UNITED STATES-CANADA BINATIONAL PANEL REVIEW

In the matter of:	USA-92-1904-05 and USA-92-1904-06
MAGNESIUM FROM CANADA	

GOUVERNEMENT DU QUÉBEC, GOVERNMENT OF CANADA, and NORSK HYDRO CANADA, INC.,
Complainants,

v.

U.S. INTERNATIONAL TRADE COMMISSION,
Respondent, and

MAGNESIUM CORPORATION OF AMERICA,
Respondent-Intervenor.

FINAL DECISION OF THE PANEL

January 27, 1994

Before: Michael P. Mabile, Chairman
Robert E. Lutz, II
John M. Peterson
R.J. Ross Stinson
Wilhelmina K. Tyler

Spencer S. Griffith, of Akin, Gump, Strauss, Hauer & Feld, argued for the Gouvernement du Québec. With him on the brief were Patrick F. J. Macrory and Shannon S. Herzfeld. Michael H. Stein and Carol A. Mitchell of Dewey Ballantine appeared on behalf of Norsk Hydro Canada, Inc. Stuart E. Benson, Homer E. Moyer, Jr., and Catherine Curtiss of Miller & Chevalier appeared on behalf of the Government of Canada.

Stephen McLaughlin argued for the U.S. International Trade Commission. With him on the brief were Lyn M. Schlitt, General Counsel, James A. Toupin, Assistant General Counsel, and Andrea Casson.

Kenneth R. Button, Ph.D., of Economic Consulting Services, and Lee R. Brown, Vice President, Magnesium Corporation of America, appearing pro se, appeared on behalf of Magnesium Corporation of America.

INTRODUCTION

Before the Panel are challenges by the Gouvernement du Québec ("Québec") and Norsk Hydro Canada, Inc. ("NHCI") to the final affirmative material injury determinations of the U.S. International Trade Commission ("ITC") with respect to subsidized imports of alloy magnesium from Canada and dumped and subsidized imports of pure magnesium from Canada, which were issued in response to the Panel's remand order of August 27, 1993. The ITC and Magnesium Corporation of America have filed briefs in support of the ITC's remand determination.

Having reviewed the briefs and the arguments of the parties at the hearing on January 11, 1994, the Panel concludes that the ITC's remand determinations are supported by substantial evidence on the administrative record and are otherwise in accordance with law. Therefore, we affirm those determinations.

BACKGROUND

In making its original affirmative determinations of material injury by reason of dumped and subsidized imports of magnesium from Canada, the ITC found that there was a single like product consisting of all primary magnesium, including both pure magnesium and alloy magnesium. Thus, there was only one domestic industry--that producing all primary magnesium. Magnesium From Canada, Inv. Nos. 701-TA-309 and 731-TA-528 (Final), USITC Pub.

2550 (Aug. 1992).[1] The Panel's decision and order of August 27, 1993 ("Panel Decision") concluded that the ITC's finding that there was a single like product was not supported by substantial evidence on the record. Panel Decision at 27. In addition, the Panel found that the ITC's alternative conclusion that it would have made affirmative injury determinations even if it had found two like products was insufficiently explained to permit the Panel to determine whether the ITC's analysis was properly based on the evidence of record. Id. at 24-26. Specifically, although the Panel found substantial evidence supporting the ITC's causation analysis with respect to the statutory factors of volume and price effects of imports from Canada, 19 U.S.C. § 1677(7)(b)(i), it found that the ITC's analysis of the impact of imports on the domestic industry was deficient. Id. at 27-28. Accordingly, the Panel remanded to the ITC for a detailed explanation as to whether the U.S. industry producing pure magnesium was materially injured or threatened with material injury by reason of dumped or subsidized imports of pure magnesium from Canada and whether the U.S. industry producing alloy magnesium was materially injured or threatened with material injury by reason of subsidized imports of alloy magnesium from Canada. Id. at 29.

[1] Further details regarding the ITC's investigation and original determinations are provided in the Panel's August 27, 1993 decision.

