

UNITED STATES INTERNATIONAL TRADE COMMISSION

MAGNESIUM FROM CHINA  
Investigation No. 731-TA-696 (Review)

DETERMINATION AND VIEWS OF THE COMMISSION  
(USITC Publication No. 3346, August 2000)

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

Investigation No. 731-TA-696 (Review)

**PURE MAGNESIUM FROM CHINA**

**DETERMINATION**

On the basis of the record<sup>1</sup> developed in the subject five-year review, the United States International Trade Commission determines,<sup>2</sup> pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)), that revocation of the antidumping duty order on pure magnesium from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

**BACKGROUND**

The Commission instituted this review on April 3, 2000 (65 F.R. 17531, April 3, 2000) and determined on July 6, 2000 that it would conduct an expedited review (65 F.R. 45105, July 20, 2000).

The Commission transmitted its determination in this review to the Secretary of Commerce on August 31, 2000. The views of the Commission are contained in USITC Publication 3346 (August 2000), entitled *Pure Magnesium from China: Investigation No. 731-TA-696 (Review)*.

By order of the Commission.

Donna R. Koehnke  
Secretary

Issued:

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<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.2(f)).

<sup>2</sup> Commissioner Askey dissenting.

## VIEWS OF THE COMMISSION

Based on the record in this five-year review, we determine under section 751(c) of the Tariff Act of 1930, as amended (“the Act”), that revocation of the antidumping duty order covering imports of pure magnesium from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>1</sup>

### I. BACKGROUND

In May 1995, the Commission determined that an industry in the United States was materially injured by reason of imports of pure magnesium from China that the Department of Commerce (“Commerce”) had determined to be sold in the United States at less than fair value (“LTFV”).<sup>2</sup> On May 12, 1995, Commerce published an antidumping duty order covering the subject merchandise.<sup>3</sup>

On April 3, 2000, the Commission instituted a review pursuant to section 751(c) of the Act to determine whether revocation of the antidumping duty order on pure magnesium from China likely would lead to continuation or recurrence of material injury.<sup>4</sup>

In five-year reviews, the Commission initially determines whether to conduct a full review (which would include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review, as follows. First, the Commission determines whether individual responses of interested parties to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the Commission determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups) and respondent interested parties (importers, exporters, foreign producers, trade associations, or subject country governments) – demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.<sup>5</sup> If the Commission finds the responses from either group of

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<sup>1</sup> Commissioner Thelma J. Askey dissenting. See Dissenting Views of Commissioner Thelma J. Askey. Except as otherwise noted, Commissioner Askey joins in sections I, II, III.A., and III.B. of these Views.

<sup>2</sup> Magnesium from China, Russia, and Ukraine, Invs. Nos. 731-TA-696-698 (Final), USITC Pub. 2885 (May 1995) (“Original Determination”). The Commission cumulated LTFV imports of pure magnesium from China with LTFV imports of pure magnesium from Russia and Ukraine, and found that the domestic industry producing pure magnesium was materially injured by reason of the cumulated imports. Original Determination, USITC Pub. 2885 at 15-16, 22. Following an appeal by a Ukraine respondent, the Commission subsequently reached a negative determination on remand with respect to imports of pure magnesium from Ukraine. Magnesium from Ukraine, Inv. No. 731-TA-698 (Final) (Remand) (June 1998), *aff’d after remand*, 27 F. Supp. 2d 1351 (Ct. Int’l Trade, Oct. 1998). Commerce then revoked the antidumping duty order on pure magnesium from Ukraine. See 63 Fed. Reg. 67854-55 (Dec. 9, 1998).

<sup>3</sup> 60 Fed. Reg. 25691 (May 12, 1995).

<sup>4</sup> 65 Fed. Reg. 17484 (April 3, 2000). The Notice of Institution covering the antidumping duty order issued on pure magnesium from China included notice of the five year review of the antidumping duty order on pure magnesium from Russia. In July 2000, Commerce revoked the order on imports from Russia, since no domestic interested party filed a Notice of Intent to Participate in the sunset review of that order. 65 Fed. Reg. 41944 (July 7, 2000). The Commission accordingly terminated its review of pure magnesium from Russia effective July 7, 2000. Confidential Report, Memorandum INV-X-173 (Aug. 1, 2000) (“CR”) at I-3, n.1, Public Report (“PR”) at I-3, n.1.

<sup>5</sup> See 19 C.F.R. § 207.62(a); 63 Fed. Reg. 30599, 30602-05 (June 5, 1998).

interested parties to be inadequate, the Commission may determine, pursuant to section 751(c)(3)(B) of the Act, to conduct an expedited review unless it finds that other circumstances warrant a full review.

The Commission received one response to the notice of institution from Magnesium Corporation of America (“Magcorp”), a domestic producer of pure magnesium and one of the petitioners in the original investigation. The Commission received no responses to the notice of institution from any foreign producer, exporter, importer, or other respondent interested party.<sup>6</sup>

On July 6, 2000, the Commission determined that the individual and group domestic interested party responses to its notice of institution were adequate and the respondent interested party group response was inadequate.<sup>7</sup> Pursuant to section 751(c)(3) of the Act,<sup>8</sup> the Commission voted to expedite its review of this matter.<sup>9</sup>

## II. DOMESTIC LIKE PRODUCT AND INDUSTRY

### A. Domestic Like Product

In making its determination under section 751(c), the Commission defines “the domestic like product” and the “domestic industry.”<sup>10</sup> The Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.”<sup>11</sup> In a section 751(c) review, the Commission also must take into account “its prior injury determinations.”<sup>12</sup>

In its final expedited sunset review, Commerce defined the subject merchandise as:

pure magnesium regardless of chemistry, form or size, unless expressly excluded from the scope of this order. Primary magnesium is a metal or alloy containing by weight primarily the element magnesium and produced by decomposing raw materials into magnesium metal. Pure primary magnesium is used primarily as a chemical in the aluminum alloying, desulfurization, and chemical reduction industries. In addition, pure primary magnesium is used as an input in producing magnesium alloy. Pure primary magnesium encompasses products (including, but not limited to, butt ends, stubs, crowns and crystals) with the following primary magnesium contents. . . . : (1) Products that contain at least 99.95 percent primary magnesium, by weight (generally referred to as “ultra-pure” magnesium);

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<sup>6</sup> Nor did any other person file a submission under Commission Rule 207.61(d).

<sup>7</sup> See Pure Magnesium from China, Inv. No. 731-TA-696 (Review), Explanation of Commission Determination on Adequacy (July 2000) (“Adequacy Explanation”).

<sup>8</sup> 19 U.S.C. § 1675(c)(3)(B).

<sup>9</sup> 65 Fed. Reg. 45105 (July 20, 2000). The record from the full five-year review of Magnesium from Canada, Invs. Nos. 701-TA-309 A-B (Review) and 731-TA-528 (Review) (July 2000) was incorporated into the record in this expedited review. Adequacy Explanation at n.1.

<sup>10</sup> 19 U.S.C. § 1677(4)(A).

<sup>11</sup> 19 U.S.C. § 1677(10). See NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int’l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991). See also S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

<sup>12</sup> 19 U.S.C. § 1675a(a)(1)(a).

(2) Products that contain less than 99.95 percent but not less than 99.8 percent primary magnesium, by weight (generally referred to as “pure” magnesium); and (3) Products (generally referred to as “off-specification pure” magnesium) that contain 50 percent or greater, but less than 99.8 percent primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium. “Off-specification pure” magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8 percent by weight. It generally does not contain, individually or in combination, 1.5 percent or more, by weight, of the following alloying elements: Aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths.

