ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:	)	
PURE MAGNESIUM AND ALLOY MAGNESIUM FROM CANADA (CVD)	)	Secretariat File No: USA-CDA-00-1904-07

DECISION OF THE PANEL
March 27, 2002

Before: Charles Owen Verrill, Jr.
Michael House
Edward Farrell
Edward C. Chiasson, Q.C.
Donald Brown, Q.C.

Appearances:

Stephen A. Jones,
King & Spalding, on behalf of Magcorp

Hamilton Loeb, Chris Cloutier, A. Jeff Ifrah and Patrick Togni
Paul, Hastings, Janofsky & Walker, on behalf of the Gouvernement du Quebec

David Richardson,
Office of the Chief Counsel for Import Administration, on behalf of the Investigating Authority, the United States Department of Commerce.

PANEL DETERMINATION

NAFTA CHAPTER 19
PURE MAGNESIUM AND ALLOY MAGNESIUM FROM CANADA
FILE USA-CDA-00-1904-07

I. PROCEDURAL HISTORY OF THIS REVIEW

This Binational NAFTA Panel review considers challenges to the final results of the full sunset review by the U.S. Department of Commerce ("DOC") of the countervailing duty orders concerning pure and alloy magnesium from Canada. Final Results of Full Sunset Reviews of Countervailing Duty Orders: Pure Magnesium and Alloy Magnesium From Canada, 65 Fed. Reg. 41,444 (July 5, 2000) ("Final Results"). In the Final Results, DOC determined that a countervailable subsidy is likely to continue or recur if the order is revoked and that it would report a subsidy rate of 1.84 percent for Norsk Hydro Canada, Inc. ("NHCI"), the investigated company, and an all others rate of 4.48 percent, to the International Trade Commission ("ITC"). The all others rate was later changed to 7.34 percent based on an alleged ministerial error. Pure and Alloy Magnesium From Canada; Ministerial Error in Final Results of Full Sunset Reviews of Countervailing Duty Orders, 65 Fed. Reg. 50,677 (Aug. 21, 2000).

On July 25, 2000, the ITC notified DOC that revocation of the orders was likely to lead to continuation or recurrence of material injury. On the basis of the

Final Results and the ITC's finding, DOC issued a notice of continuation of the orders pursuant to the sunset review procedures. Continuation of Antidumping Duty Order on Pure Magnesium From Canada and Countervailing Duty Orders on Pure and Alloy Magnesium From Canada, 65 Fed. Reg. 49,964 (Aug. 16, 2000).

On August 4, 2000, the Gouvernement du Québec ("GOQ") requested a panel review of the Final Results pursuant to Rule 39 of NAFTA Article 1904 and on September 5, 2000, filed a complaint specifying the following errors: first, DOC reported rates for likely future subsidization for which there was no substantial evidence on the record; second, DOC reported an all others rate for which the record provides no support; third, DOC increased the all others rate to 7.34 percent contrary to law; and, fourth, DOC ignored the most recent information, which showed that the only subsidy at issue was at or near the de minimis level.

On September 5, 2000, Magnesium Corporation of America ("Magcorp"), the petitioner in the DOC proceedings, filed a complaint pursuant to the request for panel review submitted by the GOQ pursuant to Rule 39 of NAFTA Article 1904. Magcorp's complaint made two claims of error in the Final Results: first, DOC wrongfully refused to investigate a newly alleged subsidy in the Sunset Review on the grounds that the alleged recipient of the subsidy was neither a producer nor exporter of subject merchandise; and, second, DOC erroneously used the

countervailable benefit from the most recently completed administrative review in lieu of the rate established in the original determination. Magcorp noted that these claims were protective and would be withdrawn if the Panel were to conclude that the GOQ's objections to the Final Results were without merit.

Briefs and reply briefs considering the issues raised in their complaints were filed by the GOQ and Magcorp. DOC, in its brief, requested a remand with regard to the reporting and selection of the all others rate. Otherwise, DOC urged that the determination in the Final Results was supported by substantial evidence and otherwise was in accordance with law.

A public hearing was held on December 4, 2001, in Washington, D.C., to provide the parties with an opportunity to be heard.

II. THE PROCEEDINGS AT DOC

In July, 1992, following investigation of a petition by Magcorp alleging that NHCI benefited from subsidies, DOC reached a final countervailing duty determination. In it, DOC found that four Canadian programs had provided a countervailable subsidy to NHCI: (i) Federal funding for a feasibility subsidy; (ii) exemption from payment of water bills; (iii) Article 7 grants from the Quebec Industrial Development Corporation; and (iv) preferential electricity rates. Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium From Canada, 57 Fed. Reg. 30,946 (July 13, 1992) ("Final Affirmative

Countervailing Duty Determination"). DOC found that the other company investigated, Timminco Ltd., had a net subsidy rate of zero and excluded it from the investigation. The final subsidy rate for NHCI and all other producers (except Timminco) was 21.61 percent. Following the ITC's affirmative injury determination, DOC published the countervailing duty order. See Countervailing Duty Order: Pure Magnesium and Alloy Magnesium From Canada, 57 Fed. Reg. 39,392 (Aug. 31, 1992).