On remand, the ITC determined that the U.S. industry producing pure magnesium was materially injured by reason of dumped and subsidized imports of pure magnesium from Canada and that the U.S. industry producing alloy magnesium was materially injured by reason of subsidized imports of alloy magnesium from Canada. Magnesium from Canada, Inv. Nos. 701-TA-309 and 731-TA-528 (Remand), USITC Pub. 2696 (Nov. 1993) ("ITC Remand").[2] The ITC's reasoning with respect to Canadian imports of both pure and alloy magnesium was similar, and, because the bulk of the Complainants' challenge concerns the ITC's conclusions with respect to imports of alloy magnesium, we focus our review on that aspect of the ITC's remand determinations.

Conditions Of Competition

The ITC discussed those conditions of competition that are distinctive to the U.S. alloy magnesium industry.[3] First, the production of alloy magnesium requires electrolytic cells that must be kept in constant operation in order to avoid

---

[2] The ITC majority's statement of views was joined in part by Commissioner Brunsdale, who also readopted her original views. ITC Pub. 2696 at 1 n.2. Commissioner Rohr readopted his original views, with an amendment for technical errors. Id. at 1 n.1 and 23. Vice Chairman Watson and Commissioner Nuzum expressed additional views on the issue of whether the ITC must consider the position of the domestic industry in making its material injury determination. Id. at 21-22.

[3] The ITC is required to assess the factors affecting the industry "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii).

deterioration or costly rebuilding. ITC Remand at 7. To be cost-effective, producers must maintain continuous production. Because the cells must run constantly, energy costs as a factor of production in the magnesium industry are high, and any producer's reduction in these costs is likely to give it a competitive edge. Id.

Second, the Canadian imports are close substitutes for U.S.-produced alloy magnesium. The ITC noted that purchasers "reported few differences between the alloy magnesium they purchased from domestic and Canadian suppliers, and indicated that the products from both countries were employed in the same range of uses." Id.

Third, the market for alloy magnesium is very price competitive. Because most contracts for sales of alloy magnesium in the United States contain "meet-or-release" clauses, price changes by one producer are followed by price changes by other producers. Id. at 7-8. Moreover, "even in the absence of such contractual provisions, changes in prices charged for alloy magnesium by one producer are followed by price changes by other producers." Id. at 8.

Fourth, despite being characterized as a potential growth market because of new applications for alloy magnesium, the market for alloy magnesium actually contracted between 1990 and 1991. Id.

Industry Performance

The ITC found that both domestic consumption and U.S. producers' domestic shipments of alloy magnesium increased from 1989 to 1990 and then decreased from 1990 to 1991. The decrease in shipments, however, was sharper than the decrease in consumption, "resulting in an overall net decrease for the period examined." Id. Domestic production of alloy magnesium declined during 1989-1991, while domestic producers' inventories increased both in absolute terms and relative to production. Id. at 8-9.

Employment data were mixed. Employment of production and related workers declined, as did the hours worked and the total compensation paid. At the same time, productivity increased and labor costs declined. Id. at 9.

The ITC further found that the industry had experienced "poor financial performance." Id. There were "substantial declines in net sales, operating income and operating income margins, and gross profits." Id.

Causation Of Material Injury

In determining that the industry was materially injured by reason of the Canadian imports, the ITC reviewed, as required by 19 U.S.C. § 1677(7)(B)(i), the volume of imports, the effect of the imports on prices in the United States for the like product, and the impact of the imports on domestic producers of the like product. Id. at 9-10.

The ITC found that "the volume of subsidized imports of alloy magnesium, measured by both quantity and value, is significant, and increased manyfold during the period of investigation." Id. at 14. The market penetration of Canadian imports, measured "by both quantity and value, also increased dramatically during the period of investigation." Id. at 15.

The ITC rejected the respondents' argument that the increase in imports was explained by the inability of the domestic industry to supply the market in 1988. Id. According to the ITC, the respondents' explanation failed to account fully for the large increase in Canadian imports from 1989 to 1990 and the further increase in 1991, "particularly as demonstrated by the decrease in U.S. production and capacity utilization from 1989 to 1991 as the subject imports increased market share substantially." Id.

