In Need of Enlightenment: The International Trade Commission's Misguided Analysis in Sunset Reviews

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NOTES

IN NEED OF ENLIGHTENMENT: THE INTERNATIONAL TRADE COMMISSION’S MISGUIDED ANALYSIS IN SUNSET REVIEWS

The United States is no different than most modern nations that trade products in the international marketplace. That is to say, as a result of its participation in the international trade arena, the United States has an extensive body of laws to regulate its trade with foreign nations. The purpose of trade regulation varies depending upon an individual’s philosophic persuasion. One individual may view trade regulation as a synonym for protectionism in which trade with other nations is discouraged, while another may interpret trade regulation as a means to protect domestically manufactured goods from unfair competition. Regardless of one’s opinion on the need for trade regulation, its omnipresence in today’s international marketplace demands careful analysis.

Trade regulation is not a recent phenomenon, but rather a resilient force whose indiscreet character morphs over time, evolving with changes in the global economy.

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2. Jagdish Bhagwati, International Trade Issues for the 90s, 8 B.U. INT’L L.J. 199, 199 (1990) (analogizing protectionism to a cockroach, because both are “indestructible,” and describing how protectionism evolves through the emergence of new forms of trade barriers).

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the General Agreement on Tariffs and Trade (GATT)\(^3\) takes center stage, nontariff barriers (NTBs)\(^4\) have replaced tariffs\(^5\) as the favored mechanism of trade regulation.\(^6\) According to one commentator, "[t]ariffs no longer matter in international trade law. ... Nontariff barriers are what matter in late twentieth and early twenty-first century international trade law, leaving protectionists

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3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. "[GATT] is the fountainhead of international trade law." RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW § 1, at 1 (1998)). In October 1947, twenty-three nations signed GATT for the purpose of liberalizing trade. Id. at 5. "The principal goal of GATT was to establish limitation on tariffs and to control the use of certain non-tariff barriers to trade." JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 5 (3d ed. 1995). To achieve the stated goals of reducing tariff levels and nontariff barriers on a global basis, GATT members participate in what are known as multilateral trade "negotiation rounds." BHALA & KENNEDY, supra, § 2, at 5-6. To date, GATT has sponsored a total of eight rounds, including the Uruguay Round, the most recent negotiation round concluded in 1994. Id.

4. Nontariff barriers are trade restraints other than tariffs, such as quotas and subsidies. See JACKSON ET AL., supra note 3, § 8.1, at 376-78. Indicative of the diverse nature of NTBs, a cataloguing effort that began in the 1960s identified over 800 distinct NTBs. Id. at 377. Despite the diversity of NTBs, most can be categorized under one of the following general headings: customs valuation, subsidies, import licensing rules, quality standards, health and safety regulations, labeling laws, investment performance requirements, rules restricting government procurement to domestic producers and testing requirements, and lack of intellectual property protection. Id. at 378.

5. A tariff is akin to a tax that is imposed on imported goods before they are allowed to enter domestic commerce. Id. at 377. With respect to the current trend towards trade liberalization, "[t]ariffs ... are the only form of trade protection that the GATT-WTO system does not specifically prohibit." BHALA & KENNEDY, supra note 3, § 1-3(a), at 78. Although GATT permits members to impose tariffs, it also legally binds members to their reciprocal commitments to reduce overall tariff levels. Id. § 1(c), at 4. Those who favor trade liberalization generally prefer tariffs to NTBs because tariffs are relatively more transparent than NTBs. JACKSON ET AL., supra note 3, § 8.1, at 377. Compared to NTBs, such as quotas and subsidies, tariffs "are more visible, capture for the government much of the 'monopoly profit' which they create, do not need licensing to administer, do not require government funds (in contrast to a subsidy), and give only a limited amount of protection ... ." Id. From a GATT perspective, tariffs are clearly preferred because it is easier to negotiate reductions in tariffs than for NTBs. Id.

6. Those who oppose trade liberalization prefer NTBs to tariffs because, under GATT, members are bound to certain tariff commitments and thus cannot protect domestic goods by increasing tariffs. BHALA & KENNEDY, supra note 3, § 1(c), at 4; see also JACKSON ET AL., supra note 3, § 8.1, at 376-78; Bhagwati, supra note 2, at 199. Alternatively, certain NTBs are not prohibited by GATT and thus afford members the means to effectuate their desired degree of protectionism. BHALA & KENNEDY, supra note 3, § 2, at 5-7.
with few remaining weapons to achieve their goals." As quickly as nations agree to reduce certain barriers to trade, new forms of NTBs emerge to perpetuate the practice of protectionism. Included among the protectionist’s arsenal of NTB “weapons” are antidumping and countervailing duty laws. Since the 1980s these laws have been the U.S. “weapon of choice” to protect domestic industries.

