# THE U.S. INTERNATIONAL TRADE COMMISSION AND TRADE REMEDY INVESTIGATIONS: 10 SUGGESTIONS FOR IMPROVEMENT

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## INTRODUCTION

The United States International Trade Commission ("ITC") is one of the most powerful, albeit least known, agencies in the Federal Government. The ITC is an independent, quasi-judicial, federal agency, which, in trade remedy investigations, determines whether a domestic industry is materially injured, or threatened with material injury, by dumped or subsidized imports.[1] The ITC's decisions in these trade remedy cases, generally either antidumping or countervailing duty investigations,[2] can have major effects on both international trade and domestic industries, specifically by determining whether U.S. manufacturers and their workers are entitled to a remedy against unfair import competition.

This article examines the ITC's current investigation procedures and suggests 10 changes that could be made to the statutes that govern the ITC and its reviewing courts.[3] These suggestions are intended to create more

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1 *See* 19 U.S.C. §§ 1330(a)–(b), 1337, 1677(7) (2006); *see also About the United States International Trade Commission*, UNITED STATES INT'L TRADE COMM'N, http://www.usitc.gov/press_room/about_usitc.htm (last visited Nov. 11, 2012).

2 19 U.S.C. §§ 1671, 1673a (2006).

3 Specifically, this article includes 10 recommendations for changes in the law as to the ITC and the authority of its reviewing courts. It should be noted that ITC injury determinations no longer cite to any economic modeling. *See* Altx, Inc. v. United States, 26 Ct. Int'l Trade 1425, 1431–32 (2002) (opining that the ITC used an economic model in the past to determine the effects of dumped imports, but no longer rely upon it), *aff'd*, 370 F.3d 1108 (Fed. Cir. 2004). Parties before the ITC, and the institution itself, would benefit from the use of sound economic modeling, which would provide additional guidance to counsel in formulating their arguments as well as protect the reputation of the agency for principled decision-making. This article addresses 10 proposed legal improvements, and therefore discussion of an increased role for economics in ITC determinations is beyond the scope of this paper.

accountability, efficiency, and meaningful judicial review of this important agency and its work.

## I. OVERVIEW OF UNITED STATES TRADE REMEDY LAWS

Before proposing any improvements that could be made to the ITC's governing statutes and regulations, it is appropriate to first provide an overview of how antidumping and countervailing duty investigations are conducted. These two types of trade remedy investigations provide relief to U.S. manufacturers that have been injured, or are threatened with injury, as a result of unfairly priced imports.

Under the antidumping ("AD") statute,[4] members of a particular domestic industry may petition the United States government to investigate imports of similar foreign goods.[5] If unfair trade practices are discovered, the statute prescribes compensating duties.[6] In order for such AD duties to be imposed, two threshold requirements must be met: (1) the imports are sold in the United States at less than fair value; and (2) the low-priced imports are a cause of, or threaten, material injury to the domestic industry that produces similar products.[7] Similarly, in a countervailing duty ("CVD") investigation, the United States government must determine two elements of unfair trade practices before taking any remedial measures: (1) whether imports are being subsidized by the government of the exporting country, and (2) whether the subsidized imports are a cause of, or threaten, material injury to the corresponding domestic industry.[8]

Generally, AD and CVD investigations are conducted together on parallel tracks before both the ITC and the United States Department of Commerce ("Commerce").[9] In both AD and CVD cases, the ITC determines whether a domestic industry is materially injured, or threatened with material injury, by the dumped or subsidized imports.[10] In an AD case, Commerce ascertains whether the imported products are being sold at less than fair value—or "dumped"—into the United States market and

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[4] 19 U.S.C. §§ 1673, 1673a–1673h (2006).

[5] §§ 1673, 1673a(b)(1).

[6] § 1673.

[7] *Id.*

[8] 19 U.S.C. § 1671(a) (2006).

[9] *See* UNITED STATES INT'L TRADE COMM'N, PUB. 4056, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK II-3 (13th ed. 2008) [hereinafter ITC HANDBOOK], *available at* http:www.usitc.gov/trade_remedy/documents/handbook.pdf.

[10] §§ 1671(a), 1673.

calculates a duty rate that appropriately offsets the extent of unfair pricing.[11] In a CVD case, Commerce is responsible for determining the nature and extent of subsidies provided by foreign governments to producers that are exporting merchandise to the United States.[12] Commerce then assesses a countervailing duty, or tax, on the subsidized imports in order to offset the effect of the subsidy.[13]

Domestic companies or industry trade associations can initiate the investigative process by simultaneously filing an antidumping and/or countervailing duty petition with both Commerce and the ITC.[14] After the investigation is initiated, opposing and neutral companies that are involved in the production or import of the relevant product are required, under threat of subpoena, to provide information necessary to the investigation.[15] Foreign producers who do not fully cooperate with the investigation may be subject to the application of "adverse inferences," which, in effect, allows the relevant agency to draw negative inferences about the non-cooperative foreign producers in favor of the domestic producers who support the petition.[16]

Before imposing the relevant antidumping and/or countervailing duties, the ITC must first find that the imports are a cause of material injury, or threat thereof, to the corresponding United States industry.[17] In this regard, "material injury" is defined simply as harm that is more than inconsequential, insignificant, or immaterial.[18] As such, the domestic industry can demonstrate injury in a number of ways, most effectively through downward trends in financial data, including that related to production, shipments, profits, etc.[19] Under relevant law, operating losses are not a necessary component of material injury if it is otherwise clear that

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[11] § 1673; *see also* 19 U.S.C. § 1677(1) (2006) (specifying that the Secretary of Commerce is the "administering authority").

[12] § 1671(a); *see also* § 1677(1) (specifying that the Secretary of Commerce is the "administering authority").

[13] § 1671(a).

[14] 19 U.S.C. §§ 1671a(b), 1673a(b), 1677(9)(C)–(F) (2006).

[15] *See, e.g.*, UNITED STATES INT'L TRADE COMM'N, OMB. NO. 3117-0016, U.S. PRODUCERS QUESTIONNAIRE (2011), *available at* http:www.usitc.gov/trade_remedy/documents/USProducerQuestionnaire.pdf ("This report is mandatory and failure to reply as directed can result in a subpoena or other order to compel the submission of records or information in your possession (19 U.S.C. § 1333(a)).").

[16] *See* 19 U.S.C. § 1677e(b) (2006).

[17] 19 U.S.C. §§ 1671(a), 1673 (2006).

[18] § 1677(7)(A).

[19] § 1677(C)(iii).

the industry would have been better off absent the subject imports.[20] As long as the dumped and/or subsidized imports are found to be a cause of material injury or threat thereof, the ITC should make an affirmative determination, even if there are other, more significant causes of such injury or threat.[21]

In addition to antidumping and countervailing duty cases, the ITC also conducts the considerably less frequent trade remedy investigations known as "safeguards."[22] A safeguard investigation, also known as a "Section 201", is potentially one of the strongest trade remedy actions under United States law, in part because it employs a broad range of trade remedies intended to help American producers adjust to increased competition from imports.[23]

As early as 1934, the United States recognized that domestic producers could be harmed by an increase in imports and decided to provide relief, under certain conditions, to injured sectors of the economy.[24] Although foreign exporters were not necessarily trading unfairly, the general expansion in global trade increased domestic companies' need for flexibility to adjust to rapidly changing imports levels. Therefore, in the 1940s, the United States began to enter into trade agreements, most notably the General Agreement on Tariffs and Trade ("GATT").[25] These trade agreements included "escape clause" or "safeguard" mechanisms to provide such needed relief.[26] Subsequently, Congress included Section 201 in the Trade Act of 1974, which mirrors the safeguard provisions contained in the GATT.[27] Commonly known as the "escape clause," Section 201 allows the

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[20] Daniel B. Pickard & Laura El-Sabaawi, *The Future of Rule 11 Sanctions for Unethical Conduct Before the U.S. Court of International Trade*, 19 TUL. J. INT'L & COMP. L. 587, 592 (2011); *see* § 1677(7)(C)(iii) (identifying what common factors are used to determine when a material injury or threat of a material injury has occurred, and does not include operating losses as a deciding factor).

[21] *See* § 1677(7)(F)(ii) (limiting the factors which can be used to determine whether dumped or subsidized imports are a cause of material injury).

[22] 19 U.S.C. § 2252(b)(1)(A) (2006).

[23] 19 U.C.C. § 2253(a)(3) (2006).

[24] STAFF OF H. COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 99 (Comm. Print 1997) [hereinafter WAYS & MEANS].