The ITC also rejected the respondents' argument that increased alloy magnesium imports from Canada merely replaced imports from Norway, noting that when imports from Canada surged from 1989 to 1990, imports from other countries remained relatively stable. Thus, imports from Canada represented additional imports, not replacements for imports from Norway. Id.

The ITC found that U.S. producers' domestic shipments of alloy magnesium declined slightly from 1989 through 1991,

while the quantity of imports from Canada increased. Id. As a result, U.S. producers' market share decreased steadily from 1989 to 1991 in terms of both quantity and value. Id.

The ITC also found that, concurrently with the increase in the volume and market share of Canadian imports, prices for both U.S.- and Canadian-produced alloy magnesium steadily declined. Id. at 16. The ITC found that the effect of Canadian import prices on U.S. prices was significant, noting:

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

Id.

Contrary to respondents' argument, the ITC found that non-price factors, such as product quality, had only "a minimal effect on purchasing decisions and do not account for the large increase in the volume and market share of the subject imports from Canada." Id. at 17. Specifically, the ITC noted that, although most purchasers ranked quality as the most important factor in choosing a supplier, "eight of ten responding purchasers found the quality of domestic and Canadian products to be identical, with the remaining two differing as to whether the U.S. or Canadian product was superior." Id.

The ITC also rejected respondents' argument that the existence of NHCI's scrap repurchase program made the U.S. and Canadian products less substitutable, finding that both U.S. producers had similar programs and that, by offering a rebate in the form of scrap repurchase, "these programs essentially provide additional services for the same price, effectively offering a discount, and adding to the overall price competition." Id. at 17.

Finally, the ITC observed that, because of the high costs of recharging the electrolytic cells, U.S. producers are willing to reduce prices to maintain production levels. Id. Because the demand for alloy magnesium is relatively inelastic, these price reductions do not increase total consumption. Id. Thus, "the substantial increases in Norsk Hydro Canada's share of the relatively stable market resulted in increased domestic inventories and placed significant pressure on the domestic producers to lower their prices." Id. Thus, the industry-wide price declines caused a direct reduction in domestic revenues, as reflected in the financial data. Id.[4]

The ITC concluded:

---

[4] The ITC also found that the subsidies provided to the Canadian imports--exemption from payment of water bills and preferential electric rates--were likely to reduce NHCI's costs of production, thereby enhancing NHCI's "competitive position in relation to the U.S. industry." Id.

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

Id. at 18.

Industry Support For The Petition

The ITC also addressed the issue, raised by the Canadian Complainants, of whether it is required to give weight in making its injury determination to whether the industry supports the petition. The ITC concluded that industry support, or lack thereof, "is not, in itself, a statutory factor the Commission is required to consider." Id. at 18. In the ITC's view, a lack of industry support may only reflect the reluctance of industry members to express support for the petition because of potential negative reactions from customers that benefit from dumped or subsidized imports. Alternatively, some companies may be multinationals with economic ties to the respondents or interests in other industries, or whose corporate parents are generally opposed to trade relief because of the effects on other subsidiaries. Other companies may decline to support the petition because they do not "share the petitioner's view of the state of the marketplace." Id. at 18-19.

The ITC further reasoned that it is not required to consider factors that are not enumerated in the statute, nor is it limited in its consideration by the enumerated factors. Thus, while it is not required to consider the level of support for a petition within the domestic industry as part of its analysis of material injury, the lack of express support or stated opposition may be relevant in some cases. Id. at 19. The ITC relied in part on Minebea Co., Ltd. v. United States, 794 F. Supp. 1161, 1165 (Ct. Int'l Trade 1992), in which the Court of International Trade stated that the position of the industry "is not something which the ITC is required to consider." The ITC distinguished the decision relied upon by Complainants, Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348 (1993), appeal docketed, No. 94-1021 (Fed. Cir. Oct. 15, 1993), on the ground that Suramerica was explicitly limited to threat, not material injury, determinations. ITC Remand at 20.[5]

DISCUSSION

I. STANDARD OF REVIEW

Under Article 1904.3 of the U.S.-Canada Free Trade Agreement, this Panel must apply the standard of review that a