Nations justify the existence of antidumping and countervailing duty laws as a means to counterbalance the “unfair” trade practices of dumping and subsidization. In the United States, counter-

7. Raj Bhala, Rethinking Antidumping Law, 29 GEO. WASH. J. INT’L. L. & ECON. 1, 3 (1995). NTBs predate the creation of the GATT system. BHALA & KENNEDY, supra note 3, § 2, at 5-7. It was only after the creation of the GATT system and the subsequent reduction in tariff levels and reliance on quotas, however, that NTBs operated to the detriment of trade liberalization. Id. Prior to 1947, “[NTBs] had no adverse effect on trade flows because tariff levels were so high that many imported goods could not clear the tariff wall in the first place.” Id. at 6. In the GATT-WTO system, however, NTBs largely replaced tariffs as the preferred means for nations to protect weak domestic industries and their economies during periods of economic hardship. Id. at 5-7.

8. JACKSON ET AL., supra note 3, § 8.1, at 377 (commenting that the elimination of certain trade barriers invariably leads to the creation of other restraints to achieve the same purpose). “The discovery of new protective devices appears to be an endless process. As soon as the international system establishes restraints or regulations on a particular protective device, government officials and human ingenuity seem able to turn up some other measures to accomplish at least part of their protective purposes.” Id.

9. Bhala, supra note 7, at 3-5 (claiming that antidumping laws have been the United States’ “weapon of choice” since the 1980s).

10. Dumping occurs when an exporter sells goods in the importing country at less than fair market value (LTFV), or at a much lower price than in its country of origin. Bhala, supra note 7, at 8-9. Under U.S. domestic law, “dumping” refer[s] to the sale or likely sale of goods at less than fair value.” 19 U.S.C. § 1677(34) (2000). For purposes of comparison, the Uruguay Round Antidumping Agreement provides that dumping occurs when “products of one country are introduced into the commerce of another country at less than the normal value of the products . . . .” BHALA & KENNEDY, supra note 3, § 6-1(a), at 650 (quoting GATT art. VI:1). Alternatively, commentators often refer to dumping as “international price discrimination.” Id. at 649 n.1.

11. The economic concept of a subsidy is a “benefit conferred on a firm or product by action of a government.” BHALA & KENNEDY, supra note 3, § 7-1(a), at 767 (citing JOHN H. JACKSON, THE WORLD TRADING SYSTEM 261 (1989)). Bhala and Kennedy disfavor the economic concept of a subsidy because its scope is too broad and thus not very useful in understanding the application of countervailing duty law. Id. In the context of U.S. domestic laws, countervailing duties are imposed only on “countervailable subsidies” which exist when “an authority (i) provides a financial contribution, (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or (iii) makes a payment to a funding mechanism to provide a financial contribution . . . to a person and a benefit is thereby conferred.” 19 U.S.C. § 1677(5)(B).
vailling duties (CVDs) are imposed to compensate for subsidies received by foreign producers, and antidumping duties (ADs) are imposed to compensate for the sale of imported products at less than their fair market value. Historically, AD and CVD orders established by the United States tended to endure without any scheduled termination. At the conclusion of the Uruguay Round in 1994, however, the United States amended its trade laws to include a mandatory review mechanism for AD and CVD orders, known as a “sunset review.”

According to one commentator, “The [Uruguay Round Agreements Act] fundamentally changed the antidumping and countervailing duty section of the amended United States Tariff Act of 1930 ....” The sunset review provision, however, has not yet led to a widespread discontinuation of AD and CVD orders. In this regard,

12. 19 U.S.C. § 1671 (imposing countervailing duties); id. § 1673 (imposing antidumping duties).

13. BHALA & KENNEDY, supra note 3, § 5-1, at 492-93. Once an AD or CVD order is issued, “[it] remains in place, and a duty is collected, for an indefinite period, though it is subject to administrative, changed circumstances, and sunset reviews.” Id. Under U.S. law prior to the adoption of sunset reviews, antidumping orders could remain in effect as long as an import was found to cause injury to a domestic industry. See TRACY MURRAY, The Administration of the Antidumping Duty Law by the Department of Commerce, in DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 54-56 (Richard Boltuck & Robert E. Liton eds., 1991).