Excluded from the scope of this order are alloy primary magnesium (that meets specifications for alloy magnesium), primary magnesium anodes, granular primary magnesium (including turnings, chips and powder), having a maximum physical dimension (i.e., length or diameter) of one inch or less, secondary magnesium (which has pure primary magnesium content of less than 50 percent by weight), and remelted magnesium whose pure primary magnesium content is less than 50 percent by weight.<sup>13</sup>

In the original determination, the Commission determined the domestic like product corresponding to the subject imports of pure magnesium was domestically-produced pure magnesium, including off-specification (“off-spec”) pure magnesium.<sup>14</sup> In its Response to the Notice of Institution (“Magcorp’s Response”), Magcorp stated that it has no objection to the Commission’s original like product definition.<sup>15</sup> There is no new information obtained during this five-year review that would suggest a reason for revisiting the Commission’s original like product determination. We consequently continue to define the domestic like product as pure magnesium, including off-spec magnesium, coextensive with Commerce’s scope definition.

## **B. Domestic Industry**

Section 771(4)(A) of the Act defines the relevant industry as the “domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.”<sup>16</sup> Given our definition of the domestic like product, we

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<sup>13</sup> Pure Magnesium from China: Final Results of Antidumping Sunset Review, 65 Fed. Reg. 47713/47714 (Aug. 3, 2000). Since the original antidumping duty order was issued, Commerce clarified that the scope of the order includes, but is not limited to, butt ends, stubs, crowns, and crystals. *Id.*

<sup>14</sup> Original Determination, USITC Pub. 2885 at 9-10. “Off-spec” pure magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium, or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8 percent by weight. “Off-spec” pure magnesium products contain 50 percent or greater, but less than 99.8 percent primary magnesium, by weight, and do not conform to ASTM specifications for alloy magnesium. *See* Pure Magnesium from China: Final Results of Antidumping Sunset Review, 65 Fed. Reg. at 47714.

<sup>15</sup> Magcorp’s Response to Notice of Institution (“Magcorp’s Response”) at 32. Magcorp did not file additional comments after the Commission determined to conduct an expedited review.

<sup>16</sup> 19 U.S.C. § 1677(4)(A).

find the domestic industry to consist of all domestic producers of pure magnesium. The domestic industry consists of two producers—Magcorp and Northwest Alloys, Inc. (“Northwest Alloys”).<sup>17</sup>

### **III. REVOCATION OF THE ANTIDUMPING DUTY ORDER ON PURE MAGNESIUM FROM CHINA WOULD LIKELY LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME**<sup>18</sup>

#### **A. Legal Standard**

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke an antidumping duty order unless: (1) it makes a determination that dumping is likely to continue or recur, and (2) the Commission makes a determination that revocation of an order “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>19</sup> The Uruguay Round Agreements Act Statement of Administrative Action (“SAA”) states that “under the likelihood standard, the Commission will engage in a counter-factual analysis; it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation [of the order] . . . and the elimination of its restraining effects on volumes and prices of imports.”<sup>20</sup> Thus, the likelihood standard is prospective in nature.<sup>21</sup> The statute provides that “the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.”<sup>22</sup> According to the SAA, a “‘reasonably foreseeable time’ will vary from case-to-case, but normally will exceed the ‘imminent’ time frame applicable in a threat of injury analysis [in antidumping duty investigations].”<sup>23 24</sup>

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<sup>17</sup> CR at I-12, PR at I-9.

<sup>18</sup> Commissioner Askey finds that revocation of the order is not likely to lead to continuation or recurrence of material injury to the domestic industry. *See* Dissenting Views of Commissioner Thelma J. Askey.

<sup>19</sup> 19 U.S.C. § 1675a(a).

<sup>20</sup> SAA, H.R. Rep. No. 103-316, vol. I, at 883-84 (1994). The SAA states that “[t]he likelihood of injury standard applies regardless of the nature of the Commission’s original determination (material injury, threat of material injury, or material retardation of an industry).” SAA at 883.

<sup>21</sup> While the SAA states that “a separate determination regarding current material injury is not necessary,” it indicates that “the Commission may consider relevant factors such as current and likely continued depressed shipment levels and current and likely continued [sic] prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked.” SAA at 884.

<sup>22</sup> 19 U.S.C. § 1675a(a)(5).

<sup>23</sup> SAA at 887. Among the factors that the Commission should consider in this regard are “the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.” *Id.*

<sup>24</sup> In analyzing what constitutes a reasonably foreseeable time, Chairman Koplán examines all the current and likely conditions of competition in the relevant industry. He defines “reasonably foreseeable time” as the length of time it is likely to take for the market to adjust to a revocation. In making this assessment, he considers all factors that may accelerate or delay the market adjustment process including any lags in response by foreign producers,

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Although the standard in five-year reviews is not the same as the standard applied in original antidumping duty investigations, it contains some of the same fundamental elements. The statute provides that the Commission is to “consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked.”<sup>25</sup> It directs the Commission to take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.<sup>26 27</sup>

Section 751(c)(3) of the Act and the Commission’s regulations provide that in an expedited five-year review the Commission may issue a final determination “based on the facts available, in accordance with section 776.”<sup>28</sup> We note that the statute authorizes the Commission to take adverse inferences in five-year reviews, but emphasize that such authorization does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination. We generally give credence to the facts supplied by the participating parties and certified by them as true, but base our decision on the evidence as a whole, and do not automatically accept the participating parties’ suggested interpretation of the record evidence. Regardless of the level of participation and the interpretations urged by participating parties, the Commission is obligated to consider all evidence relating to each of the statutory factors and may not draw adverse inferences that render such analysis superfluous. “In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive.”<sup>29</sup> As noted above, no respondent interested party responded to the Commission’s notice of institution. Accordingly, we have relied on the facts available in this review, which consist primarily of the record in the Commission’s original investigation, the limited information specific to subject imports

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<sup>24</sup> (...continued)

importers, consumers, domestic producers, or others due to: lead times; methods of contracting; the need to establish channels of distribution; product differentiation; and any other factors that may only manifest themselves in the longer term. In other words, this analysis seeks to define “reasonably foreseeable time” by reference to current and likely conditions of competition, but also seeks to avoid unwarranted speculation that may occur in predicting events into the more distant future.

<sup>25</sup> 19 U.S.C. § 1675a(a)(1).

<sup>26</sup> 19 U.S.C. § 1675a(a)(1). The statute further provides that the presence or absence of any factor that the Commission is required to consider shall not necessarily give decisive guidance with respect to the Commission’s determination. 19 U.S.C. § 1675a(a)(5). While the Commission must consider all factors, no one factor is necessarily dispositive. SAA at 886.

<sup>27</sup> Section 752(a)(1)(D) of the Act directs the Commission to take into account in five-year reviews involving antidumping proceedings “the findings of the administrative authority regarding duty absorption.” 19 U.S.C. § 1675a(a)(1)(D). Commerce has not issued any duty absorption findings in this review.