[5] In additional views, Vice Chairman Watson and Commissioner Nuzum concurred with the conclusion of the majority regarding the issue of whether the ITC must consider the position of the domestic industry in making its material injury determination. USITC Pub. 2696 at 21. They also set forth reasons why the record evidence did not indicate a lack of support for the petition by domestic producers. Id. at 21-22.

court of the United States would apply in reviewing an ITC determination. That standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B), which requires the Panel to decide whether the ITC's final affirmative material injury determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). "It is not the function of a [Panel] to decide that, were it the Commission, it would have made the same decision on the basis of the evidence." Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). Nevertheless, an agency determination must be supported by the administrative record as a whole, including evidence that detracts from the substantiality of the evidence relied upon by the agency. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

An ITC determination is presumed to be correct, and the burden of demonstrating otherwise is on the party challenging the determination. 28 U.S.C. § 2639(a)(1).

II. THE ITC'S AFFIRMATIVE INJURY DETERMINATION UPON REMAND REGARDING IMPORTS FROM CANADA OF ALLOY MAGNESIUM

This case presents two contrasting views of the evidence in the ITC's administrative record. As described above, the ITC found that, over the three-year period of investigation, the U.S. alloy magnesium industry had suffered declines in shipments and production, an increase in inventories, and a substantial decline in its financial performance. The ITC further determined that, "[g]iven the high degree of substitutability between subject imports and the like product, the rapid and dramatic increase in unfairly traded imports, and the concurrent declines in domestic market share, prices, and financial condition," the domestic alloy magnesium industry had been materially injured by reason of subsidized Canadian imports. ITC Remand at 18.

Complainants do not contest the ITC's findings with respect to the declining performance of the industry over the period of investigation, nor do they contest the ITC's findings with respect to the increase in Canadian imports, the increase in the imports' share of the U.S. market, and the decline in prices in the U.S. market. Rather, Complainants argue that the ITC failed to consider other market factors that they contend wholly

accounted for the declining condition of the industry. Complainants further claim that imports from Canada that substituted for imports from Norway could not have injured the domestic industry and that any increase in NHCI's share of the U.S. market resulted from non-price reasons. According to Complainants, if the ITC had given proper consideration to these other factors, it would have concluded that Canadian imports were not a cause of material injury to the industry.

Under the substantial evidence standard, this Panel is not required to determine which of these contrasting views of the record is more correct or more persuasive. The Panel may not substitute its judgment for that of the ITC when the choice is "between two fairly conflicting views, even though the [Panel] would justifiably have made a different choice had the matter been before it de novo." Universal Camera, 340 U.S. at 488. That the Complainants "can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. . . . It is not the function of [the Panel] to decide that, were it the Commission, it would have made the same decision on the basis of the evidence. . . . Our role is limited to deciding whether the Commission's decision is 'unsupported by substantial evidence on

the record, or otherwise not in accordance with law.'" Matsushita, 750 F.2d at 936.

In reviewing the ITC's determination that the U.S. industry was materially injured by reason of subsidized Canadian imports, the Panel is also guided by the principle that, although the ITC may consider alternative causes of injury, it may not weigh causes. The ITC need not find that the "subsidized imports are the principal, a substantial, or a significant cause of material injury." S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979). Thus, if the subsidized imports contribute to the harm to the domestic industry, the ITC may find that they are a cause of material injury. See, e.g., Encon Industries, Inc. v. United States, Slip Op. 92-164, 16 CIT ___ (1992), at 4-5, 7-8; LMI-La Metalli Industriale, S.p.A. v. United States, 712 F. Supp. 959, 971 (Ct. Int'l Trade 1989), aff'd in part and rev'd in part on other grounds, 912 F.2d 455 (Fed. Cir. 1990); Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988); Maine Potato Council v. United States, 613 F. Supp. 1237, 1243 (Ct. Int'l Trade 1985).

As discussed in the Panel's August 27, 1993 decision, there are three factors that the ITC must consider in determining causation of injury. These are (1) the volume of imports, (2) the effect of the imports on prices in the United States, and (3) the impact of the imports on domestic producers. 19 U.S.C.