[25] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

[26] *See, e.g.*, *id.* at art. XIX.

[27] 19 U.S.C. § 2251 (2006).

President to take action in order to facilitate an injured domestic industry's efforts to adjust to import competition.[28]

If the ITC makes an affirmative injury determination under Section 201, then the investigation proceeds to a remedy phase, in which the ITC recommends specific actions that can be taken to address and counteract the determined injury.[29] Once the ITC issues its recommendations, the President may authorize various remedial measures, such as: increasing or imposing duties, enforcing a tariff-rate quota, modifying or compelling quantitative restrictions, implementing adjustment measures, withdrawing or altering concessions provided to United States trading partners, and commencing negotiations with foreign governments to limit exports into the United States.[30]

For these reasons, antidumping, countervailing duty, and safeguard investigations are extremely powerful tools and are of special importance to American workers and manufacturers who are being injured, or threatened with injury, by reason of import competition.

## II. TEN SUGGESTIONS TO IMPROVE THE ITC AND JUDICIAL REVIEW

The ITC is the federal agency responsible for making injury determinations in trade remedy investigations.[31] In the current era of economic crises and increased trade frictions, the United States laws governing how the ITC functions and conducts trade remedy investigations are of increased importance. This article presents 10 suggestions for improving and facilitating the important work performed by the ITC. These recommendations are intended to increase the fairness and efficiency of the ITC's crucial responsibilities in regard to remedying foreign entities' unfair trade practices, as well as provide for more meaningful judicial review of these determinations.

### A. *Suggestion #1: ITC Decisions Should Have Precedential Value*

It is a hallmark of the common law system that judicial decisions have precedential value. The ITC's decisions, however, are *sui generis*, literally

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28 WAYS & MEANS, *supra* note 24 .

29 19 U.S.C. § 2252(e) (2006).

30 19 U.S.C. § 2253(a) (2006).

31 19 U.S.C. § 1337(c) (2006).

meaning "of its own kind."[32] An adjudicative body applying a *sui generis* standard is not bound by its prior decisions.[33] Instead, the adjudicator makes decisions on a case-by-case basis. Indeed, the ITC has noted in various decisions that its determinations are not bound by potentially conflicting findings made in previous investigations, even if based on very similar facts.[34]

Indeed, the CIT has affirmed that the ITC is under no obligation to follow its prior factual determinations in subsequent investigations.[35] Theoretically, if an ITC decision deviates from an "agency practice," the ITC should provide "a reasoned explanation of its decision."[36] Nevertheless, the ITC's reviewing courts have accepted the *sui generis* nature of ITC determinations and rarely remand ITC decisions based on deviation from an established practice.[37]

The original rationale behind the ITC's *sui generis* standard was founded on the notion that cases alleging unfair import practices are rarely the same, and, as such, decisions in previous cases are of little guidance.[38]

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[32] *See, e.g.*, Comm. for Fair Beam Imps. v. United States, 27 Ct. Int'l Trade 932, 944 (2003) ("[I]t is an equally well-established proposition that the ITC's material injury determinations are *sui generis*; that is, the agency's findings and determinations are necessarily confined to a specific period of investigation with its attendant, peculiar set of circumstances.") (alteration added), *aff'd*, 95 F. App'x. 347 (Fed. Cir. 2004). *See also* BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

[33] *See* Citrosuco Paulista, S.A. v. United States, 12 Ct. Int'l Trade 1196, 1209 (1988).

[34] Light-walled Rectangular Pipe and Tube From Mexico and Turkey, Inv. Nos. 731-TA-1054, 731-TA-1055, USITC Pub. 3728 (Oct. 12, 2004) (Final) at 6.

[35] *See Comm. for Fair Beam Imps.*, 27 Ct. Int'l Trade at 943 (recognizing the ITC arguments that because of the *sui generis* nature of its injury investigations there is a difference between "agency practice," which would have precedential value, and case-specific determinations, which would not (citing Ranchers-Cattlemen Action Legal Found. v. United States, 23 Ct. Int'l Trade 861, 884–85 (1999))).

[36] *See Comm. for Fair Beam Imps*., 27 Ct. Int'l Trade at 944. In *Usinor v. United States*, the Court did acknowledge that "each injury or investigation is *sui generis*, involving a unique combination and interaction of many economic variables," and emphasized that the ITC "may not disregard previous findings of a general nature that bear directly upon the current review." 26 Ct. Int'l Trade 767, 792 (2002).

[37] This is a considerable understatement. *See, e.g.*, Nucor Corp. v. United States, 328 Ct. Int'l Trade 188, 233 (2004), *aff'd*, 414 F.3d 1331 (Fed. Cir. 2005).

[38] James Pomeroy Hendrick, a Deputy Assistant Secretary of the Treasury during the Kennedy and Johnson Administrations, noted the following in a 1964 article on the Antidumping Act:

> The Tariff Commission, unlike American courts of law, is not bound by its own precedents. Even if it were, one must recognize that it is seldom that two cases are found which are truly alike. The elements may be

Now, however, due in equal parts to the importance of the ITC's quasi-judicial decisions and the significant due process rights that are at stake, it is time for the ITC to be subject to some form of binding precedent similar to the doctrine of *stare decisis*.

The application of *sui generis* increases the potential for arbitrary and capricious decision-making.[39] Our common law legal system is based on the notion that precedent provides a principled way to decide subsequent cases based on similar issues or facts. Specifically, it is axiomatic that justice requires similar cases to be decided similarly so that the law is predictable and the court produces consistent outcomes. As the ITC performs its functions in a quasi-judicial manner, both the institution and the parties before it would benefit from the application of at least a limited form of *stare decisis* to its determinations in these important matters.[40]

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> similar, but often enough there can be subtle differences, apprehended only after careful study of the entire record, which justify an injury decision in one and a no-injury decision in the other case.

Armstrong Bros. Tool Co. v. United States, 84 Cust. Ct. 16, 36 (1980) (citing James Pomeroy Hendrick, *The United States Antidumping Act*, AM. J. INT'L L. 914, 924 (1964)). In a similar vein, another Assistant Secretary of the Treasury made the following observation in testimony before the House Ways and Means Committee:

> To try to define "injury" is very much like trying to define precisely some of the phrases of the common law or of equity where the court's tradition may and should come to its judgment by weighing all of the factors in balance; and in any one case the balance may be very different from that of another. Injury to a large corporation or to the owner of a chain of stores may be very different from injury to the corner grocer. Injury to one industry may be very different from injury to another. Under the same set of facts mathematically opposite conclusions or differing conclusions could be drawn. These are questions of economics, not sensitive to either exact science or to predetermined close lines or channels of thought.

*Id.*

[39] *See generally* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 814 (Aspen Law & Bus. 4th ed. 2002) (discussing the need for agencies to discuss departures from precedent in order to limit agency discretion). Pierce states that "[a]n agency whose powers are not limited either by meaningful statutory standards or by legislative rules poses a serious potential threat to liberty and to democracy." *Id.* at 815. The treatise further elaborates that "[t]he dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them." *Id.* at 817. The Commission's reliance on the sui generis doctrine frustrates the purposes of the above.

[40] The author notes that this could be achieved by either an Act of Congress amending the ITC's governing statutes or perhaps by amending other legal authorities (e.g. the Administrative Procedure Act (APA)) in order to require the ITC to provide appropriate deference to previous decisions. It is somewhat interesting to note that ITC injury investigations are not bound by the due process protections of the APA. *See* Taiwan

While each case will inherently pose its own unique set of facts, the analysis that the ITC performs should be consistent and provide guidance as to the likely outcome based on material facts and legal principles.

Therefore, in light of the importance of the work performed by the ITC, it would be appropriate to make sure that it is subject to disciplines of *stare decisis*. As indicated above, it is a distinctive feature of the common law system that judicial decisions have precedential value. The ITC's "quasi-judicial" decisions in trade cases should also have precedential value, as well as the other due process protections afforded by the application of the doctrine of *stare decisis*. The parties before the ITC, and the institution itself, would benefit from this increased requirement for determinations in antidumping and countervailing duty cases.[41] Indeed, justice requires no less than predictable, consistent, and principled outcomes in these crucial determinations.

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Semiconductor Indus. Ass'n v. United States, 24 Ct. Int'l Trade 220, 221 (2000) ("Antidumping proceedings, including the Commission's injury [to domestic industry] determination under 19 U.S.C. § 1673d(b) . . . 'are investigatory in nature,' rather than adjudicatory in nature. . . . As such, the provisions of the Administrative Procedure Act, . . . do not apply to the Commission's injury investigation.") (second alteration added) (citation omitted).