<sup>28</sup> 19 U.S.C. § 1675(c)(3)(B); 19 C.F.R. § 207.62(e). Section 776 of the Act, in turn, authorizes the Commission to “use the facts otherwise available” in reaching a determination when: (1) necessary information is not available on the record or (2) an interested party or any other person withholds information requested by the agency, fails to provide such information in the time or in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified pursuant to section 782(i) of the Act. 19 U.S.C. § 1677e(a). The statute permits the Commission to use adverse inferences in selecting from among the facts otherwise available when an interested party has failed to cooperate by acting to the best of its ability to comply with a request for information. 19 U.S.C. § 1677e(b). Such adverse inferences may include selecting from information from the record of our original determination and any other information placed on the record. *Id.*

<sup>29</sup> SAA at 869.

collected by the Commission since the institution of this review, the information submitted by Magcorp in its Response to the Notice of Institution, and the record in the recent five-year review of Magnesium from Canada.<sup>30</sup>

For the reasons stated below, we determine that revocation of the antidumping duty order on pure magnesium from China would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.<sup>31</sup>

## **B. Conditions of Competition**

In evaluating the likely impact of the subject imports on the domestic industry if an order is revoked, the statute directs the Commission to consider all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>32</sup>

Pure magnesium is sold mainly to aluminum producers, to magnesium granule producers for steel desulfurization, and to chemical and pharmaceutical manufacturers.<sup>33</sup> Demand for pure magnesium is dictated largely by the demand in these end-use markets. In particular, demand for pure magnesium largely depends on the demand for aluminum sheet used in the production of beverage cans and other packaging.<sup>34</sup> In the original investigation, the Commission observed that demand in the consuming industries, and therefore demand for pure magnesium, remained relatively steady from 1992 to 1994.<sup>35</sup> Apparent U.S. consumption of pure magnesium declined between the original investigation and this review, and continued to decline from 1998 to 1999.<sup>36</sup> Pure magnesium producers and purchasers predict little change in the demand for pure magnesium in the next few years.<sup>37</sup>

The production processes for alloy magnesium and pure magnesium are very similar and are typically performed at common manufacturing facilities using the same employees and basic equipment.<sup>38</sup> From a production standpoint, a domestic or foreign producer can easily switch between production of pure magnesium and alloy magnesium.<sup>39</sup>

In the original investigation, the Commission noted that the subject imports and the domestic product competed directly in the market.<sup>40</sup> Most producers, importers, and purchasers agreed that domestically-produced pure magnesium and pure magnesium from China could be used in the same range

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<sup>30</sup> See Adequacy Statement at n.1.

<sup>31</sup> Commissioner Askey finds that revocation of the order is not likely to lead to continuation or recurrence of material injury to the domestic industry. See Dissenting Views of Commissioner Thelma J. Askey.

<sup>32</sup> 19 U.S.C. § 1675a(a)(4).

<sup>33</sup> Magnesium from Canada, Invs. Nos. 701-TA-309 A-B (Review) and 731-TA-528 (Review), Confidential Report, Memorandum INV-X-141 (June 26, 2000) (“Canada CR”) at II-1, USITC Pub. 3324 (July 2000) at II-1.

<sup>34</sup> Canada CR at II-7, USITC Pub. 3324 at II-4.

<sup>35</sup> Original Determination, USITC Pub. 2885 at 10.

<sup>36</sup> CR and PR at Table I-5.

<sup>37</sup> Canada CR at II-7-8, USITC Pub. 3324 at II-4-5.

<sup>38</sup> Canada CR at I-16 & n.12, USITC Pub. 3324 at I-9 & n.12.

<sup>39</sup> Canada CR at I-16, III-1-2, USITC Pub. 3324 at I-9, III-1; Magnesium from Canada, Invs. Nos. 701-TA-309 A-B (Review) and 731-TA-528 (Review), Transcript of Hearing, May 31, 2000 (“Canada Tr.”) at 53-54, 62, 107, 138. Therefore, we have considered not only reported capacity for pure magnesium individually, but also total primary magnesium capacity, which includes alloy magnesium.

<sup>40</sup> Original Determination, USITC Pub. 2885 at 20.

of uses and were generally of comparable quality.<sup>41</sup> In today's market, imports of pure magnesium from China are subject to the same qualification requirements as pure magnesium produced by U.S. producers and by third country producers.<sup>42</sup> Most purchasers of pure magnesium require their suppliers to become certified or prequalified and many buy pure magnesium exclusively from qualified suppliers.<sup>43</sup> Thus, although not perfect substitutes, domestic pure magnesium and subject imports from China generally are substitutable with one another and with imports from third countries.

The market for pure magnesium continues to be price competitive.<sup>44</sup> Pure magnesium purchasers reported that their purchasing patterns have not changed significantly since 1992 and that they do not expect these patterns to change in the next two years.<sup>45</sup> Before making a purchase, most pure magnesium purchasers contact between two and five suppliers.<sup>46</sup> Although \*\*\* sell the vast majority of their magnesium on a contract basis,<sup>47</sup> Magcorp currently \*\*\*.<sup>48 49</sup>

Although some U.S. market conditions discussed above have not changed significantly since the original investigation, there have been some significant changes in the domestic industry. Most notably, Dow Chemical Company ("Dow"), the largest domestic producer of pure magnesium during the original investigation, exited the market in November 1998.<sup>50</sup> As a result of Dow's exit, the industry has been further consolidated and now consists of only two producers. One, Northwest Alloys, internally transfers approximately \*\*\* percent of its pure magnesium production to its corporate parent, Alcoa, Inc., an aluminum manufacturer.<sup>51</sup> With Northwest Alloy's internal transfers and Magcorp's internal consumption of approximately \*\*\* percent of its production, the domestic industry internally transferred approximately \*\*\* percent of its 1998 pure magnesium production and \*\*\* percent of its 1999 production.<sup>52 53 54 55</sup>

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<sup>41</sup> Original Determination, USITC Pub. 2885 at 16, 20.

<sup>42</sup> See Canada CR at II-13, USITC Pub. 3324 at II-7.

<sup>43</sup> Canada CR at II-13, USITC Pub. 3324 at II-7.

<sup>44</sup> See Canada CR at II-9-10 and V-3, USITC Pub. 3324 at II-6 and V-2.

<sup>45</sup> Canada CR at II-9, USITC Pub. 3324 at II-6.

<sup>46</sup> Canada CR at II-9-10, USITC Pub. 3324 at II-6.

<sup>47</sup> Canada CR at V-3, USITC Pub. 3324 at V-2.

<sup>48</sup> Canada CR at V-3, USITC Pub. 3324 at V-2.

<sup>49</sup> Canada CR at V-3, USITC Pub. 3324 at V-2.

<sup>50</sup> CR at I-12, PR at I-9.

<sup>51</sup> CR at I-12-13, PR at I-10.

<sup>52</sup> CR at I-12-13 and Table I-1, PR at I-10 and Table I-1.

<sup>53</sup> Commissioners Bragg, Miller, and Askey note that the captive production provision of the statute, 19 U.S.C. § 1677(7)(c)(iv), does not apply to five-year reviews, but they consider the significant degree of captive production as a condition of competition. See, e.g., Magnesium from Canada, USITC Pub. 3324 at 11, n.72; Electrolytic Manganese Dioxide from Greece and Japan, Invs. Nos. 731-TA-406-08 (Review), USITC Pub. 3296 (May 2000) at 15, n.90; Sebacic Acid from China, Inv. No. 731-TA-653 (Review), USITC Pub. 3189 (May 1999) at 7, n.26.

<sup>54</sup> Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman do not reach the issue of whether the captive production provision of the statute, 19 U.S.C. § 1677(7)(C)(iv), applies to five-year reviews, because even if it does, it would clearly not apply in this case. The evidence in the record of this review indicates that the second criterion of the test, (whether "the domestic like product is the predominant input in the production of [the] downstream article" that is produced captively), is not met. See Canada CR at II-9, USITC Pub. 3324 at II-6 (cost share for pure magnesium used in aluminum products is approximately 1 percent). However, these Commissioners  
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Since the period of the original investigation, there has been an increase in the quantity and share of imports of pure magnesium from third countries, including Israel and Russia.<sup>56</sup> As noted earlier, domestic, subject, and nonsubject imports of pure magnesium are generally substitutable for one another. In addition, a large new Canadian supplier, Magnola Metallurgy (“Magnola”), is poised to enter the market.<sup>57</sup> At full capacity for primary magnesium production, Magnola will be able to produce 63,000 metric tons, making it the largest North American magnesium producer.<sup>58</sup>

We find that the foregoing conditions of competition are likely to prevail for the reasonably foreseeable future and thus provide an adequate basis by which to assess the likely effects of revocation within the reasonably foreseeable future.