§ 1677(7)(B)(i).

With respect to the first of the three factors, the Panel has already found that "the ITC's analysis of the absolute increase in the volume of Canadian imports and the increase in those imports relative to consumption is adequately stated and is supported by substantial evidence of record cited by the ITC." Panel Decision at 26-27. Similarly, the Panel has already affirmed the ITC's finding that, "[a]t the same time that volume and market share of subject imports increased, prices for both U.S.- and Canadian-produced . . . alloy magnesium steadily declined." Id. at 27.

Regarding the third statutory requirement--the impact of the imports on domestic producers--the ITC based its determination that Canadian imports had injured the domestic industry on record evidence of the high degree of substitutability of imported and domestic alloy magnesium, the relatively inelastic demand for alloy magnesium in the U.S. market, and the significant increase in subsidized Canadian imports, which coincided with the declines in U.S. producers' market share, prices, and the financial condition of the U.S. industry. ITC Remand at 15-18.

According to Complainants, the ITC's determination that Canadian imports caused injury to the domestic industry is based on the simple inference that an increase in imports in a price-

sensitive market led to declining prices and an adverse financial impact on the industry. Complainants concede that the ITC may properly draw such an inference in the absence of other evidence regarding causation, but argue that the inference is negated in this case by evidence of other market factors affecting the domestic industry's performance that the ITC ignored, including allegedly anomalous data reported by one domestic producer. According to Complainants, if the ITC's analysis had fully accounted for these other factors, it would have found the industry to have been healthy in 1991, the last year of the period investigated. Moreover, Complainants maintain that, as demonstrated by performance trends in other, comparable industries, the decline in the industry's performance merely reflected a downturn in general economic conditions.

The Panel finds no basis for concluding that the ITC "ignored" the evidence relied upon by Complainants. In the absence of a showing to the contrary, the ITC is presumed to have considered all evidence in the record. Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 740 (Ct. Int'l Trade 1989); Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (Ct. Int'l Trade 1985). Moreover, the ITC need not address every argument advanced by a party to an investigation. Roses, Inc. v. United States, 720 F. Supp. 180, 185 (Ct. Int'l Trade

1989); Avesta AB v. United States, 689 F. Supp. 1183, 1182 (Ct. Int'l Trade 1988).

In addition, Complainants' argument that the ITC should have discounted the weakened condition of the domestic industry in light of the effects of other market factors and the allegedly anomalous data is contrary to the principle that "importers take the domestic industry as they find it." Iwatsu Elec. Co. v. United States, 758 F. Supp. 1506, 1518 (Ct. Int'l Trade 1991). In determining causation, the ITC need neither adjust the data reported by the industry nor speculate how much better the industry might have fared in the absence of other competitive factors. Moreover, a simple comparison of the performance of the magnesium industry to the performance of other industries during the same period of time ignores the requirement that the ITC "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii).

Complainants next argue that the ITC's finding of adverse price effects caused by Canadian imports is erroneous because there is no evidence of significant underselling by NHCI. The ITC found that, "in light of the frequency of price changes, the high degree of substitutability, and the tendency of all producers to match price reductions, including through the use of

'meet or release' clauses," the data it solicited comparing U.S. and Canadian suppliers' prices for their largest sales in each quarter were not useful in determining whether any underselling was significant. ITC Remand at 16 n.117. As the ITC noted, a finding of underselling is not a prerequisite to an affirmative determination of material injury. CEMEX, S.A. v. United States, 790 F. Supp. 290, 298 (Ct. Int'l Trade 1992); Florex v. United States, 705 F. Supp. 582, 593 (Ct. Int'l Trade 1989). The statute requires the Commission to consider whether there has been significant underselling and whether the effect of the imports is to otherwise cause price depression or suppression. 19 U.S.C. § 1677(7)(C)(ii)(I) & (II). In this case, substantial evidence supports the ITC's finding that the large increase in the volume of highly substitutable imports in a price sensitive market, as well as the use of contractual meet-or-release clauses, "otherwise" depressed prices.