[41] At a minimum, there would appear to be value in regard to applying the doctrine of stare decisis to the agency's interpretation of ambiguous statutes:

> An agency's changing its interpretation of an ambiguous statute should raise concerns that policy preferences or political motives have replaced a principled approach to statutory interpretation and that pure legislative delegation has replaced meaningful limits on agency authority at *Chevron* step two. Stare decisis guards against these dangers, and *Chevron*'s justifications provide scant reason why the doctrine should not apply with equal force to the agency as to the judicial context. Indeed, maintaining agency flexibility seems to be the only coherent rationale for granting agencies open-ended reinterpretive authority. But even *Chevron*'s own arguments on this point fail to explain why the vast flexibility *Chevron*'s [sic] provides is necessary or optimal.
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> To be sure, agency flexibility will suffer under a regime of stare decisis. . . . But from the perspective of democratic governance and the integrity of the political process, the argument for stare decisis is strong.

Harold Greenberg, Why Agency Interpretations of Ambiguous Statutes Should be Subject to Stare Decisis (Jan. 2011) (unpublished comment, Harvard Law School), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=haroldhank_greenberg.

### B. *Suggestion #2: Chevron Deference Should be Eliminated to Increase Judicial Review by the CIT*

When challenged, ITC determinations are first reviewed by the CIT, a specialized Article III court with exclusive jurisdiction over certain international trade issues.[42] For the reasons set forth below, it would be appropriate for ITC decisions to be subject to increased judicial review by the CIT and for such decisions to be denied deference under the standard established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*.[43]

*Chevron* deference—one of the bedrock principles of administrative law—requires courts of general jurisdiction to defer to an agency's interpretation of a statute, as long as Congress has not directly addressed the precise question at issue and the agency's interpretation is based on a reasonable construction of the statute.[44] The Supreme Court further addressed the issue of judicial deference to agency interpretations of statutory law in *United States v. Mead Corp.*,[45] which held that the administrative interpretation of a statutory provision is entitled to *Chevron* deference when Congress delegates the general authority to make rules carrying the force of law to that agency and the agency's determination was an exercise of such delegated authority.[46] Deference to determinations in antidumping and countervailing duty cases was solidified post-*Chevron* in *American Lamb Co. v. United States*,[47] where the Federal Circuit held that the ITC was entitled to *Chevron* deference and that the ITC's determinations need only be "sufficiently reasonable" to be upheld on review.[48]

The logic behind *Chevron* deference, however, is that courts of general jurisdiction do not have expertise in the area of law under review; and, therefore, courts of general jurisdiction should not substitute their interpretation of a statute for that of the specialized agency in charge of administering the statute. In *Chevron*, Justice Stevens noted that interpreting a regulatory statute requires "more than ordinary knowledge

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42 28 U.S.C. § 1581 (2006).

43 467 U.S. 837 (1984).

44 *Id.* at 842–43.

45 533 U.S. 218 (2001).

46 *Id.* at 226–27.

47 785 F.2d 994 (Fed. Cir. 1986).

48 *Id.* at 1001.

respecting the matters subjected to agency regulations."[49] Justice Stevens further stated that agencies are better suited to interpret regulatory statutes because judges are not experts in each particular field, and regulatory interpretation often entails making policy choices, which are the realm of the political branches of government, not the courts.[50]

The Customs Court Act of 1980 explicitly provides that the CIT has exclusive jurisdiction over, *inter alia*, antidumping and countervailing duty investigations and certain administrative decisions made by the United States Customs and Border Protection.[51] Furthermore, the Customs Court Act provides the CIT with exclusive jurisdiction over certain cases arising under the Tariff Act of 1930 ("Tariff Act"),[52] the Trade Act of 1974 ("Trade Act"),[53] and the Trade Agreements Act of 1979 ("Trade Agreements Act").[54] Because decisions of the ITC, a specialized administrative body, are appealed to the CIT, a similarly specialized court of specialized jurisdiction, concerns that informed decisions made by a specialized tribunal could be overturned by an uninformed court of general jurisdiction are unfounded. Therefore, the underlying rationale of *Chevron* deference does not apply to ITC decisions that are reviewed by the CIT, and, accordingly, decisions of the ITC should not be granted *Chevron* deference. In other words, the decisions of the specialized ITC are reviewed by a Court that specializes in the same subject matter and accordingly the extreme deference of Chevron is unwarranted.

As discussed further below, the ITC, to some degree, has resisted the concerns of its reviewing courts. Indeed, even when an original determination is found to lack the support of substantial evidence or is otherwise contrary to law, the ITC rarely changes a determination to provide relief to the domestic industry. Removing the extremely deferential *Chevron* standard for the CIT's review of ITC determinations would provide increased and more meaningful judicial review.

### C. *Suggestion #3: The CIT Should Have Authority to Reverse a Negative ITC Decision*

The CIT has two powers when reviewing an ITC determination. The CIT can either (1) affirm the ITC's determination, or (2) remand the ITC's

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[49] *Chevron*, 467 U.S. at 844.

[50] *Id.* at 865–66.

[51] 28 U.S.C. § 1581(a), (c) (2006).

[52] § 1581(a)–(c).

[53] § 1581(d).

[54] § 1581(e).

decision if such a determination is not supported by substantial evidence or is otherwise "not in accordance with law."[55] The CIT likely will not have the authority to reverse an ITC decision even should it be determined to be unsupported by substantial evidence or if it should be found to be contrary to law.[56] The ITC, however, is not required to change its decision on remand; and, in fact, it rarely does.[57] In practice, even though an ITC decision may be factually or logically flawed, the ITC usually makes the same finding on remand as it did in its original decision, only with added justification to address the CIT's specific concerns.[58] As such, the CIT is essentially prevented from reversing fatally flawed decisions by the ITC. This practice should be changed. The CIT should, in appropriate circumstances, have the authority to reverse negative decisions of the ITC in order to provide relief to American industries and their workers who have been injured as a result of unfairly priced imports.

The Federal Circuit has acknowledged the CIT's near inability to reverse an ITC determination, stating that reversing a decision of the ITC is made incredibly difficult under 19 U.S.C. § 1516a—the statute providing for judicial review of antidumping and countervailing duty proceedings.[59] In essence, because the CIT only has remand authority, it has almost no power to force the ITC to change its findings, even when the ITC's decision is determined to be fundamentally flawed.

To the best of the author's knowledge, in the more than 30 years of judicial review, an originally negative ITC determination has been reversed to an affirmative decision providing relief to a domestic industry in only *one* instance.[60] In *Diamond Sawblades Manufacturers Coalition v. United States*,[61] the ITC initially found that the United States diamond sawblades

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55 19 U.S.C. § 1516a(b)(1)(B)(i), (c)(3) (2006).

56 § 1516a(c)(3).

57 Jay Charles Campbell, *The Trade Litigant's Gauntlet: The Hanging Judge and the Teflon Tribunal*, 31 NW. J. INT'L L. & BUS. 1, 42 (2011).

58 *Id.* at 3–4.

59 Nippon Steel Corp. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006). The ITC made the argument that its determination could not be reversed under § 1516a, but the court affirmed the determination, and thus never addressed the ITC's argument. *Id.* In dicta, the court mentioned that the CIT might be able reverse an ITC determination that is not based on substantial evidence if remand would be ineffective. *Id.*

60 This instance was the focus of the case Diamond Sawblades Mfrs. Coal. v. United States. 32 Ct. Int'l Trade 134 (2008), *aff'd*, 612 F.3d 1348 (Fed. Cir. 2010). This author was lead counsel in *Diamond Sawblades*. *See also* Campbell, *supra* note 57, at 3–4 (stating that the ITC does not tend to reverse its determinations upon remand).

