed to respond to the Panel's specific request concerning pricing record evidence that led it to conclude that Magnola's pricing practice intentions would lead to underselling and material injurious impacts for domestic firms. Nonetheless, the Panel has concluded after careful analysis and study, especially in respect of capacity projections and the past history of dumping and subsidization involving producers other than Magnola, that the legal requirements were met for a finding that revocation of the Orders could lead to a continuation or recurrence of material injury in this sunset review. The Panel affirms the Commission's Determination on this point.

5. PRICE AND VOLUME IMPLICATIONS AS TO ALLOY MAGNESIUM

As in the case of pure magnesium, the Panel sought clarification as to the record evidence that supported the Commission's conclusions regarding Magnola's pricing policies. The Commission concluded that the "industry's operating performance during the review period does not support a finding that the industry is vulnerable at the present time"[12]. However, other factors did support a conclusion of "weakness" or vulnerability. The Panel concluded in its Remand that "the Commission's analysis is contingent upon the validity of its presumption that Magnola would likely enter the market at low prices and at significant volumes in relation to demand increases."[13] In the circumstances, and given that the countervailing duty was relatively low and had not been an obstacle to NHCI's participation in the United States market, the Panel instructed the Commission to:

> 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 findings that revocation of this order would be likely to lead to Magnola entering the market either by underselling, or with volumes that would be significant in relation to anticipated demand increases.[14]

In its Determination on Remand, the Commission focused its primary analysis on NHCI's production capacity and inventories in Canada and Magnola's probable contribution to that capacity. In addition, it stated that Magnola had indicated that it expected to sell a significant volume of alloy magnesium to purchasers in the United States in 2001, a number that the Commission found rather conservative in light of the extent of NHCI's sales in the United States[15]. The Commission further noted that ". . . in order to achieve this goal Magnola would engage in aggressive price competition for sales, and that such aggressive pricing would

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[12] *Ibid*, p. 28
[13] Decision of the Panel, July 16, 2002, p. 13
[14] *Ibid*., p. 15
[15] Non-Proprietary Views of the Commission on Remand, October 15, 2002, p. 31

significantly increase if the Order was revoked."[16] The anticipated export sales were not analyzed in relation to expected market demand in 2001.

On volume and price, the Commission found the following evidence persuasive[17]:

- The substitutability and absence of non-price distinctions between the U.S. and Canadian products in this price sensitive market;
- Magnola has already made sales approaches to U.S. purchasers, including all of Magcorp's customers;
- This strategy is consistent with pre-order behaviour of the subject imports;
- In order to achieve Magnola's projections for exports in 2001, it would engage in aggressive price competition;
- 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 substantial inventory levels.

The Commission's analysis however failed to respond to the instruction set out in the Panel's Remand. That instruction was specifically directed to obtaining clarification of the evidence in the record as to the anticipated pricing policies of Magnola – pricing policies that the Commission concluded would lead to significant increases in export volumes by this firm to the United States. Unlike the market for pure magnesium, the record contains evidence that clearly indicates that the alloy market was growing and demand was expected to continue to increase for the foreseeable future. Based on evidence on the record, U.S. producers could not meet this anticipated increase in demand. Moreover, Magnola had not benefited from a subsidy and the countervailing duty was at such a low level that it did not inhibit NHCI from selling increasing volumes into the United States. In its Remand Determination, the Commission provided no analysis nor identified facts from the record (either from testimonies or collected data) specifically relating to Magnola's future pricing policies, forecasts or projections. Its statements concerning underselling and price cutting appear to be more in the nature of assumptions.

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[16] *Ibid*, p. 35
[17] *Ibid*, pp. 32-33

In this connection, the presumption that Magnola would probably undersell its competitors in the U.S. market is not supported by any analysis of the facts. Answers contained in a number of questionnaires clearly establish that price is not the only way firms attract new customers. Factors such as being a steady, reliable, close-by supplier to the automobile industry, the building of a strong supply relationship with customers, better service, better quality, better contract terms, better delivery times, more superior recycling programs, etc., all play a role in securing supplier/customer relationships. Moreover, NHCI was able to sell alloy magnesium in the U.S. market with the countervailing duty Order in place, and there would, therefore, appear to be no factual evidence to support a conclusion that the removal of the relatively low countervailing duty would provide an incentive to increase purchases from Canadian suppliers or to encourage further price reductions by Canadian firms.

While the assumed pricing scenario outlined by the Commission may have been plausible, the analysis that it put forward does not appear to identify any substantive factual evidence on the record to support its conclusions about the pricing intentions of Magnola, or to provide an explanation of how revocation of the Orders would lead to significant underselling and to price levels for subject goods that would have significant price depressing or suppressing effects causing a continuation or recurrence of material injury to the U.S. industry.

6. CONCLUSION

The Panel, having considered the Views of the Commission on Remand, has concluded that the Commission should revisit its Determination on Remand, as it relates to alloy magnesium. The Commission has not provided a reasoned explanation based on all of the evidence on the record to support a decision that revocation of the countervailing duty Order on imports of alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within the reasonably foreseeable future due to underselling by Magnola.

7. DISPOSITION AND ORDER

The Panel remands this matter to the United States International Trade Commission and Orders the Commission to take action consistent with the findings and instruction set forth herein. In particular, the Panel instructs the Commission to:

Analyze the price, volume and impact of revocation of the countervailing duty Order on alloy magnesium to show how the record supports the Commission's conclusions, providing a reasoned explanation based on all of the evidence on the record to support a decision that revocation of the countervailing duty Order on imports of alloy magnesium from Canada would be likely to lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within the reasonably foreseeable future due to underselling by Magnola. The Commission must provide further reasoned analysis supported by substantial evidence on the record, including any factual evidence not referred to in its Views on Remand, as to the conclusion that Magnola would enter the market by underselling in order to establish export volumes that would be significant in relation to anticipated demand increases.

The Commission is directed to respond to this Order within sixty (60) days of receipt by the Commission of this decision.

Dated January 17, 2006.

E. Neil McKelvey

E. Neil McKelvey, Chair

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