### **C. Likely Volume of Subject Imports**

In evaluating the likely volume of imports of subject merchandise if the order under review is revoked, the Commission is directed to consider whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States.<sup>59</sup> In doing so, the Commission must consider “all relevant economic factors,” including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise into countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.<sup>60</sup>

In the original investigation, the Commission found that the volume of cumulated LTFV imports was significant and increased substantially from 1992 through the first half of 1994.<sup>61</sup> The Commission further found that market penetration of the LTFV imports of pure magnesium, by both quantity and value, increased significantly during the period of investigation.<sup>62</sup> Following imposition of the antidumping duty order in 1994, imports from China subject to antidumping duties dropped sharply and have been at nominal

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<sup>54</sup> (...continued)

consider the significant degree of captive production as a condition of competition.

<sup>55</sup> Commissioner Askey notes that the Commission has recognized on previous occasions that the subject imports do not compete with captive production of domestic merchandise in the same way that they compete with domestic production sold in the merchant market. While the subject imports may arguably have some indirect effect on captive domestic production as a result of competition in downstream markets, any competitive price or volume effects between the subject imports and captive domestic consumption is attenuated, at best.

<sup>56</sup> See CR and PR at Table I-5. Although the 1995 antidumping duty orders covered imports of pure magnesium from Russia, the order on imports from Russia excluded major Russian producers and exporters of pure magnesium.

<sup>57</sup> See Canada CR at IV-6-7 & nn.3, 4; USITC Pub. 3324 at IV-4 & nn.3, 4.

<sup>58</sup> Canada CR at IV-6-7; USITC Pub. 3324 at IV-4; Magcorp’s Response at Exhibit 2. See also <http://www.noranda.com> (June 2000); <http://www.magnola.com> (June 2000).

<sup>59</sup> 19 U.S.C. § 1675a(a)(2).

<sup>60</sup> 19 U.S.C. § 1675a(a)(2)(A)-(D).

<sup>61</sup> Original Determination, USITC Pub. 2885 at 19.

<sup>62</sup> Original Determination, USITC Pub. 2885 at 19.

levels since 1996.<sup>63</sup> Only 14 metric tons of pure magnesium from China subject to the antidumping duty order entered the United States in 1998, and none entered in 1999.<sup>64</sup> The record indicates, therefore, that the antidumping duty order has led to the reduced presence of subject imports in the U.S. market.

The evidence in the record indicates that Chinese producers have the capability to increase significantly shipments of subject pure magnesium to the United States within the reasonably foreseeable future. Since the original investigation, the Chinese magnesium industry has developed rapidly to become the world's largest manufacturer and exporter of magnesium.<sup>65</sup> China's current magnesium production capacity is estimated to be between 170,000 metric tons and 180,000 metric tons, a considerable increase over the 26,000 metric ton figure reported for 1993.<sup>66</sup> The evidence also indicates that the Chinese industry has increased its efficiency and competitiveness during 1998 and 1999, with at least one major consolidation of smaller firms into a larger one.<sup>67</sup>

Absent the antidumping duty order, it is likely that significant volumes of Chinese producers' production will be targeted at the U.S. pure magnesium market. Available industry data estimate Chinese home market consumption of primary magnesium to be only 24,000 metric tons in 1999, accounting for approximately 14 percent of Chinese production capacity.<sup>68</sup> A representative of the Chinese industry reported that Chinese producers expect home market consumption to reach 50,000 metric tons by 2001.<sup>69</sup> However, even with this projected doubling of Chinese home market consumption, Chinese producers will still be forced to look elsewhere to place approximately two-thirds of their potential production.<sup>70</sup> Thus, Chinese magnesium producers must rely heavily on exports, and the available evidence indicates they have in fact increasingly done so as they have increased capacity.<sup>71</sup>

Both India and the EU imposed antidumping duty orders on pure magnesium from China in 1998.<sup>72</sup> Further, there are reports that the EU is considering tightening its order to counter Chinese circumvention through duty absorption.<sup>73</sup> These actual and potential import barriers further suggest that Chinese producers will look to the U.S. market if the order is lifted.

The willingness and ability of Chinese producers to export significant volumes of pure magnesium to the United States are evidenced by their exports during the period examined in this review. Since imposition of the order, there have been substantial U.S. imports of pure magnesium from China under

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<sup>63</sup> CR and PR at Figure I-1.

<sup>64</sup> CR and PR at Table I-5.

<sup>65</sup> CR at I-30, *citing* Magcorp's Response at 18 and 19, PR at I-21.

<sup>66</sup> CR at I-29, PR at I-20. The significance of this capacity is highlighted by comparison to the total volume of pure magnesium imports from all sources into the United States during the original investigation, which, at their peak, reached only 25,590 metric tons. CR and PR at Table I-3.

<sup>67</sup> CR at I-28 & n.73, PR at I-20 & n.73.

<sup>68</sup> *See* Magcorp's Response at 20 and Exhibit 10. Magcorp based this estimate on Metal Bulletin Research ("MBR") data reportedly reflecting information obtained from the Chinese Magnesium Association ("CMA").

<sup>69</sup> CR at I-30, PR at I-21.

<sup>70</sup> *See* CR at I-29-30, PR at I-20-21. Moreover, reported increases in government sponsored export tax rebates will provide additional incentive for Chinese producers to export their magnesium. *See* CR at I-31, PR at I-22 and Magcorp's Response at 22.

<sup>71</sup> *See* Magcorp's Response at 20; CR at I-30, PR at I-21.

<sup>72</sup> CR at I-31, PR at I-22.

<sup>73</sup> *See* Magcorp's Response at 21 and Exhibit 9.

temporary importation under bond (“TIB”) provisions,<sup>74</sup> as well as significant U.S. imports of non-subject magnesium products from China. While non-TIB, pure magnesium imports essentially ceased after the order was imposed, TIB imports surged in 1997 and 1998, at volumes above those attained by the subject Chinese imports during the original investigation.<sup>75</sup> The importation of these products indicates that Chinese producers have the ability to export significant volumes of non-TIB pure magnesium to the United States if the antidumping duty order were revoked.

In addition, Chinese magnesium producers exported 3,644 metric tons of alloy magnesium (which is not subject to antidumping duties) to the United States in 1999.<sup>76</sup> Chinese producers can easily switch production from alloy magnesium to pure magnesium.<sup>77</sup> Likewise, since the order was imposed, increasing volumes of non-subject magnesium powder from China have been imported into the United States.<sup>78</sup> Chinese magnesium producers would have an incentive either to revert to exporting pure magnesium to U.S. magnesium powder producers, or to supplement their magnesium powder sales with sales of pure magnesium, if the antidumping duty order were revoked.

We consequently find it is likely that producers in China would increase significantly exports of the subject merchandise to the U.S. market if the order is revoked. We therefore conclude that, based on the record evidence, the volume of subject imports likely would increase to a significant level upon revocation of the order.

#### **D. Likely Price Effects of Subject Imports**

In evaluating the likely price effects of subject imports if the antidumping duty order is revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared with domestic like products and whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the prices of domestic like products.<sup>79</sup>

During the original investigation, the Commission found that the large and increasing volume of subject imports during the period of investigation depressed prices or prevented price increases to a significant degree.<sup>80</sup> Noting the general substitutability between domestic product and subject imports, the Commission observed that prices for domestic pure magnesium rose and fell in relation to the presence in the U.S. market of unfairly traded imports. In contrast, prices for U.S.-produced alloy magnesium, which were not forced to respond to large increases of LTFV alloy imports from the subject countries, remained stable

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<sup>74</sup> CR and PR at Table I-5; Magcorp’s Response at I-15 and Exhibit 4. TIB provisions permit temporary entry of the items without deposit of antidumping duties so long as the items are re-exported within a specified period of time. Magcorp’s Response at 15. See CR at I-21-22 & n.47, PR at I-12 & n.27.

<sup>75</sup> CR and PR at Figure I-1 and Table I-5.

<sup>76</sup> Canada CR at I-20, n.18, USITC Pub. 3324 at I-5, n.18.