61 32 Ct. Int'l Trade 134 (2008), *aff'd*, 612 F.3d 1348 (Fed. Cir. 2010).

industry was not harmed by imports from China and Korea, even though the sale prices of such imports were determined to be unfair.[62] The decision to deny relief to the domestic industry was made despite evidence that American producers had lost market share and witnessed decreases in aggregate operating income, operating income margins, and return on assets during the period of investigation, while Chinese and Korean manufacturers gained market share.[63] On review, the CIT held that the ITC's findings of attenuated competition, as well as its price-effects analysis and findings on the threat of material injury, were not supported by substantial evidence, and the investigation was remanded back to the ITC for further proceedings.[64]

On remand, the ITC again found that the domestic diamond sawblades industry was not materially injured by imports from China and Korea, but the ITC *did* reverse its position on the threat of material injury, finding that there was competitive overlap between American, Chinese, and Korean sawblades.[65] In other words, in its second decision, the ITC found that there was a causal relationship between the increased Chinese and Korean imports, the under-selling and price depression caused by the imports, and the deteriorating health of the domestic diamond sawblade industry.[66] This reversal, however, was not the result of any Commissioner changing his or her individual determination. Rather, it was the result of two new Commissioners joining the ITC.[67] The *Diamond Sawblade* case, as exceptional as it is, still reinforces the proposition that reversal authority is needed because the ITC has demonstrated an unwillingness to reevaluate prior negative determinations denying relief to United States manufacturers and their workers.[68]

Over three decades of judicial review, remands of ITC determinations have rarely resulted in the Commission changing its denial of relief to American companies.[69] In order to promote meaningful judicial review,

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[62] Diamond Sawblades and Parts Thereof From China and Korea, Inv Nos. 731-TA-1092-1093, USITC Pub. 3862 (July 5, 2006) (Final) [hereinafter Diamond Parts Final] at 1.

[63] *Diamond Sawblades*, 32 Ct. Int'l Trade at 136.

[64] *Id.* at 146, 150–51.

[65] Diamond Sawblades and Parts Thereof from China and Korea, Inv. Nos. 731-TA-1092 and 1093, USITC Pub. 4007 (May 14, 2008) (Final) (Remand) [hereinafter Diamond Parts Remand] at 1, 3.

[66] *Id.* at 3–4.

[67] *See id.* at 1 n.2. Both new Commissioners, Irving A. Williamson and Dean A. Pinkert, made *de novo* determinations and found a threat of material injury in the remand decision. *Id.*

[68] *See* Campbell, *supra* note 57, at 42.

[69] *Id.* at 3–4.

Congress should act to explicitly provide the CIT with the power to, in appropriate circumstances, reverse a negative decision of the ITC, rather than simply remanding the case to the ITC for further justification.

### D. *Suggestion #4: Federal Circuit Review Should be Limited to an Abuse of Discretion or Clearly Erroneous Standard*

Judicial review of ITC decisions in antidumping duty and countervailing duty cases is governed by 19 U.S.C. § 1516a, under which the initial review is before the CIT,[70] and appellate review is before the Federal Circuit.[71] The standard of review for the CIT is set forth in section 1516a(b)(1)(B)(i), which states that "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[72] The statute, however, is silent as to what standard of review the Federal Circuit should apply when hearing appeals from the CIT regarding ITC decisions.[73]

In *Atlantic Sugar, Ltd. v. United States*,[74] the Federal Circuit adopted the "substantial evidence" standard and stated that "[t]he statute specifies that the standard of judicial review of a final ITC material injury determination in an antidumping case is whether that determination is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'"[75] Thus, in *Atlantic Sugar*, the Federal Circuit essentially duplicated the CIT's standard of review and denied granting any deference to the CIT's decision. Instead of reviewing the CIT's decision for error, *Atlantic Sugar* set the precedent for the Federal Circuit to essentially ignore CIT decisions and conduct *de novo* reviews of ITC findings for substantial evidence on the record.

The Federal Circuit's duplicative standard of review, however, is not supported by the relevant statutes. In *Atlantic Sugar*, the Federal Circuit only cited 19 U.S.C. § 1516a(b)(1)(B) in its adoption of the substantial evidence standard.[76] As a Federal Circuit judge later observed, however,

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70 19 U.S.C. § 1516a(a)(1) (2006).

71 28 U.S.C. § 1295(a)(5) (2006).

72 19 US.C. § 1516a(b)(1)(i) (2006).

73 *See generally* § 1516a.

74 744 F.2d 1556 (Fed. Cir. 1984).

75 *Id.* at 1559 (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

76 *Id.*

"[c]arefully read, section 1516a neither requires nor suggests the standard of review for [the Federal Circuit's] review of decisions from the Court of International Trade."[77]

As noted above, 19 U.S.C. § 1516a(b)(1)(B)(i) states that "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . *in an action brought under paragraph (2) of subsection (a) of this section*, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[78] Therefore, the quoted section only defines the court's standard of review for actions brought under 19 U.S.C. § 1516a(a)(2)(A), which states "[w]ithin thirty days after . . . [an antidumping or countervailing duty order] . . . an interested party . . . may commence an action in the United States Court of International Trade."[79] This means that "the court," for the purposes of the whole of 19 U.S.C. § 1516a, is the CIT and *not* the Federal Circuit, and *Atlantic Sugar*'s sole reliance on 19 U.S.C. § 1516a in adopting the duplicative standard of review is mistaken.[80] 19 U.S.C. § 1516a does not mention any other court and, therefore, does not expressly provide a standard of review for the Federal Circuit.[81]

There are serious consequences arising from the Federal Circuit's duplicative "substantial evidence" standard of review. By applying the same standard as the CIT and reviewing the ITC's record for substantial evidence, the Federal Circuit renders the CIT's review superfluous. Conducting a *de novo* review marginalizes the CIT's decision and deprives the Federal Circuit of the CIT's experience and expertise. Losing parties also have the perverse incentive to appeal to the Federal Circuit for what is effectively a second bite of the apple.

Furthermore, the Federal Circuit's duplicative standard is inefficient and adds time and expense to the appeal process, while wasting scarce judicial resources. As such, the statute should be amended to expressly state that the Federal Circuit's standard of review is the "abuse of discretion" or "clearly erroneous" standard. "Abuse of discretion may be found when: (1) the tribunal's decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision was based on an erroneous conclusion of law; (3) the tribunal's findings are clearly erroneous; or (4) the record contains no evidence upon which the [lower court] rationally could have based its

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[77] Zenith Elecs. Corp. v. United States, 99 F.3d 1576, 1580 (Fed. Cir. 1996) (Rader, J., concurring) (second alteration added).

[78] § 1516a(b)(1)(B)(i) (emphasis added).

[79] § 1516a(a)(2)(A)(ii) (second alteration added).

[80] *See generally* § 1516a; *Atlantic Sugar Ltd.*, 744 F.2d 1556 (Fed. Cir. 1984).

[81] *See* § 1516a.

decision."[82] Similarly, under the "clearly erroneous" standard, an appellate court will not reverse a lower court unless it has a "definite and firm conviction that a mistake has been committed" by the lower court.[83]

Replacing the Federal Circuit's existing "de novo" standard with an "abuse of discretion" or "clearly erroneous" standard would restore the deference that an expert court such as the CIT should command and would remove an inefficient and completely duplicative standard. Additionally, it would promote efficiency because parties would be less likely to appeal to the Federal Circuit, thus reducing the amount of litigation in the federal courts. Perhaps most importantly, it would contribute to a more reasonable method of judicial review of ITC decisions.

### E. *Suggestion #5: The ITC and Commerce Should Have One Common Administrative Protective Order*

In antidumping and countervailing duty investigations, the parties need assurances that the confidential business information they provide in the course of the proceedings will not be subject to public disclosure. To accommodate this reasonable expectation during the adjudication process, the ITC only releases confidential business information to authorized applicants under an "administrative protective order" ("APO").[84] An APO requires authorized applicants not to divulge any designated confidential business information it obtains during the investigation and limits use of such information to the relevant adjudication.[85]

Similarly, Commerce issues its own APOs during the course of antidumping and/or countervailing duty proceedings.[86] Commerce's APO procedures are entirely separate from those of the ITC, and it will only disclose parties' confidential business information to its own separately authorized APO applicants.[87]

While the ITC and Commerce have similar processes for issuing APOs and handling confidential business information, the APOs are unique

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82 Kevin Casey, Jade Camera & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 286 (2001) (alteration added).

83 United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

84 UNITED STATES INT'L TRADE COMM'N, Pub. No. 3755, AN INTRODUCTION TO ADMINISTRATIVE PROTECTIVE ORDER PRACTICE IN IMPORT INJURY INVESTIGATIONS 1 (March 2005).

85 *Id.* at 3; *see also* 19 C.F.R. §§ 210.34, 210.5 (2012).

86 19 U.S.C. § 1677f(c) (2006).