14. The Uruguay Round was the most recent round of multilateral trade negotiations of GATT. BHALA & KENNEDY, supra note 3, § 4, at 8-9. One of the most significant outcomes of the Uruguay Round was the creation of the World Trade Organization. Id. To lend perspective to the importance of the Uruguay Round, it has been described as “the most far-reaching and comprehensive development in world trade since 1947 ....” Id. at 8.


17. From July 1998 (when sunset reviews of AD and CVD orders in existence as of January 1, 1995 began) to March 2002, 351 sunset reviews were instituted. See Int’l Trade Comm’n, Five-Year Review Status (Mar. 5, 2002), available at http://205.197.120.60/inv/sunset.nsf. As of March 5, 2002, the ITC has made determinations with respect to 271 of these 351 sunset reviews. Id. Eighty-eight reviews were revoked by the Commerce Department due to the lack of response by U.S. domestic producers and two reviews were pending before the ITC. Id.; see infra note 79 (discussing mandatory revocation of an order upon the failure of any interested domestic party to respond to the notice of initiation of a sunset review). Of the 271 sunset reviews submitted to the International Trade Commission (ITC), the ITC made a determination to revoke orders in a mere thirty-two percent of the
those who originally envisioned the sunset review as a means to dramatically reduce trade barriers to the U.S. market may well be disappointed. The question, therefore, remains whether the failure of the ITC to revoke a substantial number of AD and/or CVD orders is attributable to either (a) the failure of the URAA to bring about significant substantive changes in the domestic AD and CVD laws or (b) the misinterpretation of the legal standards to be applied during sunset reviews by the Department of Commerce (Commerce), the International Trade Commission (ITC), or both.

This Note analyzes the domestic administrative processes used to establish AD and CVD orders and critiques the review mechanism that can lead to removal of these orders. Essentially, this Note examines the legal standards applied during sunset reviews and concludes that the ITC's interpretation of these standards is misguided and fails to honor the legislative intent underlying sunset reviews.¹⁸

Using the sunset reviews of AD and CVD orders in Magnesium from Canada¹⁹ as a case example, this Note suggests that the standards of review applied by the ITC in sunset reviews are flawed in three respects. First, the ITC erroneously engaged in prospective analysis of future production volumes of a new Canadian company,
Magnola. In its calculation of the potential volume of magnesium imports from Canada, as part of its material injury analysis, the ITC included the manufacturing capacity of Magnola despite the fact that it had not yet begun to produce magnesium in commercial quantities. This Note evaluates how the ITC's inclusion of statistics from a prospective entrant in its analysis defeats the legislative intent of the sunset review mechanism.

Second, in its material injury determination, the ITC failed to fully appreciate the proper causation standard. The ITC's failure to distinguish between the harm to the domestic industry caused by Canadian imports and harm caused by nonsubject imports invalidates its determination that injury to the U.S. domestic industry would likely continue.

Third, the ITC failed to properly apply the theory of "captive production," a term that refers to the process in which a subsidiary produces an input that is consumed, either by another subsidiary or by the parent company, in the manufacture of a downstream product. The production of such inputs is said to be "captive" because it fulfills an internal manufacturing need. By definition, captively produced goods are not sold in the merchant market but rather are consumed internally by the manufacturer. The premise underlying the theory of "captive production" is that imported goods do not compete with internally consumed products. Ultimately, if the imports do not compete with captively consumed products in the merchant market then, by definition, the portion of domestic production that is consumed internally cannot

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20. See infra notes 118-24 and accompanying text.
21. See MAGNESIUM, supra note 19, at 12.
22. See infra notes 142-54 and accompanying text.
23. Instead of purchasing all the inputs needed to manufacture a product from external suppliers, companies often establish facilities to manufacture such inputs.
24. "Merchant market" is a general term used to describe business-to-business transactions.
25. A product is "internally consumed" if it is incorporated into another product before being sold.
26. See MAGNESIUM, supra note 19, at 12 n.76.
be injured by the imports, regardless of whether the imports are subsidized or dumped.

In the sunset review involving Canadian magnesium, despite the internal consumption of a large percentage of U.S. produced magnesium, the ITC found that the U.S. magnesium industry was materially injured by the Canadian imports. This Note examines the legal reasoning employed by the ITC to justify its apparent disregard for the domestically produced magnesium that was captively consumed.

The ITC's expansive construction of the statutory language establishing sunset reviews eliminates any notion of predictability or consistency in its determinations and defeats the intended objectives of the provision. Ultimately, the standards of review must be clarified in order for the United States to achieve the outcomes Congress intended in adopting the URAA and to meet its obligations under international law as established in the Uruguay Round negotiations.