<sup>77</sup> See Canada CR at I-15-16, USITC Pub. 3324 at I-9.

<sup>78</sup> CR at I-23, n.53, PR at I-16, n. 53. See Magcorp’s Response at 22-23.

<sup>79</sup> 19 U.S.C. § 1675a(a)(3). The SAA states that “[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation and termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.” SAA at 886.

<sup>80</sup> Original Determination, USITC Pub. 2885 at 20.

throughout the original period of investigation.<sup>81</sup> Additionally, the cumulated subject imports undersold domestically-produced pure magnesium in the vast majority of pricing comparisons.<sup>82</sup> In particular, price data collected from U.S. purchasers during the original investigation showed underselling by imports from China in 9 of 13 price comparisons.<sup>83</sup>

The current pricing data on this record for subject imports are limited to data on average unit values (“AUVs”). As previously stated, no pure magnesium imports from China entered the U.S. market in 1999. However, the AUV for TIB imports from China in 1998, \$1.13 per pound, was well below the 1998 AUVs of \$1.65 per pound for non-TIB pure magnesium imports from China and \$\*\*\* per pound for domestically-produced pure magnesium.<sup>84</sup> The AUVs for these TIB imports were also below the AUVs for pure magnesium imported from China during the first two years of the original investigation.<sup>85</sup> By contrast, the AUVs for non-TIB, pure magnesium imports from China and for domestically-produced pure magnesium were higher in 1998 than they were during the original investigation.<sup>86</sup>

The pricing patterns for imports of pure magnesium from China both currently and during the original period of investigation indicate that, if the antidumping duty order is revoked, subject imports are likely to be priced aggressively to regain market share currently held by both domestically-produced pure magnesium and nonsubject imports.<sup>87</sup> As noted, the original record and the evidence available in this review indicate that the domestic like product and subject imports are fairly good substitutes. In light of the importance of price in purchasing decisions for pure magnesium and static demand for pure magnesium, increases in subject import volumes will likely drive down pure magnesium prices by forcing domestic producers and importers of nonsubject pure magnesium to match the low prices offered by the subject imports. Consequently, we find that, if the antidumping duty order is revoked, the subject imports likely will have significant price-depressing or -suppressing effects.

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 \*\*\*.<sup>88</sup> This trend increases the likelihood that re-entry of low-priced subject imports would be able to gain volume quickly and adversely affect pricing even in the short-term. These contract trends have already resulted in \*\*\*.<sup>89</sup> These \*\*\* during the first quarter of 2000 coincided with declines in the AUVs for the non-TIB imports of pure magnesium from China.<sup>90</sup>

For the foregoing reasons, we find that revocation of the antidumping duty order on pure magnesium from China would be likely to lead to significant underselling by the subject imports of the

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<sup>81</sup> Original Determination, USITC Pub. 2885 at 21.

<sup>82</sup> Original Determination, USITC Pub. 2885 at 21.

<sup>83</sup> Original Staff Report, USITC Pub. 2885 at I-34.

<sup>84</sup> CR and PR at Table I-1; Magcorp’s Response at Exhibit 4.

<sup>85</sup> CR and PR at Table I-4.

<sup>86</sup> See CR and PR at Table I-1; Magcorp’s Response at Exhibit 4.

<sup>87</sup> Commissioner Bragg infers that, in the event of revocation, subject producers will revert to aggressive pricing practices in connection with exports of subject merchandise to the United States, as evidenced in the Commission’s original determination.

<sup>88</sup> See Canada CR at V-3-4, USITC Pub. 3324 at V-5. \*\*\* Magcorp’s pure magnesium contracts contain \*\*\*. See Magnesium from Canada, Invs. Nos. 701-TA-309 A-B (Review) and 731-TA-528 (Review); Magcorp’s Posthearing Brief at 2 and Magcorp’s Producers’ Questionnaire Response at 29-A.

<sup>89</sup> Canada CR and PR at Table V-1.

<sup>90</sup> Magcorp’s Response at Exhibit 4. Prices for TIB imports have also declined.

domestic like product, as well as significant price depression and suppression, within a reasonably foreseeable time.

### **E. Likely Impact of Subject Imports**

In evaluating the likely impact of imports of subject merchandise if the order is revoked, the Commission is directed to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including but not limited to: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.<sup>91</sup> All relevant economic factors are to be considered within the context of the business cycle and the conditions of competition that are distinctive to the industry.<sup>92</sup> As required by the statute, we have considered the extent to which any improvement in the state of the domestic industry is related to the antidumping duty order at issue and whether the industry is vulnerable to material injury if the order is revoked.<sup>93</sup>

In the original investigation, the Commission found that the significant and increasing LTFV imports and the declines in their prices from 1992 to mid-1994 had a significant adverse impact on the domestic pure magnesium industry.<sup>94</sup> The entry of these imports resulted in increased domestic inventories and placed significant pressure on the domestic producers to lower their prices.<sup>95</sup> The Commission determined that the losses in market share and price pressures resulted in reductions in industrywide capacity to produce pure magnesium, as well as \*\*\* and declines in employment of workers producing pure magnesium.

It is difficult to assess the effect of the antidumping duty order on the domestic industry's performance, in light of the lack of post-order data for Dow's operations. A comparison of the financial data for Magcorp during the original period of investigation with Magcorp's data in the record of this review indicates some improvement in Magcorp's financial condition since the original investigation.<sup>96</sup>

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<sup>91</sup> 19 U.S.C. § 1675a(a)(4).

<sup>92</sup> 19 U.S.C. § 1675a(a)(4). Section 752(a)(6) of the Act states that "the Commission may consider the magnitude of the margin of dumping" in making its determination in a five-year review. 19 U.S.C. § 1675a(a)(6). The statute defines the "magnitude of the margin of dumping" to be used by the Commission in five-year reviews as "the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title." 19 U.S.C. § 1677(35)(C)(iv). *See also* SAA at 887.

In the final results of its five-year review of pure magnesium from China, Commerce published a rate of 108.26 percent for all Chinese manufacturers and exporters. 65 Fed. Reg. 47713, 47714 (Aug. 3, 2000).

<sup>93</sup> The SAA states that in assessing whether the domestic industry is vulnerable to injury if the order is revoked, the Commission "considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they may also demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." SAA at 885.

<sup>94</sup> Original Determination, USITC Pub. 2885 at 22.

<sup>95</sup> Original Determination, USITC Pub. 2885 at 22.

<sup>96</sup> *Compare* Original Confidential Report at Table 8 *with* Canada CR and PR at Table III-8.

However, Magcorp's financial performance, as well as that for the industry as a whole, \*\*\* somewhat from 1998 to 1999.<sup>97</sup>

The industry's \*\*\* operating performance during much of the review period does not support a finding that the industry is vulnerable at the present time.<sup>98</sup> However, the condition of the domestic industry reveals several important signs of \*\*\*. As noted, many of the industry's financial indicia \*\*\* from 1998 to 1999, and, as reflected in Magcorp's first fiscal quarter 2000 data, the \*\*\*.<sup>99</sup>

Given the vast amounts of Chinese production capacity as well as increasing worldwide magnesium capacity, the return of significant volumes of pure magnesium from China into the U.S. market likely would push the domestic industry into a further decline and prevent the industry from improving its financial condition. As discussed above, revocation of the antidumping duty order likely would lead to significant increases in the volume of subject imports at prices that would undersell the domestic like product and significantly depress U.S. prices. With demand for pure magnesium essentially stagnant in a price-sensitive market, the increase in subject imports is likely to cause decreases in both the prices and volume of domestic producers' shipments. These declines in turn would translate into lost revenues for the domestic industry, making it more difficult for Magcorp to finance its planned improvements and continue to meet its large interest expenses.