87 § 1677f(c)(1)(A).

to each agency and violations under each carry separate and significant penalties.[88] The independent issuance of APOs by both the ITC and Commerce can create problems when the same parties are involved in proceedings before both agencies. For example, should it come to the attention of a domestic party authorized under both ITC and Commerce APOs that a foreign producer party made a factual assertion in the confidential business information it provided to Commerce that is in direct conflict with an assertion it made in the information it provided to the ITC, the domestic party would be unable to inform either federal agency of the foreign producer's misrepresentation. This is due to the concept of "crossing APOs," which holds that a party cannot inform the ITC of information that it received under an APO issued by Commerce, and *vice versa*.[89] This is akin to the left hand not knowing what the right hand is doing, and allows for too much gamesmanship in these important proceedings.[90]

In addition, the different operating procedures of the ITC and Commerce lead to perverse incentives for parties that are involved in related proceedings before both agencies. Just as, in accordance with the rules of evidence, a court will instruct the finder of fact to make an adverse inference when a party fails to obey a subpoena to produce evidence,[91] both the ITC and Commerce have the discretion to make adverse inferences when a party fails to cooperate with their proceedings.[92] Commerce,

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[88] *See* 19 C.F.R. §210.34(c); 19 U.S.C. § 1677f(f)(4).

[89] *See, e.g.*, Summary of Commission Practice Relating to Administrative Protective Orders, 75 Fed. Reg. 66,127, 66,127 (Oct. 21, 2010) (stating that ITC's current application for disclosure of protected information "requires the applicant to swear that he or she will . . . [n]ot divulge any of the [privileged information] disclosed under this APO . . . to any person other than . . . [t]he person or agency from whom the [information] was obtained." (alterations added)).

[90] This is not a hypothetical problem. The author and other counsel who regularly practice before the ITC could cite numerous examples of foreign respondents who made certain factual representations to the Commerce Department in an attempt to lower their dumping margins, but denied the existence of these same facts to the ITC in an attempt to prevent a finding of a causal connection between the increased imports and harm to the domestic industry. Counsel is prevented from putting the contrary evidence on the record in the related proceedings (or providing detailed examples to non-APO signatories) as it would amount to an intentional violation of the APO and which carries potential significant penalties (including the option of referral for criminal prosecution). *Id.* at 66, 128.

[91] *See generally* Annotation, *Adverse Inference From Failure of Party to Produce Available Witness or Evidence, as Affirmative or Substantive Proof*, 70 A.L.R. 1326 (1936).

[92] 19 C.F.R. §§ 210.33, 351.308 (2012).

however, is more inclined to make an adverse inference than the ITC,[93] which means foreign parties have less incentive to provide information to the ITC and can hope to obtain a more favorable result by ignoring the ITC's request for information despite full cooperation with Commerce. Consequently, foreign parties may seek to maximize their own interests and undermine the integrity and purpose of the investigation by choosing to cooperate with Commerce proceedings, in order to avoid an adverse inference, while simultaneously stonewalling the ITC, where an adverse inference is unlikely.[94] This leads to much frustration for American companies that are adversaries of foreign parties in proceedings before both the ITC and Commerce because the United States companies cannot inform the ITC or Commerce of a foreign party's conflicting responses without exposing themselves to potentially significant penalties for APO violations.

To solve this imbalance between foreign party cooperation at the ITC and Commerce and to further protect United States companies, Congress should amend the Tariff Act to allow for greater information sharing between the ITC and Commerce. Instead of each agency issuing its own independent APO, there should be a "common" APO that applies to both agencies. That way, the confidential business information of parties would still be protected and available only to authorized applicants, but foreign parties would not have an incentive to cooperate incongruently with Commerce and the ITC. With a joint ITC-Commerce APO, foreign parties would not be rewarded for providing false and conflicting information to the agencies. A common APO system would also be more efficient, in that it would decrease the costs of gathering, accessing, and analyzing information. Therefore, a common APO system would result in more

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[93] The Department of Commerce is more inclined to apply adverse facts available because the target of its investigations are specific companies. So should Company A refuse to participate to the best of its ability, Commerce had been willing to apply adverse facts to Company A's dumping margin calculation. The ITC's decision applies to all imports from a subject country and thus has been reluctant to apply adverse facts available for all producers because of one company's bad acts. *See generally* Diamond Parts Remand, *supra* note 65. Sadly, this appears to be true even when the bad acts are performed by several respondent companies and even when they represent the vast majority of all imports. *See id.*

[94] It is public knowledge that only 12 respondents in *Oil Country Tubular Goods from China* submitted questionnaire data to the ITC while 39 Chinese firms participated in the Department of Commerce investigation. Transcript of Hearing at 79–80, *In re* Certain Oil Country Tubular Goods (OCTG) from China, Inv. Nos. 701-TA-463 and 731-TA-1159, USITC Pub. 4124 (Dec. 1, 2009) (Final).

informed adjudications at both the ITC and Commerce, as well as more just outcomes for American companies and foreign parties. [95]

### F. *Suggestion #6: The Related Party Provision Should be Amended*

In trade remedy investigations, certain United States manufacturers do not support the petition brought by the other domestic producers in their industry. Such a situation might arise when an American producer has significant investments in a foreign country (*e.g.*, China) and is opposed to a trade remedy investigation targeting its own imports into the United States from this country. Even when the imports are, in fact, injuring the domestic industry, including *all* American producers, a United States producer with affected foreign investments may be disinclined to support a trade case if the value of its dumped imports is anticipated to be greater than the value of its United States production operations. Moreover, it is conceivable that a significant domestic producer in a particular U.S. industry might be a large multinational entity, with interests that, in the context of a certain trade remedy investigation, are adverse to the domestic industry and its workers.[96]

The ITC has struggled with this factual scenario: a case in which the largest American producer in a domestic industry is opposed to trade relief for that domestic industry even though it is being injured as a result of low-priced imports.[97] In an effort to address this issue, Congress added a "related parties" provision to the ITC's governing statute, which allows the ITC to exclude a domestic producer from its analysis if the domestic producer is a "related party" with interests not aimed at protecting domestic industries.[98]

Currently, when conducting a trade remedy investigation, one of the ITC's first tasks is defining which domestic producers are included and

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[95] Moreover, and for the reasons discussed above, a foreign entity that chooses to only participate in Commerce's proceedings but refuses to comply with information requests by the ITC should be deemed to be in non-compliance with both agency investigations. Consequently, it would be appropriate to apply Adverse Facts Available/Adverse Inferences against the noncomplying party in both the ITC and Commerce investigations.

[96] *See, e.g.*, Diamond Parts Final, *supra* note 62, at 11–13 (explaining exclusion of some domestic producers for the purpose of determining injury, and showing that some domestic producers import pieces of goods that are the subject of an ITC investigation).

[97] Transcript of Hearing at 18, *In re* Certain Steel Wire Garment Hangers from China, Inv. No TA-421-2 (Jan. 9, 2003) (showing that large domestic producers may oppose trade relief).

[98] 19 U.S.C. § 1677(4)(B)(i) (2006).

excluded from the investigation's defined "domestic industry." [99] The Tariff Act defines "domestic industry" as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[100]

During a trade remedy investigation, however, the ITC may exclude some producers from the domestic industry pursuant to the "related parties" provision discussed above.[101] Specifically, under "appropriate circumstances," the ITC is allowed to "exclude from the domestic industry producers that are related to an exporter or importer of the [domestic like product], or which are themselves importers."[102] The Tariff Act states that:

> [A] producer and an exporter or importer shall be considered to be related parties, if . . . (I) the producer directly or indirectly controls the exporter or importer, (II) the exporter or importer directly or indirectly controls the producer, (III) a third party directly or indirectly controls the producer and the exporter or importer, or (IV) the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer.[103]

Nevertheless, exclusion of related parties is not mandatory; rather, under the "appropriate circumstances" requirement, exclusion is at the ITC's discretion based upon the facts presented in each individual case.[104] As guidance, the ITC has established that:

> The primary factors . . . examined in deciding whether appropriate circumstances exist to exclude related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S.

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[99] § 1677(4)(A).

[100] *Id.*

[101] § 1677(4)(B).

[102] Polychloroprene Rubber From Japan, Inv. No. AA1921-129, USITC Pub. 3212 (July 26, 1999) (Review) at 6 (alteration added).

[103] § 1677(4)(B)(ii)(I)–(IV).

[104] *See, e.g.*, Torrington Co. v. United States, 16 Ct. Int'l Trade 220, 224 (1992); Sandvik AB v. United States, 13 Ct. Int'l Trade 738, 747–48 (1989); Empire Plow Co. v. United States, 11 Ct. Int'l Trade 847, 852 (1987).