In a subsequent changed circumstances review requested by GOQ and NHCI, DOC determined that the electricity rates paid by NHCI were not preferential and did not support a subsidy finding. As a result, DOC subtracted the 14 percent subsidy attributable to the electricity program from the CVD calculation, leaving a 7.61 percent deposit rate for NHCI of which 6.18 percent was attributable to the Article 7 program. This deposit rate was also adopted as the all others rate. Final Results of Changed Circumstances Administrative Reviews: Pure Magnesium and Alloy Magnesium From Canada, 57 Fed. Reg. 54,047 (Nov. 16, 1992).

Between the date of the changed circumstances review and the final results in the Sunset Review, DOC completed six administrative reviews of NHCI exports of pure and alloy magnesium to the United States. In the sixth review, DOC declared a rate of 0.18 percent for the water program and 1.84 percent for the

Article 7 program. Pure Magnesium and Alloy Magnesium From Canada: Final Results of Countervailing Duty Administrative Reviews, 64 Fed. Reg. 48,805, 48,806 (Sept. 8, 1999) ("Sixth Review Countervailing Duty Determination"). DOC also found that the water program (as well as all other subsidies other than the Article 7 program) had ended. Hence the deposit rate set by the sixth review was determined to be the 1.84 percent attributable to the Article 7 program.

Two additional administrative reviews were pending at the time of the Final Results, but they had not been finalized. For the seventh review, DOC published preliminary results that indicated a subsidy rate of 1.38 percent attributable to the Article 7 Program. Pure Magnesium and Alloy Magnesium From Canada: Preliminary Results of Countervailing Duty Administrative Reviews, 65 Fed. Reg. 25,910, 25,911 (May 4, 2000). And, for the eighth review, the preliminary rate (published after the Final Results) for that program was determined to be 1.21 percent. Pure Magnesium and Alloy Magnesium From Canada: Preliminary Results of Countervailing Duty Administrative Reviews, 66 Fed. Reg. 23,669, 23,671 (May 9, 2001).

III. PANEL JURISDICTION AND THE STANDARD OF REVIEW

This Panel's authority derives from Chapter 19 of the North American Free Trade Agreement. Article 1904.1 provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational

panel review." Pursuant to NAFTA Article 1911, Final Results of sunset reviews of countervailing duty orders are "determinations" that are reviewable pursuant to Article 1904. In the conduct of this review, which involves a DOC decision, Article 1904.2 requires the Panel to apply the law of the United States.[1] This includes the U.S. statutes, relevant legislative history, regulations, and judicial precedents "to the extent that a court . . . would rely on such materials in reviewing a final determination of the competent investigating authority." In addition, NAFTA Article 1904.3 requires the Panel to apply the "general legal principles" and "the standard of review that a court" would otherwise apply.[2]

If this review were not before this Panel, it would be before the Court of International Trade ("CIT"); this Panel stands in the same role that the CIT would occupy but for Article 1904. The Panel must apply the substantive and procedural laws of the United States in the same manner that the CIT would apply them. Accordingly, the Panel is required to apply the standard of review specified in Section 516A(b)(1)(B) of the Tariff Act of 1930 which states that "{t}he Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance

[1] Article 1904.2 states that panels are to apply the applicable statutes, precedents, regulations and other authorities that a court of the "importing Party" would rely on in review of a determination.

[2] See also Article 1911 which prescribes the standard of review set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930 when the importing Party is the United States. See Section 516A(b)(1)(B) of the Tariff Act of 1930, codified at 19 U.S.C. § 1516a(b)(1)(B) (2001).

with law." Under this standard, the Panel does not engage in de novo review and must restrict its review to the administrative record.

In reviewing DOC interpretations of the governing statute, the Panel follows the two-stage approach adopted by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) ("Chevron"). First, if the intent of Congress were unambiguous, the judiciary (i.e., the Panel) would be the final authority to determine whether an administrative interpretation is consistent with clear congressional intent. If the statute were silent or ambiguous, the "question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 842-43. The Panel simply evaluates whether the Department's statutory interpretations are "sufficiently reasonable." American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986) citing Chevron, 467 U.S. at 843. The "agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." Id. As long as the agency interpretation is reasonable, that is sufficient under the Chevron rule.

The Panel has considered the decision in United States v. Mead Corp., 533 U.S. 218 (2001), where the Supreme Court held that certain administrative decisions of the Customs Service are not entitled to Chevron deference. In Mead, the Court approved a lower deference standard where, inter alia, an administrative

determination is not subject to deferential judicial review. (For example, where there is de novo judicial review of the agency decision, the review by the court is not deemed deferential.) This is not the case with respect to antidumping determinations where review is on the record, not de novo. In Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1382 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit concluded that antidumping determinations meet the Mead test for Chevron deference and held "{t}hat statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under Chevron." The Panel finds that this precedent is binding and accordingly will follow the Chevron deference rule as to statutory interpretations by DOC in the Final Results.