Complainants next claim that the ITC "refused to acknowledge" that imports from Canada that merely substituted for prior imports from Norway could not have injured the domestic industry. The ITC, however, explicitly considered this argument and found that it failed to account for data showing that, from 1989 to 1990, imports from NHCI surged while imports of alloy magnesium from other sources remained relatively stable. Thus, the Commission concluded that alloy magnesium imports from Canada

represented additional imports and did not merely replace imports from Norway. ITC Remand at 15.

Complainants contend that the ITC's finding with respect to the increase in imports from 1989 to 1990 ignores the decline in total imports from all sources over the 1989-1991 period of investigation. According to Complainants, therefore, imports could not have had the depressing effect on prices that was found by the ITC. Complainants' argument, however, fails to take into account the increase in 1991 of shipments of imported alloy magnesium, both from Canada and from all sources. As a result, the market share held by total imports and by Canadian imports in 1991 was substantially greater than in 1989, and the market share held by domestic producers was correspondingly smaller.

Finally, Complainants argue that NHCI's increase in market share resulted entirely from non-price factors, in particular sales to customers for reasons that were unrelated to price, and cannot be considered injurious. The ITC, however, did not disregard purchaser information concerning non-price reasons for purchasing from particular producers. It noted:

> [W]e find that non-price factors had, at most, a minimal effect on purchasing decisions and do not account for the large increase in the volume and market share of the subject imports from Canada. While most purchasers of alloy magnesium ranked quality, rather than price, as the most important consideration in choosing a supplier, eight

> of ten responding purchasers found the quality of domestic and Canadian products to be identical, with the remaining two differing as to whether the U.S. or Canadian product was superior. Most of these purchasers also found the domestic and Canadian supplier to be identical with regard to availability and reliability of supply.

ITC Remand at 23-24.

Complainants point to selected statements by customers in an attempt to show that such considerations as service and technical support were more important than price in customers' purchasing decisions and that these considerations favored NHCI. Based on consideration of the record as a whole, however, the Panel cannot conclude that the ITC's finding that these non-price factors did not totally account for the large increase in the volume and market share of the Canadian imports is unsupported by substantial evidence.

The ITC similarly rejected the Complainants' argument that NHCI's scrap repurchase program for alloy magnesium was a non-price factor that rendered the U.S. and Canadian products less substitutable and accounted for some of the increase in Canadian sales. The ITC found that scrap repurchase programs were not distinctive to NHCI because U.S. producers of alloy magnesium offered similar programs. Furthermore, the ITC explained that, because these programs entail rebates in the form of scrap repurchase programs, they "essentially provide additional services for the same price, effectively offering a

discount, and adding to the overall price competition." ITC Remand at 17. It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence, Maine Potato Council v. United States, 613 F. Supp. 1237, 1244 (Ct. Int'l Trade 1985), and we cannot say that the ITC's conclusions with respect to NHCI's scrap repurchase program are either unreasonable or unsupported by the record.

Complainants also argue that, because magnesium supply was short in 1988 and 1989, customers purchased from NHCI in order to ensure a reliable future supply of alloy magnesium. The ITC also rejected this argument, finding that it did not "account fully for the large increase in subject imports from 1989 to 1990, or for the continued increase in 1991, particularly as demonstrated by the decrease in U.S. production and capacity utilization from 1989 to 1991 as the subject imports increased market share substantially." ITC Remand at 21. "The Commission has broad discretion to determine the importance of any particular factor it considers." Metallverken Nederland B.V. v. United States, 728 F. Supp. 730 (Ct. Int'l Trade 1989). While there is evidence of record to support Complainants' argument, the ITC was within its discretion to find that that evidence, considered alone or in combination with evidence of other non-price factors cited by purchasers for choosing a supplier, did

not negate the significance of price in buyers' purchasing decisions.

Having reviewed the evidence of record, the Panel concludes that the ITC reasonably determined that the volume and price effects of alloy magnesium imports from Canada were a contributing cause of injury to the domestic alloy magnesium industry. The substantial evidence standard of review does not permit the Panel to substitute its views of the record for that of the ITC, even if application of the same standard could also have justified the conclusion urged by Complainants.