> producer has decided to import the product subject to investigation, *i.e.*, whether the firm benefits from the [less than fair value] sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and (3) the position of the related producers vis-a-vis the rest of the industry, *i.e.*, whether inclusion or exclusion of the related party will skew the data for the rest of the industry.[105]

While the third factor, the party's position compared to the rest of the industry, seems to indicate that the ITC will exclude a related party if including its information would skew the industry data as a whole, the exact opposite is true in practice. Since the "related parties" provision was enacted, the ITC has consistently excluded relatively small related parties, but it has been reluctant to exclude particularly large domestic producers.[106] As a result, the ITC sometimes has counter-intuitively failed to exclude a related party even when that related party's inclusion had a significant effect on the overall industry data.[107] Ironically, the result of this policy, when consistently practiced, is that the related parties provision is only applied when it is irrelevant—when exclusion of the related party's data has no significant effect on the industry's data set.

To better realize the general intent and purpose of the trade remedy laws, Congress should make exclusion of domestic producers that are opposed to the investigation and are also importers and/or foreign producers mandatory for the ITC. Domestic producers in antidumping and countervailing duty investigations are already required to complete a "domestic producers questionnaire" that requests production information, sales and profit data, and an indication of whether the surveyed producer supports the trade investigation.[108] Therefore, the related party provision should be amended so that any American producer who is deemed a related party *and* does not support the case (as indicated on the questionnaire) should be excluded from the domestic industry definition. This would prevent companies with an interest in dumped imports that takes precedence

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105 Diamond Parts Final, *supra* note 62, at 11 n.56.

106 Unfortunately, several of the most poignant examples of this phenomenon are protected from public disclosure by the ITC's administrative protective order. *See generally* ITC HANDBOOK, *supra* note 9, at II-24–II-27.

107 *See, e.g.*, Diamond Parts Final, *supra* note 62, at 16–17.

108 *See* UNITED STATES INT'L TRADE COMM'N, OMB. NO. 3117-0016, U.S. PRODUCERS QUESTIONNAIRE (2011), *available at* http:www.usitc.gov/trade_remedy/documents/US ProducerQuestionnaire.pdf.

over their United States production operations from skewing the general industry's data set. Such an amendment would lessen the ITC's discretion, but it would also prevent large companies, who may have a stronger interest in dumped imports, from potentially sabotaging trade cases brought by companies whose primary interest is in protecting the domestic industry and its workers.

## G. *Suggestion #7: The ITC Should Audit/Verify Respondents*

Under its regulations relating to practice and procedure, the ITC has the discretion to verify information received in the course of an antidumping or countervailing duty investigation.[109] In such investigations, questionnaires formulated by ITC staff are sent to domestic producers, importers, foreign producers, and—in final investigations—purchasers.[110] The questionnaires request a variety of data including, but not limited to, production outputs, inventories, commercial shipments, export shipments, and costs of production, as well as financial data and price information.[111] While the ITC may audit or verify the responses to final questionnaires submitted during the course of an investigation, it is not under a legal obligation to do so.[112] It is this questionnaire data, however, that eventually forms the bulk of the agency's administrative record, so its accuracy has a significant bearing on the related investigation's outcome.

It is troubling to note that, in practice, when the ITC *does* audit or verify questionnaire responses, it generally only audits those of domestic producers, not those of foreign producers.[113] It is fundamentally unfair that, in a government investigation, often only one side of the dispute is subjected to an audit. Moreover, the knowledge that the accuracy of information submitted by foreign producers usually is not subject to verification may incentivize companies to report less-than-accurate information in their questionnaire responses.

For instance, there seems to be an almost uncanny tendency of foreign producers, especially in cases involving steel products, to report capacity utilization rates of 99% or 100%.[114] If these numbers are accurate, it would

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[109] 19 C.F.R. § 207.4(b) (2012).

[110] ITC HANDBOOK, *supra* note 9, at II-6–II-7, II-15.

[111] *Id.* at II-8–II-9, II-16–II-17.

[112] Nitrogen Solutions Fair Trade Comm. v. United States, 29 Ct. Int'l Trade 86, 91 (2005).

[113] Chung Ling Co. v. United States, 16 Ct. Int'l Trade 636, 640–41 (1992).

[114] *See* Diamond Parts Final, *supra* note 62, at 37 (stating that Chinese and Korean diamond sawblade producers produced at a capacity utilization rate of over 90 percent).

suggest that such foreign producers are incapable of increasing their exports to the United States. The suspicious consistency of the unverified 100% foreign capacity utilization rates has been a frequent topic of discussion, particularly among counsel to the domestic industry.[115] Further fueling such conversation, the ITC has demonstrated that it is willing to accept the foreign producers' self-reported capacity utilization rates, despite public information that seems to directly contradict the data.[116] If the ITC took steps to verify such reported data, it would increase the accuracy of its administrative record and improve the integrity of the ITC's investigative process.

Although the central focus of the ITC's investigation is the health of the domestic industry and, therefore, domestic producers are the presumptive targets for auditing, only auditing one-side of an investigation inevitably raises questions of fairness. As a matter of good practice, and to ensure that the outcome of antidumping and countervailing duty investigations is based on the most accurate evidence available, the ITC should audit the data reported by both domestic producers and foreign respondents equally.

### H. *Suggestion #8: The ITC's Discretion to "Cumulate" Imports in Sunset Investigations Should Be Limited*

Five years after the ITC decides to provide relief in an antidumping or countervailing duty investigation, the agency must conduct a review to determine whether the dumping or countervailing subsidies that were originally determined to cause material injury to the domestic industry would continue to do so if the antidumping or countervailing duty was revoked.[117] These investigations, known as "sunset" reviews, allow the domestic industry and other affected parties to present arguments related to the volume, price effect, and impact of imports on the domestic industry.[118] The ITC evaluates these variables—along with other factors, such as improvements to the domestic industry as a result of the antidumping or

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[115] The author relies on his experience as a partner in the International Trade practice of Wiley Rein LLP in Washington, DC and as a former attorney-advisor in the Office of General Counsel of the U.S. International Trade Commission in support of these observations.

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[117] 19 U.S.C. §1675(c)(1) (2006).

[118] *See* §1675(c)(2) (2006); ITC HANDBOOK, *supra* note 9, at III-3, III-6–III-7.

countervailing order and whether the industry is vulnerable to material injury if the order is rescinded—to determine if the order should be revoked.[119]

During a sunset review, the ITC may "cumulatively assess the volume and effect of imports of the subject merchandise from all countries."[120] Congress implemented this practice of evaluating the cumulated impact of imports from multiple countries in the Trade and Tariff Act,[121] which sought to remedy the unpredictability and discrepancies in the Commission's prior injury determinations.[122] Prior to the Trade and Tariff Act, in cumulation determinations, the ITC "articulated a variety of differing criteria and conditions" and occasionally "imposed conditions which [did] not seem justified."[123] Consequently, Congress acted to remove improper conditions for cumulation that had been imposed by the ITC by creating a provision in the statute that required cumulating subject imports from all sources that caused contemporaneous injury.[124]

The Report of the House Ways and Means Committee ("Report") accompanying the Trade Remedies Reform Act of 1984sheds light on Congress's rationale behind revising the cumulation provision.[125] The Report states that the purpose of cumulation is to prevent injury created by "simultaneous unfair acts or practices."[126] The new cumulation provisions indicate that Congress intended the ITC to group countries together when the subject imports cause simultaneous injury to the domestic industry, even if these imports injure the domestic industry in different ways.[127] According to the Report, the Committee amended the cumulation provision

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[119] § 1675a(a)(1).

[120] § 1675a(a)(7). Under this statutory language, the ITC is allowed to combine import data from multiple countries in its causation analysis in order to evaluate the volume and price effects for an injury determination. *Id.*

[121] *See* Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 612(a)(2), 98 Stat. 2948, 3033 (codified at 19 U.S.C. § 1677(7) (2006)).

[122] *See* Judith Hippler Bello & Alan F. Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 INT'L LAW. 639, 659–63 (1985) (discussing the general lack of clarity in the ITC's prior injury-determination regime and the changes made to it for the purpose of clarification).

[123] H.R. REP. NO. 98-725, at 36–37 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5163–5164 (alteration added).

[124] *Id.*

[125] *Id.*; *see also* Dag Wilkinson, *The Trade and Tariff Act of 1984: Its Impact on Developing Countries*, 20 TEX. INT'L L.J. 453, 453–55 (1985).

[126] H.R. REP. NO. 98-725, at 37, *reprinted in* 1984 U.S.C.C.A.N. at 5164.