With respect to factual determinations, the Panel examines whether DOC has relied on such relevant evidence as a reasonable mind would consider to support the conclusion. Zenith Elecs. Corp. v. United States, 77 F.3d 426, 430 (Fed. Cir. 1996), reh'g denied Apr. 11, 1996. It "is not the ambit of the Court to choose the view it would have chosen in a trial de novo as long as the agency's decision is supported by substantial evidence." Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-06, at 12-13 (Sept. 28, 1990), citing Hercules, Inc. v. United States, 673 F. Supp. 454, 479 (Ct. Int'l Trade 1987).

IV. DISCUSSION: ISSUES RAISED BY GOQ

In its brief and presentation at the hearing, GOQ modified the claims of error specified in its complaint.[3] The Panel has considered those modified claims in the sequence presented by GOQ.

A. The Claim that DOC has Inverted the Statutory Standard

GOQ first argues that the sunset provisions create a presumption that CVD orders "would terminate at the five-year mark" absent a clear showing that "without the discipline of the orders" the subsidy practice would continue to distort trade. See GOQ Brief at 18. In support of this contention, GOQ cites Article 21.3 of the WTO Agreement on Subsidies and Countervailing Measures ("SCM"), which provides that "{a}ny definitive countervailing duty shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine, in a review initiated before that date . . . that the expiry of the duty would be likely to lead to continuation or recurrence of the subsidy."[4] Congress implemented this requirement in the Uruguay Round Agreements Act ("URAA") by adopting new sections 751(c)-(d) and 752(b) of the Tariff Act. Section 751(c) requires DOC and ITC to commence a review to determine whether "sunsetting" a CVD order after five years "would be likely to lead to continuation or recurrence

[3] See generally Brief of Gouvernement du Quebec (Mar. 23, 2001) ("GOQ Brief"); see also Oral Argument Hearing Transcript, USA-CDA-00-1904-07 (Dec. 4, 2001) ("1904-07 Transcript").

[4] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994.

of . . . a countervailable subsidy . . . and of material injury."[5] In, addition, Section 751(d) provides that DOC shall revoke a countervailing duty order unless it finds in a sunset review that subsidies would be "likely to continue or recur."[6]

GOQ claims that DOC has been "faithless" to the "likely to continue or recur" standard that is required by both the U.S. statute and the SCM Agreement. Instead, it is claimed, DOC applied a "not likely to continue or recur" test, thus "inverting" the SCM and statutory standard. In support of this claim, GOQ cites a provision of the DOC regulations, 19 CFR § 351.222(i)(2)(ii) (2001), which states that DOC will revoke an order where the "Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailable subsidy . . . ." (emphasis added). Based on this regulatory provision, GOQ argues that there has been an inversion of the statutory and WTO presumption that orders should terminate after five years, unless there is a finding concerning the likelihood of continuation or recurrence of countervailable subsidy. Aside from this single reference, GOQ does not refer to any other regulation, policy or decision of DOC where the so-called inverted standard was utilized.

GOQ does cite the frequency of affirmative findings by DOC as evidence that it has "failed to conform to the letter, objectives, or intent of the U.S. sunset

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5 19 U.S.C. § 1675(c)(1) (2001).

6 19 U.S.C. § 1675(d)(2)(A) (2001).

statute and SCM agreement." GOQ Brief at 20. The Panel is not persuaded that this data, without more, is of any decisional significance.

The Panel concludes that DOC has not "inverted" the statutory standard for revocation of CVD orders. Section 751(c) of the statute plainly requires a "likely" test.[7] So does 19 CFR § 351.218(b) of the DOC's regulations which spells out the criteria for a sunset determination. The DOC Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 18,871, 18,872, (Apr. 16, 1998) ("Sunset Policy Bulletin") repeatedly refers to the "likely" test. For example, the Sunset Policy Bulletin states: "{t}he URAA assigns to the Department of Commerce . . . the responsibility of determining whether revocation of an antidumping or countervailing duty order . . . would be likely to lead to a continuation or recurrence of dumping or a countervailable subsidy." Similar language using the "likely to lead to continuation or recurrence" standard appears throughout the Sunset Policy Bulletin.[8]

The only place where the "not likely" language appears is in 19 C.F.R. § 351.222(i), which provides that DOC "will revoke an order" where the Secretary

[7] 19 U.S.C. § 1675(c)(1) (2001).

[8] See, e.g., Section III.A.1 where the applicable standard is whether "in determining whether revocation . . . would be likely to lead to continuation or recurrence of a countervailable subsidy. . . ."

determines that "revocation or termination is not likely to lead to continuation or recurrence"[9] of a countervailable subsidy. In our view, however, Section 351.222(i) has an obvious procedural purpose that by itself does not require a "not likely" test during any stage of the substantive proceedings in a sunset review. The Panel concludes that the "not likely" reference in this section does not represent an "inversion" of the statutory and SCM "likely to lead to a continuation or recurrence" standard.

Our analysis begins with 19 C.F.R. § 351.218 of DOC's regulations which contains "rules regarding the procedures for sunset reviews." Section 351.218(b) states that the Secretary will conduct a review to determine whether revocation of an antidumping or countervailing duty order "would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy." The regulation goes on to state that if the determinations by the Secretary (and the ITC) were affirmative, the order would remain in place. But if either determination were negative the order would be revoked. There is no indication in these regulatory provisions of an inverted standard.