The first section of this Note provides background on a case that will be analyzed throughout the Note by explaining the importance of magnesium. The second section explains the basic theoretical principles of subsidization and dumping and how such practices injure domestic markets. The third section provides a statutory and factual overview of U.S. AD and CVD laws that are designed to counterbalance the effects of dumping and subsidization, with an emphasis on the processes by which AD and CVD orders can be established and removed. The fourth section examines the 1994

27. Material injury or threat of material injury is one of the determinations required under the statute before AD or CVD orders can be imposed. 19 U.S.C. § 1677a(a) (2000) (imposing countervailing duty orders); id. § 1673a(a) (imposing antidumping duty orders); see also infra notes 52-61 and accompanying text.

28. The exact percentage has not been publically disclosed due to the Administrative Protective Order (APO) concerning such company-specific information. The ITC recognizes that both of the domestic magnesium producers, Magcorp and Northwest Alloys, internally consume some of the magnesium they produce.

29. MAGNESIUM, supra note 19, at 11-12. Northwest Alloys, for example, internally transfers its pure magnesium production to Alcoa, its corporate parent, for the manufacture of aluminum. Id.

30. See infra notes 35-36 and accompanying text.

31. See infra notes 37-41 and accompanying text.

32. See infra notes 42-72 and accompanying text.
Uruguay Round Agreements Act that amended U.S. domestic trade law and created the "sunset review." The fifth section of this Note introduces the case study of Magnesium from Canada. In particular, this section critiques the ITC's analysis during the sunset review of the AD and CVD orders on magnesium from Canada in light of prior case law and the legislative intent of the URAA. This section also proposes alternative interpretations of the legal standards established for sunset reviews, suggesting that the AD and CVD orders on magnesium from Canada should have been terminated.

**Importance of Magnesium**

In addition to illustrating the ITC's flawed analysis, the case study of magnesium provides for a discussion of how magnesium is poised to revolutionize the automobile manufacturing industry. Although the standards applied by the ITC are extremely important in the context of international trade, the importance of magnesium metal itself should also be highlighted. Given the strict emissions standards with which auto manufacturers must comply, automobile manufacturers constantly strive to minimize the weight of their vehicles. The ability of auto manufacturers to replace aluminum parts with those made of magnesium is exactly why magnesium is so highly valued. General Motors and Ford both plan to incorporate a greater percentage of magnesium into their automobiles, especially their SUVs, in the near future. These lighter-weight vehicles will require less gasoline, thereby reducing auto emissions and enhancing the overall air quality.

The realization of these environmental benefits, however, depends on the reliability and quality of the magnesium supply. Although magnesium is the third most abundant mineral on earth, the extraction, purification, and manufacturing processes are extremely fragile. Given the sensitivities of the manufacturing process of magnesium, the ITC's determination not only prevented

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33. See *infra* notes 73-87 and accompanying text.
34. See *infra* notes 88-158 and accompanying text.
the removal of the AD and CBD orders on magnesium from Canada, it also complicated the procurement of magnesium for American manufacturers, and has placed automobile manufacturers’ architectural visions on hold.

**Sources of Unfair Competition: Subsidization and Dumping**

To better understand the mechanics of AD and CVD orders it is helpful to examine the rationale for imposing such barriers on imports. It is well-established that AD and CVD laws are remedial in nature. The purpose of such laws is “to equalize competitive conditions between the exporter and American industries affected.”

When a foreign product is subsidized or dumped, the domestic product with which it competes is disadvantaged by virtue of the import’s artificially lower price. To counteract the effects of these practices, the United States imposes duties on foreign products to proportionately compensate for the disadvantage created by the dumping or subsidization.

In a simplified analysis, subsidization demands a remedy because a subsidy provides a tangible economic advantage for a foreign producer, which in turn can be passed along to consumers in the form of lower prices. Similarly, the dumping of imports demands a remedial because, by definition, dumping involves artificially

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37. *See e.g.*, National Knitwear & Sportswear Ass'n v. United States, 15 Ct. Int'l. Trade 548, 558 (1991) (stating that “[a]s the courts have long recognized, the antidumping law is a remedial statute”).


39. Subsidization refers to payments or favorable programs provided by a government to a producer. *See supra* note 11 and accompanying text. In turn, such subsidies theoretically reduce the costs of production or exportation of the product, thereby enabling the producer to sell its goods at a relatively lower price than unsubsidized goods. Common examples of subsidization include providing favorable rates for utilities, such as electricity and water, and beneficial loan programs.