[127] *See* William B.T. Mock, Jr., *Cumulation of Import Statistics in Injury Investigations Before the International Trade Commission*, 7 NW. J. INT'L L. & BUS. 433, 434–35 (1986).

to allow cumulation of imports from multiple countries "that each account individually for a very small percentage of total market penetration, but when combined may cause material injury."[128]

The ITC has adopted, and the CIT and Federal Circuit have affirmed, incredible discretion in deciding whether or not to cumulate the injurious impact of imports from several countries.[129] This practice should be changed so that the intent of Congress's delegation of authority is better taken into account. Otherwise, the ITC's discretion allows its decisions in five-year reviews to become essentially unreviewable by courts. It is not in the interests of justice to grant the ITC so much discretion that it becomes a "black box" of decision-making.[130] Such seemingly unfettered decision-making in regard to cumulation makes it impossible for parties appearing before the ITC to make an informed prediction about whether or not the ITC will choose to cumulate imports in any particular case. The ITC has argued that because the statute states that it "may" cumulate imports, its use of ultimate discretion regarding whether or not to cumulate is properly granted under the language of the statute.[131]

The Federal Circuit has essentially upheld the ITC's absolute power of discretion in regard to whether or not to cumulate, for whatever reason or lack thereof.[132] In *Nucor Corp. v. United States,*[133] the ITC argued that in exercising that discretion, it is not required to consider the statutory purpose of determining if an exaggerated aggregate negative impact on the domestic industry resulting from imports from multiple countries is likely.[134] The Federal Circuit affirmed and determined that the ITC's decision *need not* be guided, first and foremost, by a consideration of why cumulation is provided for by United States law.[135]

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[128] H.R. REP. NO. 98-725, at 37, *reprinted in* 1984 U.S.C.C.A.N. at 5164.

[129] *See, e.g.*, Nucor Corp. v. United States, 32 Ct. Int'l Trade 1380, 1408, 1415 (2008), *aff'd*, 601 F.3d 1291, 1295–96, 1297 (Fed. Cir. 2010) (stating that the cumulation statute allows the ITC discretion as long as it follows a "reasonable and permissible interpretation" per 19 U.S.C. § 1675a(a)(7)).

[130] The term "black box" is often used in science to describe a process that can be viewed solely in terms of its input and output without any knowledge of its internal workings. David S. Caudill, *Barely Opening, Then Slamming Shut, Science's "Black Box" in Law: A Response to Beecher-Monas's Heuristics*, 23 CARDOZO L. REV. 1795, 1796 (2002). In other words, certain data goes into the box, and a result comes out, but no one knows which facts (or absence of facts) led to that outcome.

[131] *Nucor Corp.*, 32 Ct. Int'l Trade at 1391.

[132] *Nucor Corp.*, 601 F.3d at 1295–96, 1297.

[133] 32 Ct. Int'l Trade 1380 (2008), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010).

[134] *Nucor Corp.*, 32 Ct. Int'l Trade at 1391–92.

[135] *See Nucor Corp.*, 601 F.3d at 1296–97.

As mentioned previously, Congressional intent indicates that the purpose of cumulation is to ensure that the ITC's causation analysis captures the particularly extreme negative effects subject products being imported from multiple countries have on the domestic industry.[136] Such analysis ensures that significant aggregate injury is not overlooked in country-specific reviews, leading to what might be referred to as a domestic industry's "death by a thousand cuts." The ITC, however, has indicated that it is not guided by Congress's intent in enacting the law, and the courts have agreed.[137] This practice should be corrected.

To ensure that the ITC properly cumulates imports in sunset reviews, Congress should amend 19 U.S.C. § 1675a(a)(7) to state that, if the statutory requirements are satisfied, the ITC *must* cumulate and evaluate the hammering effects of contemporaneous imports. Removing the "may" and replacing it with "must" would require that the ITC "cumulatively assess the volume and effect of imports of the subject merchandise from all countries."[138] This simple modification would remove the ITC's seemingly unfettered discretion regarding cumulation and, accordingly, allow for greater transparency in five-year sunset reviews. This approach better reflects Congress's intent behind the cumulation provision and insures that the ITC's decision will be reviewable by the courts.

### I. *Suggestion #9: The ITC's Causation Standard in Safeguard Cases Should Be Decreased*

This article has primarily focused on antidumping and countervailing duty investigations. However, as briefly mentioned in Section II, an important alternative to these trade remedy laws exists in Section 201 of the Trade Act of 1974.[139] This trade remedy is a "safeguard," which allows the President to enact a range of remedies to restore competition to the affected United States industry.[140] As safeguard cases are less disruptive to international trade than antidumping investigations, there may be some persuasive policy reasons to shift towards safeguard cases in the 21st century, but two major changes must be made to the relevant law before this

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[136] H.R. REP. NO. 98-725, at 37 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127. 5164.

[137] 601 F.3d at 1296–97.

[138] The current statute is permissive, and does not mandate cumulation. 19 U.S.C. § 1675a(a)(7) (2006).

[139] 19 U.S.C. § 2251(a), (b)(1) (2006) (allowing the President to take appropriate action to remedy injuries to domestic producers resulting from unfair trade as identified by the ITC).

[140] § 2251(a).

is possible. More specifically: (1) there must be a lower causation standard, and (2) these cases must have less of a political element. This section will describe the rationale for lowering the causation standard in safeguard cases, which is fully in-line with our international treaty obligations.[141] The potential to decrease the political element of a safeguard case and, under certain circumstances, create a right to relief as a matter of law, is described in the final section of this article.

Safeguard cases have their origin in the post-World War II era.[142] As world trade liberalized, the United States entered into trade agreements that included escape clauses intended to protect domestic industries from rapid increases in imports.[143] These provisions were built in to provide temporary relief and give ailing industries time to generate profits, to reinvest those profits in factors of production, and to regain their competitive edge.[144] However, the effectiveness of this remedy in the United States has been compromised by use of the "substantial cause" standard, which places a significantly higher burden of proof on injured domestic industries than what is required under international obligations and, therefore, hinders such industries from benefitting from safeguard remedies.[145] Accordingly, Congress should act to lower the United States causation standard in these cases, thereby improving the effectiveness of safeguard remedies and better reflecting our international obligations.

Article XIX of the GATT allows contracting nations to utilize a general safeguard trade remedy. Article XIX(1)(a) states:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers . . . the contracting party shall be free . . . to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw

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141 Mock, *supra* note 127, at 446–47 (stating that injury causation must be shown before a compensating duty may be assessed so as not to violate GATT provisions).

142 Wilkinson, *supra* note 125, at 457.

143 *Id.* (stating that an escape clause, Article XIX, was included in the GATT after the United States insisted).

144 RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 944 (2005).

145 Mock, *supra* note 127, at 446.

or modify the concession.[146]

Following the adoption of the GATT, the Uruguay Round Agreement on Safeguards ("Safeguards Agreement") was drafted to clarify Article XIX's safeguard provision.[147] Under both the GATT and the Safeguards Agreement, a contracting party may impose a safeguard remedy when imported products "cause or threaten to cause serious injury to the domestic industry."[148] Article 4 section 2 of the Safeguards Agreement elaborates that "the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry."[149] Specifically listed factors to be considered are:

> [T]he rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.[150]

The Trade Act codifies Article XIX in United States law, with some slight modifications to the language of the original agreement.[151] Section 201 of the Trade Act, for example, changed the United States safeguard causation standard from that dictated by the GATT and the Safeguards Agreement.[152] According to Section 201, any good "being imported into the United States in such increased quantities as to be a *substantial cause* of

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[146] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 190 (1994) [hereinafter GATT 1994] (adopting the terms of GATT 1947 by reference); *see* GATT 1947 art. XIX(1)(A), *supra* note 25.

[147] Agreement on Safeguards, Apr. 15, 1994, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 154 (1994) [hereinafter Safeguards Agreement].

[148] *Id.* at art. 2(1). The language in the GATT is slightly different, requiring that a trade activity "cause or threaten to cause serious injury to domestic producers in that territory." GATT 1994, *supra* note 146, at art. XIX(1)(a).

[149] Safeguards Agreement, *supra* note 147, at art. 4(2)(a).

[150] *Id.*

[151] *Compare, e.g.*, GATT 1994, *supra* note 146, at art. XIX(1)(a), *with* 19 U.S.C. § 2252 (2006); *see also* Daniel B. Pickard & Tina Potuto Kimble, *Can U.S. Safeguard Actions Survive WTO Review?: Section 201 Investigations in International Trade Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 43, 45 (2007).