The regulation cited by GOQ appears later in a section that deals with the procedures that apply where the Secretary has not made an affirmative finding under Section 351.218(b). Specifically, Section 351.222(i) provides that if DOC,

[9] 19 C.F.R. § 351.222(i)(1)(ii) (2001).

after an investigation, concludes that the continuance or recurrence of the subsidy is not likely based on application of the Section 351.218 standard ("likely to lead"), it will revoke the order. Given the placement of this language in a section devoted to procedures, the Panel does not believe that it represents an inversion of the appropriate statutory standard which is clearly articulated in Section 351.218.

In this case, DOC specifically found that continuance or recurrence of the subsidy was likely. See Final Results, 65 Fed. Reg. at 41,444 ("As a result of this review, the Department finds that revocation of the countervailing duty orders would likely lead to continuation or recurrence of a countervailable subsidy.") The decision memorandum concluded that "a countervailable subsidy is likely to continue or recur if these orders were revoked." See Memorandum from Jeffrey A. May to Troy H. Cribb re: Issues and Decision Memo for the Full Sunset Reviews of Pure Magnesium and Alloy Magnesium from Canada; Final Results, at 6 (July 5, 2000) ("Final Results Decision Memorandum"). These findings indicate that DOC performed the analysis in accordance with the "likely" standard mandated by the SCM, the statute, Section 351.218 of the DOC regulations, and the Sunset Policy Bulletin. Indeed, the DOC Decision Memorandum specifies the "likelihood of continuation or recurrence of a countervailable subsidy" as one of the issues for which DOC "received case and rebuttal briefs" from the parties.

There is no evidence in this record that DOC utilized an "inverted" standard in concluding that there was a likelihood of continuance or recurrence of the subsidy. The regulation provision cited by GOQ is not referred to in the DOC Final Results or the accompanying Decision Memorandum, which is consistent with the procedural nature of 19 C.F.R. §351.222(i). Only after a substantive determination by the Secretary that continuation or recurrence is not likely, would 19 C.F.R. §351.222(i) be applicable. Since the Secretary found that continuation or recurrence of the subsidy is likely, there was no reason for DOC to refer to 19 C.F.R. § 351.222(i).

B. The Claim that Reliance on the "Subsidy Tail" as Evidence of the Likelihood of Continuation of the Countervailable Subsidy Was Contrary to Law

GOQ next contends that as "accounting-generated benefit tails" are not the type of subsidization that the SCM contemplates, as implemented in Section 751, there is no justification for the continuation of an order after the initial five year period.[10] According to GOQ, the Sunset Policy Bulletin undermines the statute by providing that DOC will "normally" determine "that a countervailable subsidy will continue to exist when the benefit stream, as defined by the Department, will continue beyond the end of the sunset review." GOQ Brief at 23. GOQ claims that this policy, which DOC relied on in the Final Results, is inconsistent with the

[10] GOQ Brief at 23.

statute and is not entitled to deference. GOQ further contends that one-time grants from "years gone by are by their essence unlikely to continue or recur." Id. at 24.

GOQ's challenge requires the Panel to evaluate whether the non-recurring grant methodology of DOC, which often amortizes subsidies over periods of up to 15 years, can be reconciled with the five year limitation on the duration of countervailing duty orders which applies unless DOC finds that the subsidy is "likely to continue or recur." In other words, is GOQ correct in claiming that where DOC decides to allocate the value of the subsidy over a period longer than five years, that allocation does not necessarily mean that the subsidization is likely to continue or recur after the initial five-year period? This is an issue of first impression.

The principal component of the subsidy rate established in the sixth administrative review was the continuing effect of the Article 7 Grant from the Quebec Industrial Development Corporation that NHCI received in 1988. DOC determined, in the original investigation, that NHCI received a disproportionate share of the available funds under this program in 1988 and that receipt of this share was countervailable. After determining that this was a non-recurring grant, DOC "allocated the benefits over 14 years, the average useful life of assets in the magnesium industry." Final Affirmative Countervailing Duty Determination, 57

Fed. Reg. at 30,949. The benefits stream from this one-time subsidy will expire in 2004.

The Decision Memorandum that accompanied the Final Results explained that DOC relied on the Sunset Policy Bulletin in finding that a countervailable subsidy is likely to continue or recur based solely on the Article 7 benefit stream. According to the Bulletin,

> The SAA at 889, provides that, with respect to subsidies for which the benefits are allocated over time, such as grants, long-term loans, or equity infusions, the Department "will consider whether the fully allocated benefit stream is likely to continue after the end of the review, without regard to whether the program that gave rise to the long-term benefit continues to exist."

Sunset Policy Bulletin, 63 Fed. Reg. at 18,874-75.[11] Where there is such a benefit stream which continues after the date of the sunset review, the Department will "normally" determine that a countervailable subsidy will continue to exist. Sunset Policy Bulletin, 63 Fed. Reg. at 18,874.