Thus, the price and volume declines likely would have a significant adverse impact on the production, shipment, sales, and revenue levels of the domestic industry. The reduction in the industry's production, sales, and revenue levels would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. In addition, we find it likely that revocation of the order will result in commensurate employment declines for the industry. In particular, Magcorp has undertaken cost reductions and invested in new electrolytic cell technology in anticipation of increasing its efficiency and production capacity and improving its financial performance.<sup>100</sup> However, given Magcorp's \*\*\*, the loss of sales volume and price depression that are likely to result if the antidumping duty order is revoked likely would prevent Magcorp from implementing this new technology.

Accordingly, we conclude that, if the antidumping duty order is revoked, subject imports of pure magnesium from China would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

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<sup>97</sup> See CR and PR at Table I-1; Canada CR and PR at Tables III-6 and III-8.

<sup>98</sup> Commissioners Miller and Hillman find that the domestic industry is vulnerable. The condition of the industry \*\*\* between 1998 and 1999 with regard to several indicia, including profitability, employment and inventories. Magcorp's first quarter financial data for 2000 reflect a continuing \*\*\*. Given Magcorp's \*\*\*, Commissioners Miller and Hillman find it is appropriate to consider not only operating income but also net income, which \*\*\* from 1998 to 1999 and into the first quarter of 2000. Prices are declining; due particularly to the substitutable nature of the product; additional imports are likely to further depress prices. Finally, Dow's exit from the industry, while triggered by a natural disaster, was at least in part due to weak market conditions. See Canada CR and PR at Tables III-4 through III-9; Canada Tr. at 32-34, 75-76, 195-97, 222; Magnesium from Canada, Invs. Nos. 701-TA-309 A-B (Review) and 731-TA-528 (Review): Magcorp's Prehearing Brief at Attachments 12, 25, 26, 27 and Staff Notes of telephone conversation with \*\*\*, June 9, 2000. The data in the record reflecting prices and the financial condition of domestic industry indicate that these weak conditions have continued.

<sup>99</sup> Magnesium from Canada, Invs. Nos. 701-TA-309 A-B (Review) and 731-TA-528 (Review): Magcorp's Producers' Questionnaire Response at 18; Magcorp's Prehearing Brief at Exhibit 12.

<sup>100</sup> Canada CR at III-28 & n.19, USITC Pub. 3324 at III-8; Canada Tr. at 16-18. Replacement of just one half of its existing electrolytic cells would enable Magcorp to increase its capacity by 33 percent. Canada Tr. at 18.

## **CONCLUSION**

For the foregoing reasons, we determine that revocation of the antidumping duty order on pure magnesium from China would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.

## DISSENTING VIEWS OF COMMISSIONER THELMA J. ASKEY

Section 751(d) requires that Commerce revoke a countervailing duty or an antidumping duty order in a five-year (“sunset”) review unless Commerce determines that dumping or a countervailable subsidy would be likely to continue or recur and the Commission determines that material injury would be likely to continue or recur within a reasonably foreseeable time.<sup>1</sup> In this review of the order on pure magnesium from China, I find that material injury is not likely to continue or recur in a reasonably foreseeable time if the order is revoked.

I join my colleagues’ discussion regarding domestic like product, domestic industry, conditions of competition, and in their explanation of the relevant legal standard. As a preliminary matter, I note that one domestic producer representing less than half of the domestic industry responded to the Commission’s notice of institution; no respondent interested parties chose to participate in the review.<sup>2</sup> The Commission therefore has a limited record to review in determining whether revocation of the order will likely lead to continuation or recurrence of material injury in the reasonably foreseeable future.<sup>3 4</sup> In a case such as this, where only one domestic interested party participates in an investigation or review, that party has an advantage in terms of being able to present information to the Commission without rebuttal from the other side. However, irrespective of the source of information on the record, the statute obligates the Commission both to investigate the matters at issue and to evaluate the data before it in terms of the statutory criteria.<sup>5</sup> The Commission cannot properly accept participating parties’ information and characterizations thereof without question and without evaluating other available information.<sup>6</sup>

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<sup>1</sup> 19 U.S.C. §§ 1675(d)(2), 1675a(a)(1) (1994).

<sup>2</sup> Office of Investigations Memorandum INV-X-142, June 27, 2000.

<sup>3</sup> Congress and the administration anticipated that the record in expedited sunset reviews would likely be more limited than that in full reviews and accordingly provided that the Commission’s determination would be upheld unless it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(b)(ii). Nevertheless, even under a more relaxed standard of review, the Commission must ensure that its decision is based on some evidence in the record. See Genentech Inc. v. United States Int’l Trade Comm’n, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (discussing the Commission’s decision on sanctions).

<sup>4</sup> More data is available in this than in most expedited reviews, however, since the Commission incorporated into this record the record established as of July 6, 2000 for the review of Magnesium from Canada, Invs. Nos. 701-TA-309-A-B and 731-TA-528 (Review), Pub. No. 3324 (July 2000) [hereinafter, “Canada Review”]. CR at I-4, n.5; PR at I-3, n.5.

<sup>5</sup> 19 U.S.C. § 1675a(a).

<sup>6</sup> See, e.g., Alberta Pork Producers’ Mktg. Bd. v. United States, 669 F. Supp. 445, 459 (Ct. Int’l Trade 1987) (“Commission properly exercised its discretion in electing not to draw an adverse inference from the low response rate to questionnaires by the domestic swine growers since the fundamental purpose of the rule to ensure production of relevant information is satisfied by the existence of the reliable secondary data.”).

## A. General Considerations

The statute directs the Commission to take into account some general considerations.<sup>7</sup> I therefore have taken into account the Commission's prior injury determination, including the volume, price effects, and impact of the subject imports on the industry before the order was issued.<sup>8</sup>

The original determination concerned three countries whose imports were cumulated for purposes of the determination: Ukraine, Russia and China.<sup>9</sup> In 1994, domestic magnesium producer Magnesium Corporation of America ("Magcorp") and two unions filed a petition alleging material injury or threat of material injury by reason of dumped imports of primary magnesium from China, Russia and Ukraine. The Commission issued its final determination in 1995: three Commissioners found that the domestic industry producing pure magnesium was materially injured by reason of cumulated imports from those three countries and three Commissioners made negative determinations.<sup>10</sup> The Ukrainian respondents appealed and the Court of Appeals for the Federal Circuit vacated and remanded the decision. The Commission reached a negative determination on remand, with two Commissioners making negative determinations and one making an affirmative determination,<sup>11</sup> although the result applied only to imports from Ukraine because only Ukrainian respondents had appealed.<sup>12</sup> In July 2000, Commerce revoked the antidumping duty order on pure magnesium from Russia, since no domestic interested party filed a Notice of Intent to Participate in the sunset review of that order.<sup>13</sup> Accordingly, only the order concerning China remains from the original investigation.

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<sup>7</sup> 19 U.S.C. § 1675a(a)(1). The Commission is also to take into account the Commission's prior injury determinations, consider whether any improvement in the state of the industry is related to the order, consider whether the industry is vulnerable to material injury in the event of revocation, and consider any duty absorption orders made by Commerce. *Id.* Commerce has made no findings of duty absorption in this review. The statute also provides that the Commission may consider the margin of dumping when making its determination. 19 U.S.C. § 1675a(a)(6). Commerce determined that the margin it would expect in the event of revocation for Chinese producers would be 108.26 percent. 65 Fed. Reg. 47713 (Aug. 3, 2000).

<sup>8</sup> 19 U.S.C. § 1675a(a)(1)(A). According to the Statement of Administrative Action ("SAA") to the Uruguay Round Agreements Act, if pre-order conditions are likely to recur, it is reasonable to conclude that there is a likelihood of continuation or recurrence of injury. H. R. Rep. No. 103-316, vol. 1 at 884 (1994).

<sup>9</sup> Magnesium from China, Russia, and Ukraine, Invs. Nos. 731-TA-696-698 (Final), USITC Pub. 2885 (May 1995) ("Original Determination").