III. THE ITC'S AFFIRMATIVE INJURY DETERMINATION UPON REMAND REGARDING IMPORTS FROM CANADA OF PURE MAGNESIUM

The brief filed by Québec and supported by NHCI challenging the ITC's remand determinations alleges that "the Commission ignored evidence in the record that indicated that any harm suffered by the domestic pure and alloy magnesium industries was caused by factors other than imports." Brief at 2. Counsel confirmed at oral argument that Complainants were challenging both the ITC's affirmative material injury determination with respect to alloy magnesium and its affirmative material injury determination with respect to pure magnesium. Nearly all of Complainants' specific claims of error, however, relate only to the ITC's determination concerning alloy magnesium.[6]

[6] The brief filed on behalf of Québec, at 11-14, refers to both the alloy and pure magnesium markets in arguing that NHCI

The ITC found similar conditions of competition to exist in the pure and alloy magnesium markets. It also found comparable trends in the performance of the two industries over the period of investigation and in the volume of imports, the level of import penetration of the U.S. market, and the decline in prices in the U.S. market. Given Complainants' failure to specifically challenge most aspects of the ITC's remand determination with respect to pure magnesium and the substantial similarity in the reasoning expressed by the ITC concerning both pure and alloy magnesium, we conclude that the ITC's determination on pure magnesium imports from Canada is supported by substantial evidence of record.

IV. THE ITC'S CONCLUSION THAT IT IS NOT REQUIRED TO CONSIDER THE LEVEL OF INDUSTRY SUPPORT FOR THE PETITION IN ITS INJURY DETERMINATIONS

Complainants assert that the ITC's injury determinations are not supported by substantial evidence and are otherwise not in accordance with law because the agency failed to consider record evidence concerning the level of domestic industry support for the petition. Citing Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348

---

was not responsible for the price declines that occurred during the ITC's period of investigation. In addition, Complainants' argument that the ITC erred in failing to consider the degree of industry support for the petition, which is discussed below, clearly relates to the ITC's determinations with respect to both industries.

(Ct. Int'l Trade 1993), appeal docketed, No. 94-1021 (Fed. Cir. Oct. 15, 1993), Complainants claim that lack of industry support undermines the ITC's determinations that the domestic pure and alloy magnesium industries have been injured by reason of imports from Canada and that the ITC's failure to consider this factor renders its remand determinations unsupported by substantial evidence.

The ITC initially counters that, because the issue of industry support for the petition was not raised before the agency, Complainants are barred from raising it for the first time before this Panel for failure to exhaust available administrative remedies. The Panel disagrees.

It is ordinarily the rule that "a party aggrieved by an agency decision or action must exhaust its remedies for relief on that issue at the agency level before it may contest the decision or action before a reviewing court" or, in this case, before a Binational Panel. Calabrian Corp. v. U.S. Int'l Trade Comm'n, 794 F. Supp. 377 (Ct. Int'l Trade 1992) (citing United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 73 (1952)). This rule, however, is not absolute, and its application is within the discretion of the reviewing body. See Ceramica Regiomontana, S.A. v. United States, Slip Op. 92-71, 16 CIT ___ (1992).[7] As

[7] See also 28 U.S.C. § 2637(d), which provides that the Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies."

the Supreme Court stated in Hormel v. Helvering, 312 U.S. 552, 557 (1941), "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."

In Hormel v. Helvering, the Court considered an issue that had not been raised before the administrative agency. That issue arose out of a ruling by the Court in another case that was issued after the conclusion of the agency's proceeding. The Hormel v. Helvering rule--that exhaustion of administrative remedies may be excused where a judicial interpretation of existing law that might materially affect the outcome the case has been issued subsequent to the agency's decision--has been applied in appeals of agency decisions in trade cases. See Ceramica Regiomontana; Rhone Poulenc, S.A. v. United States, 583 F. Supp. 607, 608-09 (Ct. Int'l Trade 1984).