GOQ contends that the SAA, which is an authoritative statement of the Administration's views on the interpretation and application of the Uruguay Round Agreements, and the Sunset Policy Bulletin are inconsistent with the statute. The Panel does not agree. Section 751(c)(1) provides that the DOC shall conduct a

[11] SAA refers to the Statement of Administrative Action found in Message from the President of the United States to Congress concerning the Uruguay Round Agreements. See H.R. Doc No. 103-316, at 656 (1994). The SAA was approved by Congress in Section 101(a)(2) of the URAA.

review to determine whether revocation of an order would "be likely to lead to continuation or recurrence" of the subsidy.[12] The same phraseology is utilized in Section 752(b). It is significant that the statutory language is disjunctive: either continuation or recurrence can be a basis for a "likely" finding. This disjunctivity is relevant because, under long standing DOC practice, a nonrecurring subsidy is deemed to continue to provide a benefit throughout the amortization period. See Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 49 Fed. Reg. 18,006, 18,016 (Apr. 26, 1984).

The Panel concludes that the SAA and the Sunset Policy Bulletin are not inconsistent with the statutory framework. Under DOC practice, the benefit of an amortized subsidy is deemed to continue throughout the amortization period. This practice was in place when the SCM was adopted and can be assumed to have been known to the Uruguay Round negotiators. The Panel concludes that the word "continuation" reasonably can be construed to include those instances where the amortization schedule (or "benefit tail") calls for allocation of a portion of the subsidy to periods after the sunset review. There is no conflict between the SCM and the Sunset Policy Bulletin cited by DOC in support of the Final Results.

[12] 19 U.S.C. § 1675(c)(1) (2001).

Were the Panel to conclude that the position on nonrecurring grants in the SAA and the Sunset Policy Bulletin is inconsistent with Sections 751(c) and 752(b) of the Tariff Act, it would mandate that no countervailing duty order involving a nonrecurring grant ever could be extended in a sunset review. Counsel for GOQ conceded that this result would be the necessary consequence of the interpretation he urged in briefs and in oral argument. The Panel is not prepared to adopt this interpretation of the statute. Such an interpretation would be inconsistent with longstanding DOC practice and finds no support in either the statute or the SCM. We find that DOC's interpretation of the statute in the Sunset Policy Bulletin, and the application of that interpretation in these proceedings, is reasonable and entitled to deference.

C. The Claim that DOC Did Not Use the Most Recent Information and Ignored the De Minimis Nature of the Continuing Subsidy

The statute requires DOC to determine the subsidy rate that is "likely to prevail" in the post sunset review period.[13] Pointing out that the countervailing duty rate based on the Article 7 program grant has "shrunk each year", GOQ argues that the amortized benefits of the grant will continue to shrink and that the "tail was too small to support a finding that a countervailable subsidy was likely to continue or recur." GOQ Brief at 25. Based on these contentions, GOQ argues that (1) DOC failed to use the most recent information in determining the subsidy

[13] 19 U.S.C. § 1675b(2)(A) (2001).

rate likely to prevail and (2) failed to consider the de minimis rules in the circumstances of this review. The Panel concludes that a remand is necessary on the first of these issues, but not the second.

(1) The recent information claim: When the Final Results were adopted, the seventh and eighth administrative reviews of the order were pending. The preliminary results of the seventh review were published before the Final Results in the Sunset Review and specified a rate of 1.38 percent for NHCI. In the eighth review, the preliminary margin was 1.21 percent. GOQ now argues that the net countervailable subsidy likely to prevail if the orders were revoked should be the 1.21 percent found in the preliminary results of the eighth administrative review and that DOC erred in relying on the Final Results of the Sixth Review.

In its explanation of the decision to use the rate determined in the sixth review, DOC stated that:

> {w}e disagree that the subsidy rate of 1.22 percent, based on the calculation for the year 2000, as recommended by NHCI and GOQ, should be used . . . {T}he rate of 1.84 percent for NHCI . . . is the most recently calculated rate available to the Department, from the Final Results of the sixth (1997) administrative review.

See Final Results Decision Memorandum, at Interested Party Cmt. 2. This "explanation" does not, in the Panel's opinion, justify the decision to ignore the preliminary results of the seventh and eighth reviews. There may be good reasons for this decision but, since they do not appear anywhere in the DOC Decision

Memorandum, the Panel is not prepared to speculate about what those reasons might be.

DOC is required to report to the ITC the rate that is likely to prevail in the post sunset review period. Because of the potential significance of this finding on the ITC injury deliberations, DOC has an obligation to make a reasoned assessment of the rate likely to prevail so as to avoid any undue influence on the ITC decision process. A rate that is, for example, unreasonably high could lead the ITC to a decision that might not be reached if the projected rate were lower. The opposite result is also an evident possibility.

The Panel concludes that DOC's adoption of the sixth review results as the rate to be reported to the ITC was arbitrary because the "reasons" cited for utilization of the sixth review results fall short of an adequate explanation. Given the fact that the reported rate is an essential aspect of the ITC continuation of injury determination, DOC determinations of the reported rate must be based on a clear statutory and policy foundation. We find that such a foundation is lacking here and that a remand is necessary.