<sup>10</sup> Original Determination, USITC Pub. 2885 at 15-16, 22. The Commission found that there were two separate like products—pure magnesium and alloy magnesium—coextensive with the two classes or kinds defined by Commerce. *Id.*

<sup>11</sup> Magnesium from Ukraine (Views on Remand), Inv. No. 731-TA-698 (Remand), USITC Pub. 3113 (June 1998).

<sup>12</sup> The Court of International Trade ("CIT") affirmed the Commission's determination in Gerald Metals, Inc. v. United States, 937 F. Supp. 930 (Ct. Int'l Trade 1996), and Gerald Metals appealed to the U.S. Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit"), which vacated and remanded the CIT's order. In response to the Federal Circuit's remand, the CIT ordered the Commission to reconsider its original determination. On remand, the Commission reached a negative determination with respect to pure magnesium from Ukraine. Magnesium from Ukraine, Inv. No. 731-TA-698 (Final) (Remand) (June 1998), aff'd after remand, 27 F. Supp. 2d 1351 (Ct. Int'l Trade, Oct. 1998). The CIT subsequently affirmed the Commission's remand determination. Gerald Metals v. USITC, 27 F. Supp. 2d 1351 (Ct. Int'l Trade 1998).

<sup>13</sup> 65 Fed. Reg. 41944 (July 7, 2000). The Commission accordingly terminated its review of pure magnesium from Russia effective on July 7, 2000. CR at I-3, n.1; PR at I-3, n. 1.

In the original investigation, Russian and Ukrainian subject imports represented the large majority of subject imports, namely, \*\*\* percent of subject imports in 1992 and 1993, and \*\*\* percent in 1994.<sup>14</sup> In other words, the present review concerns the order on the only remaining country from the original investigations involving cumulated imports from three countries, a country whose imports represented a small proportion of the subject imports at that time.

In a review such as this the statute directs that the Commission “shall revoke . . . an antidumping duty order . . . unless” dumping is likely to continue or recur and material injury is likely to continue or recur.<sup>15</sup> In this regard, I note that the Commission on remand of the original determination made a negative determination with respect to Ukraine, based upon its evaluation of the same volume and price data for cumulated imports from China, Russia and Ukraine, and the same financial data concerning the domestic industry. I find little evidence on the current record to suggest that within a reasonably foreseeable time, subject import volumes for China alone will rise above the levels for the three cumulated countries that the Commission considered when it made that negative determination.

## **B. Volume**

The Commission is to consider whether the likely volume of subject imports if the order under review is revoked would be significant either in absolute terms or relative to production or consumption in the United States.<sup>16</sup> In so doing, the Commission shall consider “all relevant economic factors,” including four enumerated in the statute: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise in countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.<sup>17</sup>

The Commission’s focus in a sunset review is whether subject import volume is likely to be significant in the reasonably foreseeable future if the antidumping duty order is revoked. Based upon the record in this review, I do not find it likely that subject import volumes would be significant in the reasonably foreseeable future if the antidumping duty order is revoked.

First, I note that the volume of the subject imports from China was very small during the course of the original investigation, at 410 metric tons, 2,071 metric tons and 800 metric tons in 1992, 1993 and 1994, respectively.<sup>18</sup> These volumes represented shares of domestic apparent consumption of only \*\*\*, \*\*\*, and \*\*\* percent, respectively.<sup>19</sup> At that time, Chinese subject imports were cumulated with those of Russia and Ukraine, for total market shares of \*\*\* percent, \*\*\* percent and \*\*\* percent in 1992, 1993 and 1994,

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<sup>14</sup> CR and PR at Table I-3.

<sup>15</sup> 19 U.S.C. § 1675(d)(2).

<sup>16</sup> 19 U.S.C. § 1675a(a)(2).

<sup>17</sup> 19 U.S.C. § 1675(a)(2)(A)-(D). The SAA indicates that the statutory factors specified for analysis of volume, price, and impact are a combination of those used to determine both material injury by reason of subject imports and threat of material injury in original antidumping and countervailing duty investigations. See SAA at 886.

<sup>18</sup> CR and PR at Table I-3.

<sup>19</sup> CR and PR at Table I-5. This contrasts also with the fact that Canadian shares during the original investigation concerning Canada had increased more consistently and substantially, rising from less than \*\*\* percent in 1989 to \*\*\* percent in 1990 and to \*\*\* percent in 1991. Canada Review, CR and PR at Table I-1.

respectively.<sup>20</sup> However, as noted above, the Commission on remand made a negative determination with respect to Ukraine, and the Russian order was recently terminated because of lack of domestic industry interest. Those two countries combined represented the large majority of subject imports during the original investigation.<sup>21</sup> Accordingly, the subject imports at issue in this review represented a very small portion of the domestic market during the original investigation.

Moreover, since 1994, subject import volumes have been actually or essentially zero.<sup>22</sup> Most recently, Chinese subject imports were 14 metric tons in 1998 and zero in 1999.<sup>23</sup> Since 1996 there has been an increase in the volume of Chinese pure magnesium entered under temporary importation under bond (“TIB”).<sup>24</sup> Such imports are not subject to the order under review because they are entered for purposes of re-export. In 1998, 2,180 metric tons of pure magnesium from China were entered under TIB; there were no imports in 1999.<sup>25</sup> However, even at their peak in 1998, combined imports of subject and TIB imports would have represented a mere \*\*\* percent of apparent domestic consumption had they been entered for domestic consumption.<sup>26</sup> Thus, in light of the previous and current small Chinese import volumes, I see no evidence that large volumes of Chinese pure magnesium are likely to be imported within a reasonably foreseeable time.

Second, nonsubject imports, including those from Russia, have grown significantly over the past years. Non-subject imports made up a consistently larger proportion of the domestic market in the review period than during the original investigation period. During the original POI, nonsubject imports made up relatively small proportions of domestic consumption, at \*\*\* percent of the market in 1992, \*\*\* percent in 1993 and \*\*\* percent in 1995.<sup>27</sup> By contrast, they made up a much higher proportion during the review period, holding \*\*\* and \*\*\* percent of the market in 1998 and 1999, respectively.<sup>28</sup> Nonsubject imports from Russia in 1998 and 1999 accounted for more than ten percent of domestic consumption.<sup>29</sup> However, as discussed below, even with the presence of large volumes of nonsubject imports, the domestic producers are performing well. Additionally, the order concerning pure magnesium from Canada was recently continued.<sup>30</sup>

The statute directs the Commission to consider any likely increase in production capacity or existing unused production capacity in the exporting country. It appears that the Chinese industry has undergone considerable consolidation since 1995, shrinking from 300 plants in 1995 to 85 in 1999.<sup>31</sup> Production capacity for primary magnesium, which includes both pure and alloy magnesium, is reported to have

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<sup>20</sup> Original Determination at Table A-1.

<sup>21</sup> CR and PR at Table I-3.

<sup>22</sup> CR and PR at Figure I-1.

<sup>23</sup> CR and PR at Table I-5.

<sup>24</sup> CR and PR at Figure I-1; CR at I-21-22, PR at I-12, I-15.

<sup>25</sup> CR and PR at Table I-5.

<sup>26</sup> CR and PR at Table I-25.

<sup>27</sup> Original Determination at Table A-1.

<sup>28</sup> CR and PR at Table I-5.

<sup>29</sup> See CR and PR at Table I-3 and Table I-5.

<sup>30</sup> Canada Review at 1.

<sup>31</sup> CR at I-28; PR at I-20.

increased, from 26,000 metric tons in 1993<sup>32</sup> to an estimated 170,000-180,000 tons in 1999, making China the world's largest producer and exporter of magnesium.<sup>33</sup> The record also indicates there may be some current unused capacity in China.<sup>34</sup> However, during the original investigation, when Chinese import volumes were low, Chinese producers were reportedly operating at a capacity utilization rate of less than 50 percent.<sup>35</sup> Accordingly, prior to imposition of the order, there appears to have been considerable unused capacity that could have been utilized to increase exports to the United States, but import levels remained low nevertheless.