[152] *See* Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 406 n.65 (1994).

serious injury, or the threat thereof" may qualify the domestic industry for safeguard relief.[153] Section 201 subsequently defines "substantial cause" as a "cause which is important and not less than any other cause."[154] The Trade Act's legislative history explains that this "requires that a dual test be met—increased imports must constitute an important cause and be no less important than any other single cause."[155]

As asserted above, "substantial cause" is a higher standard than the "cause or threaten to cause serious injury" standard mandated by the GATT and the Safeguards Agreement.[156] Furthermore, it is considerably higher than the United States' existing causation standard in antidumping and countervailing duty investigations.[157] This means that fewer American industries are afforded the protection of safeguard remedies. The "substantial cause" language of Section 201 requires the ITC, charged with determining whether a United States industry has been harmed and, if so, whether an influx of imports is the cause of that harm,[158] to apply an unnecessarily difficult causation analysis that is not required by the GATT or the Safeguards Agreement.

By unnecessarily increasing the evidentiary burden to prove causation, the "substantial cause" analysis has prevented American industries from acquiring a remedy under the safeguard law. Indeed, the absence of Section 201 investigations in the last ten years calls into question the practical availability of the United States safeguard provision. As evidenced by the number of antidumping and countervailing duty petitions being filed,[159] American industries are still being injured by increased import competition. Domestic industries, however, are overwhelmingly choosing to file antidumping and countervailing duty cases rather than

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[153] 19 U.S.C. § 2251(a) (2006) (emphasis added).

[154] § 2251(b)(1)(B).

[155] S. REP. NO. 93-1298, at 120 (1974) *reprinted in* 1974 U.S.C.C.A.N. 7186, 7264.

[156] Schoenbaum, *supra* note 152 ("[T]he causation standard in the GATT escape clause differs from 201 in that it requires only that the injurious imports 'cause' serious injury or the threat thereof; the U.S. standard in 201 is 'substantial cause.'").

[157] *See* 19 U.S.C. §§ 1671(a), 1673 (2006) (each requiring a "material injury"); 19 U.S.C. § 1677(7)(A) (2006) (defining material injury as one that ""material injury" means an injury "which is not inconsequential, immaterial, or unimportant").

[158] *See* § 2252(b).

[159] *See, e.g.*, OFFICE OF INVESTIGATIONS, UNITED STATES INT'L TRADE COMM'N, IMPORT INJURY INVESTIGATIONS CASE STATISTICS (FY 1980-2008) 1 (2010), *available at* http://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf (showing 1,632 petitions filed from fiscal year 1980 to 2008).

safeguards.[160]

Accordingly, Congress should act to reform the causation standard so that it does not reflect a standard that is higher than what our international treaty obligations require. Doing so would provide domestic industries that are injured as a result of increased import competition with an additional important tool for protecting their livelihood and remedying their situations.

### J. *Suggestion #10: A Super-Majority Remedy Recommendation From The ITC Should Automatically Go Into Effect if the President Fails to Act*

In perhaps its boldest recommendation, this article proposes that, when the President fails to act after a super-majority of ITC Commissioners (at least four out of six Commissioners) has made an affirmative finding of material injury in a safeguards investigation and recommended a particular remedy, the domestic industry automatically should receive such remedy as a matter of law.

In a safeguards investigation, after an affirmative injury determination, the ITC is charged with making a recommendation to the President regarding the form and extent of relief that is appropriate.[161] As the law currently stands, upon the completion of an investigation, the ITC must submit a recommendation to the President regarding what specific trade remedies are appropriate to provide safeguard relief.[162] Following receipt of the ITC report, the President has 30 days to implement the recommended remedy, a modified version of the recommended remedy, or no remedy whatsoever.[163] The President is under no obligation to institute a recommended safeguard remedy, even after an affirmative determination by the ITC that a domestic industry is being seriously harmed.[164] The current law gives the President the discretion to weigh the reported harm to domestic industry against the potential political ramifications with affected

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[160] *See, e.g.*, UNITED STATES INT'L TRADE COMM'N, *The Year in Trade 2009: Operation of the Trade Agreements Program*, 2010 U.S. INT'L TRADE COMMISSION ANN. REP. 61, 2-1, *available at* http://www.usitc.gov/publications/332/pub4174.pdf (showing only one safeguard action filed with the ITC in fiscal year 2009).

[161] § 2252(e)(1).

[162] § 2252(e)(1)–(e)(2).

[163] § 2252(d)(2)(D).

[164] *Id.* ("[T]he President, *if* he considers provisional relief to be warranted and after taking into account the finding of the Commission under subparagraph (B), shall proclaim, for a period not to exceed 200 days, such provisional relief that the President considers necessary to prevent or remedy the serious injury" (emphasis added)).

trade partners.[165] Congress should remove this political calculation in certain, very narrow circumstances, specifically in order to allow a remedy to go into effect unless the President moves to block the relief.

This amendment would strengthen the safeguard provision as a viable trade remedy with practical and important protections in favor of the domestic industry, rather than political interests, as its core purpose. Currently, all safeguards cases require affirmative Presidential action in order for actual relief to be provided.[166] In contrast, antidumping and countervailing duty cases provide relief as a matter of law. Although the President is required under the law to make his determination within 30 days, there are examples of Presidents failing to meet this deadline by several months,[167] and an established track-record of Presidents outright denying recommended relief in safeguard cases.[168]

The uncertainty connected with Presidential action could be avoided by allowing a safeguard remedy that is recommended by a super-majority of the ITC commissioners to go into effect after the 30 day period unless the President intervenes to prevent the trade remedy from taking effect. This affords the President political cover by allowing him to take no action and shifts the burden of protecting domestic industry directly to the ITC. Presidential inaction, relative to presidential action, is a lower barrier for the domestic industry, and will increase the probability that a domestic industry will receive safeguard remedies. This solution also allows safeguard remedies to more closely mirror antidumping and countervailing duty determinations, which do not require presidential action to go into effect.[169]

Safeguard cases may, in certain circumstances, be a better alternative than antidumping or countervailing duty investigations. However, for this to occur the overly burdensome causation standard should be changed, and the extent of political discretion should be minimized. A change in the law allowing safeguard remedies to automatically enter into effect—for example, in the event of a super-majority ITC recommendation and a failure by the President to act to the contrary—would be a positive development for United States manufacturers. Indeed, removal of the overly strict

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[165] *See* 19 U.S.C. § 2253(a)(2) (2006).

[166] 19 U.S.C. § 2251(a) (2006).

[167] *See, e.g.*, Brian Balzer and Kyle Stiegert, *The European Union-United States Wheat Gluten Policy Dispute*, 30 J. FOOD DISTRIBUTION RES. 1, 1 (1999), *available at* http://ageconsearch.umn.edu/bitstream/27387/1/30020001.pdf.

[168] *See, e.g.*, Jeanne J. Grimmett, CONG. RESEARCH SERV., R40844, CHINESE TIRE IMPORTS: SECTION 421 SAFEGUARDS AND THE WORLD TRADE ORGANIZATION 14 (WTO) (2011), *available at* http://assets.opencrs.com/rpts/R40844_20110131.pdf.

[169] *See* 19 U.S.C. §§ 1673d(c), 1671d(c) (2006).

causation standard and a decrease in the political element will in safeguard cases, and the broad range of relief connected with these trade remedy actions, will more easily allow injured American companies to adjust to increased and injurious competition from imports.

## CONCLUSION

The United States trade remedy laws are of vital importance to American companies that have been injured as a result of increased import competition. The ITC, an independent, quasi-judicial agency is the body responsible for making consequential determinations in regard to whether American industries and their workers have in fact been harmed by such imports.[170] This article has presented ten suggestions for increasing the fairness and efficiency in the ITC's crucial work and in the judicial review by the federal courts charged with overseeing the legal adequacy of ITC determinations. This article's recommendations include requirements that ITC decisions have precedential value and, where appropriate, agency discretion be more limited by statute. Additionally, lesser and increased standards of judicial review are proposed for the CIT and the Federal Circuit, respectively. Other changes, detailed above, to ITC practice would increase the efficiency, effectiveness, and fairness of the Commission's investigation. Lastly, two significant changes to United States safeguards law are proposed in order to allow domestic companies to more fairly access these important remedies, which are intended to increase the competitiveness of American manufacturers.

The work of this powerful but little known agency may never have been more essential than it is today. The ten suggestions discussed above are intended to improve not only the efficiency of this vital work but to provide a more just process for the parties who appear before the ITC.

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[170] *See* 19 U.S.C. §§ 1330(a)–(b), 1337, 1677(7) (2006); *see also About the United States International Trade Commission*, UNITED STATES INT'L TRADE COMM., http://www.usitc.gov/press_room/about _usitc.htm (last visited Nov. 11, 2012).