We note that Magcorp has also questioned DOC's use of the sixth review results, claiming that the Sunset Policy Bulletin requires use of the original investigation rate unless DOC justifies a different rate. This argument is addressed in Part V.B. infra.

(2) The de minimis argument: GOQ contends that DOC failed to perform a reasoned analysis applying the de minimis rules to the circumstances presented by this review. This argument is based on the claim that the countervailing duty rate for the post-sunset period is likely to shrink below the 1 percent level. While it is true that a countervailable subsidy is de minimis if it is less than "1 percent ad valorem,"[14] we do not believe it is appropriate to require DOC to speculate that a subsidy rate may become de minimis where there is no record evidence on which to base such a finding. Here, the most recent information available to DOC is the preliminary result of the eighth administrative review which specifies a rate in excess of one percent, and which exceeds the de minimis level. In these circumstances, we cannot fault DOC's refusal to conclude that the rate likely to prevail would be de minimis.

D. The Claim that DOC Improperly Reported an All Others Rate

In the Final Results, as amended, DOC adopted an all others rate of 7.34 percent – nearly identical to the original rate applied to NHCI in the initial investigation as modified by the changed circumstances determination. GOQ challenges the use of this all others rate on the grounds that DOC had no basis for finding that any Canadian producer other than NHCI would benefit from the only subsidy still supporting the CVD order. That is, GOQ argues that the Article 7

[14] 19 U.S.C. § 1671b(b)(4)(A) (2001).

Program subsidy was unique to NHCI, that no other producer would benefit from this nonrecurring subsidy, and that the all others rate adopted by DOC has no basis in the record. GOQ Brief at 32-33.

DOC does not defend the selection of an "all others rate." Instead, DOC concedes that it "did not adequately explain its all-others rate determination" and "articulated the wrong standard with regard to the all-others net countervailable subsidy likely to prevail if the order were revoked." See Brief of Department of Commerce, at 50 (July 19, 2001). Further, DOC conceded that it failed to explain the reasoning behind its determination. Id. at 51. Consequently, DOC has requested the Panel to order a remand to further consider and explain its reasoning. The Panel agrees that a remand to reconsider the "all others" rate is appropriate.

V. DISCUSSION: ISSUES PRESENTED BY MAGCORP

Because a remand is necessary for the reasons stated above, the Panel is obligated to consider the issues raised in the conditional request for review by Magcorp.

A. The Claim that DOC Improperly Refused to Investigate Subsidies Likely to be Received by Magnola

Magcorp first raised the issue of potential subsidies to Magnola Metallurgy Inc. ("Magnola") in a response to DOC's notice of initiation of the Sunset Reviews. Magcorp alleged that Magnola, a company that established operations subsequent to the imposition of the CVD order, had begun production of

magnesium in Quebec and had received potentially countervailable subsidies. Magcorp Substantive Response to Notice of Initiation, at 24-35 (Sept. 1, 1999). Citing Section 752(b)(2)(B) of the Tariff Act, Magcorp stated:

> {I}n order for the Department to proceed with an examination of a newly-alleged program, there must be a potential for an affirmative countervailing duty determination with respect to such program, the exporter or producer which is alleged to have received the subsidy must be "subject to the review," and "good cause" must be shown. As demonstrated below, each of these criteria is satisfied with regard to two programs currently being used by Magnola.

Id. at 24. Magcorp alleged that Magnola was "subject to the {sunset} review" because it was currently producing subject merchandise and making offers for sale in the United Sates. Id. at 29-31. Additionally, "good cause" existed because information that countervailable subsidies were being conferred on Magnola had not been available to Magcorp during the most recently completed administrative review. Id. at 31-34 (citing the SAA and DOC's Sunset Policy Bulletin).

In its preliminary determination, DOC declined to investigate whether Magnola would likely receive countervailable subsidies if the order were revoked:

> We agree with NHCI and the GOQ that consideration of Magnola and potential subsidies to Magnola in the course of these sunset reviews is not appropriate. Magnola is neither a producer nor exporter of the subject merchandise and, therefore, is not an interested party as defined in section 771(9) of the Act; nor is Magnola subject to this order.

See Memorandum from Jeffrey A. May to Robert S. LaRussa re Issues and Decision Memo for the Sunset Reviews of Alloy Magnesium and Pure Magnesium from Canada; Preliminary Results (Feb. 29, 2000).

In its case brief Magcorp took issue with DOC's preliminary conclusion that Magnola is neither a producer nor exporter of the subject merchandise and is not subject to this order. See Brief of Magcorp at 6-10 (Mar. 21, 2001). Magcorp argued that the order covered all subject merchandise from the exporting country, that Magnola had engaged in pilot production of magnesium, and that record evidence showed that U.S. sales by Magnola were both likely and imminent. Id.