Complainants' claim that the ITC was required to consider industry support for the petition is based on the decision in Suramerica, which was issued after this Panel review was initiated. In Suramerica the Court of International Trade ruled, apparently for the first time, that the ITC must consider the domestic industry's position in determining whether the industry is threatened with material injury by reason of unfairly

traded imports. Complainants did not waive this issue by failing to raise it before the ITC.[8]

Turning to the merits of Complainants' argument, the Panel notes that, as discussed above, the statute only requires the ITC to consider the volume of imports, the effect of imports on prices in the United States, and the impact of imports on domestic producers in determining whether the domestic industry is materially injured by reason of the dumped or subsidized imports under investigation. 19 U.S.C. § 1677(7)(B)(i).[9] Complainants, in fact, concede that industry support for the petition is not among the factors that the ITC is required to consider. Instead, Complainants contend that the ITC "must consider the degree of support when a clear lack of industry support is evident from the record." Québec Brief at 27 (emphasis deleted). Complainants argue that the record demonstrates such a lack of support and urge that the ITC "should

---

[8] We also find that Suramerica cannot be distinguished from the current case on the ground that it involved a determination of threat of material injury, rather than a determination of material injury. In Suramerica, the court stated that "[t]he industry's position is highly relevant to whether an industry has been injured by imports, and even more relevant to the question of whether an industry that has not been so injured is nevertheless threatened with material injury." Slip Op. 93-36 at 26.

[9] In addition, the ITC is permitted to consider "such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

have weighed this evidence heavily against a finding of material injury." Id. The ITC having failed to do this, Complainants conclude that the agency did not "overcome the presumption that, due to their lack of support for the petition, the domestic producers . . . were not injured by Canadian imports." Id. at 30.

Complainants' arguments are unpersuasive.[10] The Panel finds that the ITC's interpretation of the statute as not requiring it to consider the position of the industry is reasonable and must be upheld. The ITC concluded that because industry support is not an enumerated statutory factor, it is not required to take such evidence under consideration in its causation analysis. Rather, the ITC took the position that it is required to "rely foremost on the actual record data concerning material injury by reason of subject imports rather than the position of each individual producer regarding the petition." ITC Remand at 26. While certain Commissioners may find evidence of lack of industry support to be relevant in some

[10] U.S. judicial precedent on this issue is equivocal. Complainants rely on Suramerica, which held that the ITC erred by failing to consider the views of the domestic industry. The ITC, however, relied in part on Minebea Co., Ltd. v. United States, 794 F. Supp. 1161 (Ct. Int'l Trade 1992), where the court concluded that the ITC is not required to consider the position of the industry. In reviewing the ITC's determination at issue here, the Panel is not bound by either of these decisions of the Court of International Trade. See Algoma Steel Corp., Ltd. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1989).

investigations, Complainants have not proved that the ITC must consider such evidence in every injury determination. Absent a showing that the ITC's construction of the statute is impermissible, it would be improper for the Panel to substitute its judgment for that of the ITC or to impose upon the agency any additional requirements. See American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986). Accordingly, there is no basis for concluding that the ITC erred in failing to consider the degree of industry support for the petition.[11]

CONCLUSION AND ORDER

The Panel concludes that the ITC's affirmative material injury determinations pursuant to remand with respect to dumped and subsidized imports of pure magnesium from Canada and subsidized imports of alloy magnesium from Canada are supported by substantial evidence in the administrative record and are otherwise in accordance with law. Accordingly, the Panel affirms the ITC's determinations.

[11] There is also no "presumption," as suggested by Complainants, that the alleged lack of industry support inevitably precludes an affirmative injury determination. Again, the complainants point to no legal basis for this claim. Further, inasmuch as the Panel concludes that the ITC was not legally required to consider the extent of industry support for the petition in its analysis of injury, it is unnecessary for the Panel to review Complainants' claim that the alleged evidence of lack of industry support so detracts from the evidence of injury relied upon by the ITC that the latter cannot be supported by substantial evidence.

SO ORDERED.

SIGNED IN THE ORIGINAL BY:

Michael P. Mabile
Michael P. Mabile, Chairman

Robert E. Lutz
Robert E. Lutz, II

John M. Peterson
John M. Peterson

R.J. Ross Stinson
R.J. Ross Stinson

Wilhelmina K. Tyler
Wilhelmina K. Tyler