The statute also directs the Commission to consider the effects of existing inventories of the subject merchandise, or likely increases in inventory. Because no Chinese producer or importer participated in this investigation, the Commission has no information on existing Chinese producer or importer inventories. Further, the Commission is to consider the existence of barriers to the importation of the subject merchandise in countries other than the United States. The record indicates that the EU and India currently have antidumping orders in place against magnesium from China.<sup>36</sup>

The data on the record indicates that on the one hand, China represents a large source of magnesium in the world and, therefore, could possibly become a substantial presence in the United States market. However, on the other hand, the record shows that Chinese import volumes and market shares during the original investigation period were small, particularly in comparison with those countries with which its imports had originally been cumulated, one of which was subject to a negative determination on remand and the other of which had its order revoked this year. Given that this is a review, and because the circumstances upon which the order was based in 1995 have changed so dramatically since that time, I focus on the fact that Chinese import volumes have never been a significant presence in the U.S. market, even when Chinese capacity utilization was low and there was no order in effect against Chinese imports, and conclude that while Chinese import volumes could increase, they are not likely to increase significantly given the current situation and in light of Chinese import activity during the original investigation.

In sum, I find that the volume of the subject imports of pure magnesium from China is not likely to be significant upon revocation of the order.

### C. Price

In evaluating the likely price effects of the subject merchandise in the event of revocation, the Commission shall consider (1) whether imports are likely to be sold at a significantly lower price than the domestic like product, and (2) whether imports are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of the domestic like product.<sup>37</sup>

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<sup>32</sup> CR at I-28; PR at I-20.

<sup>33</sup> CR at I-29-30; PR at I-21.

<sup>34</sup> CR at I-29; PR at I-21.

<sup>35</sup> Original Determination at I-39.

<sup>36</sup> CR at I-31; PR at I-22. The domestic industry also alleges that there is a potential for product shifting in that Chinese producers may shift from production of alloy magnesium and magnesium powder to pure magnesium if the order is revoked. Id.

<sup>37</sup> 19 U.S.C. § 1675a(3). The SAA states that “[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation or termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.” SAA at 886.

In the original investigation the Commission “determine[d] that the effect of the large and increasing volume of subject imports during the period of investigation has been to depress prices or prevent price increases to a significant degree.”<sup>38</sup> The record in this review contains no current pricing data and limited AUV data.

Chinese import levels during the review period were low, and therefore AUV data are limited. The 1998 data show Chinese landed duty-paid unit values being lower than the landed duty-paid unit values for nonsubject imports. However, while the 1998 Chinese unit values are lower than those of Canada and other sources, they are similar to those of Russian imports, whose imports represented more than ten percent of domestic consumption in 1998 and 1999<sup>39</sup> and whose order was revoked this year.<sup>40</sup> The 1998 data also show Chinese unit values being lower than the domestic producer unit values.<sup>41</sup> However, these two figures are not directly comparable because the domestic figure represents shipment data that is close to the actual price to purchasers while the Chinese figures do not include importer profits and U.S. inland freight costs.

Accordingly, while the limited available data suggest that Chinese imports are likely to be priced lower than the domestic like product and some nonsubject imports, they also suggest that Chinese import prices are likely to be similar to those of Russian imports. Moreover, as discussed above, there are likely to be small volume increases, at best, which would likely have small price effects in the domestic market. Therefore, because it is likely that Chinese imports would be priced similarly to other nonsubject imports that make up a substantial portion of U.S. imports and because I find that current and prior Chinese import levels do not suggest that Chinese imports will be significant in the future, I find it unlikely that subject imports of pure magnesium will have a significant adverse impact on domestic prices upon revocation of the order.

#### **D. Impact**

When considering the likely impact of subject imports, the Commission is to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more enhanced version of the domestic like product.<sup>42</sup>

As an initial matter, I find that the U.S. industry is not currently in a vulnerable state. The industry is not vulnerable despite the presence of large volumes of nonsubject imports that held roughly one-third of the market during the review period. Although the industry’s market share is lower than during the original

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<sup>38</sup> Original Determination at 20.

<sup>39</sup> See CR and PR at Table I-3 and Table I-5.

<sup>40</sup> Chinese landed duty-paid unit value for 1998 was \$1.13; there were no data for 1999 because there were no Chinese imports. Russian landed duty-paid unit values were \$1.32 in 1998 and \$1.21 in 1999. By contrast, values for Canada were \$\*\*\* in 1998 and \$\*\*\* in 1999 and for other sources were \$\*\*\* in 1998 and \$\*\*\* in 1999. CR and PR at Table I-3.

<sup>41</sup> Domestic producers’ U.S. shipment per pound total unit values were \$\*\*\* in 1998 and \$\*\*\* in 1999, which represent an average of company transfers, which were \$\*\*\* and \$\*\*\*, respectively in 1998 and 1999, and domestic shipments, which were \$\*\*\* and \$\*\*\* in 1999. CR and PR at Table I-1.

<sup>42</sup> 19 U.S.C. § 1675a(a)(4).

period of investigation,<sup>43</sup> the industry's operating income levels and capacity utilization rates remain healthy.<sup>44</sup> Moreover, the industry's condition is likely to strengthen considerably in the future with the departure of the domestic producer Dow from the marketplace. The consolidation of this already concentrated industry will contribute to the industry's competitiveness. Additionally, the industry's competitive position will likewise benefit from the recent continuation of the order against pure magnesium imports from Canada. Further, the industry is experiencing its current healthy state despite competition from a large volume of nonsubject imports, including imports from Russia that appear to be priced similarly to Chinese imports.

Because I find that subject imports are unlikely to have significant volume or price effects in the U.S. market in the reasonably foreseeable future, I find that subject imports are not likely to have a significant adverse impact on the domestic pure magnesium industry if the order is revoked. In this regard, I note that subject imports have essentially been absent from the market since 1995, and, as discussed above, even before the order went into effect, subject imports held a small share of domestic consumption. Moreover, while TIB imports increased in 1996 and 1997, they remained at relatively low levels and dropped to zero in 1999.

Additionally, even if I were to assume that subject imports may enter at prices that could perhaps adversely affect prices for the domestic like product (i.e., create some additional price competition apart from that which already exists in the market between and among domestic producers and nonsubject imports), I conclude that volume levels would not be sufficient to enable subject imports to have a price suppressing or depressing effect. I therefore find that subject imports would not be likely to have a significant impact on domestic pure magnesium producers' cash flow, inventories, employment, wages, growth, ability to raise capital, or investment. In conjunction with my conclusions regarding likely volume and price effects, I find that revocation is not likely to lead to a significant reduction in U.S. producers' output, sales, market share, profits, productivity, ability to raise capital, or return on investments. I therefore find that revocation is not likely to have a negative impact on the domestic industry in the reasonably foreseeable future.

Finally, the fact that only one of the two domestic producers expressed interest in maintaining the order supports my conclusion that the order should be revoked.

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<sup>43</sup> CR and PR at Table I-5. The industry's market share ranged between \*\*\* and \*\*\* percent during the original period of investigation, its market share was \*\*\* percent in 1998 and \*\*\* percent in 1999. Id. While these market shares are lower than the original period, they appear to be due, in part, to the departure of Dow from the industry in 1999. Canada Review, CR and PR at III-1.

<sup>44</sup> The industry's operating income levels were \*\*\* percent in 1998 and \*\*\* percent in 1999. Canada Review, CR and PR at Table I-1. The industry's combined capacity utilization rates, while understated, were \*\*\* percent in 1998 and \*\*\* percent in 1999. Canada Review, CR and PR at Table C-1.

## **E. Conclusion**

For the reasons stated above, I determine that revocation of the order covering subject imports from China would not be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.