In the decision memorandum accompanying the Final Results of the Sunset Review, DOC again declined to investigate Magcorp's allegations regarding Magnola. DOC explained:

> As stated in our preliminary results, we agree with NHCI and the GOQ that consideration of Magnola and potential subsidies to Magnola in the course of these sunset reviews is not appropriate. We disagree with Magcorp that there is sufficient evidence to support a determination that Magnola has produced or exported the subject merchandise. Nor do we agree, even if we were to adopt Magcorp's proposed standard, that the evidence supports a "clear and present" intent to export. Pursuant to 19 C.F.R. 351.218(e)(2)(i), the Department normally will not assess a CVD rate absent production and export and, further, in no case will the Department calculate a CVD rate for a new shipper in the course of a sunset review. Therefore, we determine that Magnola is neither a producer nor exporter of the subject merchandise and,

> therefore, is not an interested party as defined in section 771(9) of the Act; nor is Magnola subject to this order.

See Final Results Decision Memorandum, at Interested Party Cmt. 1.

In its briefing before this Panel, DOC noted that the statute defines an "interested party" as "a foreign manufacturer, producer, or exporter . . . of subject merchandise," 19 U.S.C. § 1677(9)(A) (2001); defines "subject merchandise" as "the class or kind of merchandise that is within the scope of . . . an order," 19 U.S.C. § 1677(25) (2001); and defines the class or kind of merchandise within the scope of an order as "merchandise imported, 19 U.S.C. § 1671(a)(2) (2001) or sold (or likely to be sold) for importation, into the United States." DOC Brief at 45-46. DOC argued that Magnola does not fit within these definitions because it did not make an entry, sale, or likely sale, i.e., an irrevocable offer for sale, into the United States. Id. at 47. At oral argument, DOC receded from its argument that an irrevocable offer for sale is necessary, but continued to argue that Magnola was not an interested party within the meaning of the statute. See 1904-07 Transcript, at 62-63, 68-69.

DOC's stated rationale for denying Magcorp's request to investigate Magnola is not adequate. We fail to see the relevance of the question whether Magnola is an "interested party" under 19 U.S.C. § 1677(9)(A), the only statutory provision cited by DOC. Magcorp, which asked DOC to consider the countervailable subsidies allegedly provided to Magnola, is undisputedly an

interested party. We are not aware of any provision in the law requiring the alleged recipient of the subsidies to be an interested party as well and DOC does not direct us to any such provision. 19 U.S.C. § 1677(9) is purely definitional; it assumes operational significance only if another, substantive provision of the law refers to the term defined. No such provision has been identified in this case.

DOC does not explain why it believes that Magnola must qualify as an "interested party" under the statute before DOC may investigate the allegations made by Magcorp. Without such a link, the definitional arguments made by DOC regarding Magnola's status as an interested party under 19 U.S.C. § 1677(9) are not legally relevant.[15] Likewise, DOC does not explain why it failed to determine whether Magcorp had shown "good cause" for DOC to consider Magcorp's allegations of newly provided countervailable subsidies, as DOC was required to do under Section 752(b)(2)(B) of the statute.

The statutory scheme for consideration in sunset reviews of allegations regarding programs newly alleged to provide countervailable subsidies is unambiguous. The statute provides:

> (1) IN GENERAL – In a review conducted under section 1675(c) of this title, the administering authority

[15] For the same reason, DOC's prior determination in Active Matrix Liquid Crystal High Information Content Flat Panel Displays and Display Glass Thereof From Japan: Final Results of Changed Circumstances Administrative Review, 58 Fed. Reg. 34,409 (June 25, 1993), would not be dispositive in this case even if the facts were comparable. Flat Panels concerned whether a U.S. producer qualified as an "interested party" under the definition of that term and did not involve the statutory provision at issue here.

> shall determine whether revocation of a countervailing duty order or termination of a suspended investigation under section 1671(c) of this title would be likely to lead to continuation or recurrence of a countervailable subsidy. The administering authority shall consider –
>
> (A) the net countervailable subsidy determined in the investigation and subsequent reviews, and
>
> (B) whether any change in the program which gave rise to the net countervailable subsidy described in subparagraph (A) has occurred that is likely to affect that net countervailable subsidy.
>
> (2) CONSIDERATION OF OTHER FACTORS – If good cause is shown, the administering authority shall also consider –
>
> (A) programs determined to provide countervailable subsidies in other investigations or reviews under this subtitle, but only to the extent that such programs –
>
> (i) can potentially be used by the exporters or producers subject to the review under section 1675(c) of this title, and
>
> (ii) did not exist at the time that the countervailing duty order was issued or the suspension agreement was accepted, and
>
> (B) programs newly alleged to provide countervailable subsidies but only to the extent that the administering authority makes an affirmative countervailing duty determination with respect to such programs and with respect to the exporters or producers subject to the review.

19 U.S.C. §§ 1675a(b)(1)-(2) (emphasis added).

Two conditions apply to a decision by DOC to consider programs newly alleged to provide countervailable subsidies: first, good cause must be shown for DOC to consider other factors – besides those listed in Section 19 U.S.C. § 1675a(b)(1) — to determine whether revocation of a countervailing duty order

would be likely to lead to continuation or recurrence of a countervailable subsidy; second, if good cause were shown, DOC would consider programs newly alleged to provide countervailable subsidies only to the extent that DOC makes an affirmative countervailing duty determination with respect to such programs and with respect to the exporters or producers subject to the review.

It would be entirely speculative for this Panel to judge whether these conditions were met in this case because the Final Results do not address them. It appears that in focusing erroneously on the question whether Magnola was an "interested party" as defined by the statute, DOC did not reach the question whether Magcorp had shown "good cause" for DOC to consider the programs newly alleged by Magcorp to provide countervailable subsidies to Magnola. See 1904-07 Transcript at 68. Because DOC did not reach the question whether "good cause" had been shown, DOC did not consider whether the newly alleged programs were countervailable or whether Magnola properly could be considered an exporter or producer "subject to the review" within the context of 19 U.S.C. § 1675a(b)(2).[16]

[16] Although DOC found that there was not "sufficient evidence to support a determination that Magnola has produced or exported the subject merchandise," this conclusion was reached as a step towards DOC's determination "that Magnola is neither a producer nor exporter of the subject merchandise and, therefore, is not an interested party as defined in section 771(9) of the Act; nor is Magnola subject to this order." Final Results Decision Memorandum, at Interested Party Cmt. 1. Thus, we cannot necessarily conclude that DOC, if it had reached this question, would have determined that Magnola was not an "exporter or producer subject to the review" within the separate context of Section 752(b)(2)(b).

For these reasons, we remand this matter to DOC to consider Magcorp's allegations regarding Magnola under the standards set forth in Section 752(b)(2)(B) of the statute. DOC shall provide an explanation of its reasons whether good cause for consideration of other factors has been shown. If DOC were to find that good cause has been shown, then it should provide a detailed explanation of its reasons whether the newly alleged programs are countervailable and whether Magnola may properly be considered an exporter or producer "subject to the review," within the context of Section 752(b)(2)(B).

B. The Claim that DOC Erred in Selecting the NHCI Rate from the Most Recent Review

Magcorp also claims that DOC should have used the NHCI rate from the initial investigation as "normally" required by the Sunset Policy Bulletin and the SAA. Instead, DOC used the rate from the most recently completed administrative review as the NHCI rate reported to the ITC.

The Sunset Policy Bulletin, citing the SAA and the House Report on the URAA, states that DOC "normally will provide to the Commission the net countervailable subsidy that was determined . . . in the original investigation." Sunset Policy Bulletin, 63 Fed. Reg. at 18,773. The Bulletin also provides for adjustments to the subsidy amount in certain defined circumstances. Id. While none of those circumstances describe the situation present here, the Bulletin makes clear that the list is not exclusive ("including, but not limited to"). Id. at 18,776.

The Panel concludes that the SAA and the Sunset Policy Bulletin clearly contemplates that DOC will have discretion to use a rate other than that determined in the original investigation, provided that DOC explains its reasons for deviating from the "normal" practice. The Panel finds, however, that DOC's Final Results decision memorandum does not contain a sufficiently reasoned explanation for its departure from the SAA's stated preference for the original investigation subsidy rate. In the absence of such a reasoned explanation, this Panel cannot uphold DOC's decision on this issue.

In light of the Panel's remand with respect to the "recent information" claim of GOQ (see Part IV (c)(1), supra), we rule that DOC on remand must provide an adequate explanation for the selection of the "rate likely to prevail" that takes into account the normal rule as set forth in the Sunset Policy Bulletin and the fact that the final sixth review and preliminary seventh and eighth reviews show a declining subsidy rate that is considerably lower than the initial investigation rate.

VI. CONCLUSION

For the reasons set forth in the foregoing opinion, the Panel hereby remands the Final Results to DOC to reconsider: (i) the determination to utilize the results of the sixth review as the subsidy rate to be reported to the ITC; (ii) the basis for the all others rate; and (iii) the reasons for the failure to investigate subsidies alleged to have been received by Magnola.

Charles Owen Verrill, Jr.
Charles Owen Verrill, Jr., Chairman

Donald Brown
Donald Brown

Edward Chiasson
Edward Chiasson

Edward Farrell
Edward Farrell

Michael House
Michael House

SIGNED IN THE ORIGINAL ON MARCH 27, 2002.

ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:	**)**	
	)	
PURE AND ALLOY MAGNESIUM	**)**	**SECRETARIAT FILE NO.**
FROM CANADA	**)**	**USA-CDA-00-1904-07**
FULL SUNSET REVIEW - INJURY		

ORDER OF THE PANEL

The Panel issued its final decision on March 27, 2002 without advising the Investigating Authority of the due date for the redetermination on remand in this matter.

Therefore, it is **ORDERED** that the date for the redetermination on remand from the Investigating Authority is 60 days from the date of this order or May 27, 2002.

ISSUED ON MARCH 27, 2002.

SIGNED IN THE ORIGINAL BY:

Charles Owen Verrill
Charles Owen Verrill, Chair

Edward Chiasson, Q.C.
Edward Chiasson, Q.C.

Michael House
Michael House

Donald Brown, Q.C.
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Edward Farrell
Edward Farrell