40. “Dumping” is a phrase commonly used to describe the practice whereby a product is sold at a price lower than its fair value. 19 U.S.C. §§ 1673, 1677(34) (2000); *see also supra* note 10 and accompanying text. When a foreign manufacturer sells a product in the United States at a lower price than that for which it is sold in its country of origin, the product is characterized as being “dumped” in the foreign market.

41. *See 19 U.S.C.* § 1671e(a) (issuing countervailing duty order); *id.* § 1673e(a) (issuing antidumping order); BHALA & KENNEDY, *supra* note 3, § 5-1, at 492.
reducing prices in order to compete with domestically manufactured products. Ultimately, imports that are dumped or subsidized can harm the domestic industry by decreasing the domestic products' volume of sales or forcing the price of domestically manufactured goods downward, thus reducing profits. When domestic manufacturers demonstrate that they have harmed by either dumping or subsidization, AD and CVD duties are intended to create a "fair" market in which U.S. domestic industries can continue to compete.

Petsions, Investigations, and Orders: The Respective Roles of the Department of Commerce and the International Trade Commission in AD and CVD Cases

Although the practices of dumping and subsidization are mechanically very different, the standards used to establish AD and CVD orders are quite similar. The Tariff Act of 1930 (Tariff Act) created the administrative petitioning process through which U.S. domestic producers can obtain relief from unfair trading practices through the imposition of AD or CVD orders on imported goods. AD and CVD cases are complex due to the involvement of both Commerce and the ITC in the administrative review process. Given the complexities involved in AD and CVD cases, it is essential to trace the evolution of a typical case, from its initiation to its conclusion and the imposition of an order. Under

42. David A. Gantz, A Post-Uruguay Round Introduction to International Trade Law in the United States, 12 ARIZ. J. INT'L & COMP. L. 7, 120-31 (1995). Given the procedural similarities, for the purposes of this overview it is proper to combine the discussion of AD and CVD cases.
44. 19 U.S.C. § 1671a(a) (antidumping duty orders); id. § 1673a(a) (countervailing duty orders).
45. Id. §§ 1671a(a), 1673a(a).
46. For a comprehensive discussion of the "life cycle" of AD and CVD cases, see BHALA & KENNEDY, supra note 3, § 5-1, at 489-500. Bhala divides the cases into ten steps:
   i. Filing an Antidumping or Countervailing Duty Petition
   ii. The Department of Commerce's Determination on the Sufficiency of the Petition
   iii. The ITC's Preliminary Injury Determination
   iv. Commerce's Preliminary Dumping Margin or Subsidy Determination
   v. Commerce's Final Dumping Margin or Subsidy Determination
   vi. The ITC's Final Injury Determination
the Tariff Act, AD and CVD cases begin either at the initiative of the Department of Commerce or upon petition by a domestic industry, provided the petitioner qualifies as an "interested party." Although Commerce has the authority to initiate investigations absent a petition, the majority of investigations are initiated in response to petitions filed by American companies. Once Commerce determines that the petition is sufficient on its face, the investigation phase begins.

Given the remedial nature of antidumping and countervailing duty laws, justifying the creation and continued existence of AD and CVD orders requires two separate findings. First, there must

vii. Commerce's Antidumping or Countervailing Duty Order
viii. Judicial Appeals or NAFTA Panel Review of an Antidumping or Countervailing Duty Order
ix. Administrative Reviews of an Antidumping or Countervailing Duty Order
x. Addressing Circumvention of an Antidumping or Countervailing Duty Order

Id. at 494-95.

47. 19 U.S.C. § 1671a(a) (authorizing Commerce to initiate countervailing duty investigations); id. § 1673a(a)(1) (authorizing Commerce to initiate antidumping investigations).

48. Id. § 1671a(b) (authorizing domestic producers to initiate countervailing duty investigations); id. § 1673a(b) (authorizing domestic producers to initiate antidumping investigations). Parties file petitions simultaneously with Commerce and the ITC. Id. § 1671a(b)(2) (filing of countervailing duty petitions); id. § 1673a(B)(2) (filing antidumping petitions).

49. Only "interested parties" have standing to file AD and CVD petitions. Id. §§ 1671a(b)(1), 1673a(b)(1). A simplified definition of an "interested party" is "one who acts by or 'on behalf of' the allegedly affected United States industry." BHALA & KENNEDY, supra note 3, § 5-2(b)(1), at 501 (citation omitted). For the detailed statutory definition of who qualifies as an "interested party" see 19 U.S.C. § 1677(9).

50. BHALA & KENNEDY, supra note 3, § 5-2(b), at 500.

51. A petition is sufficient if it (1) alleges the necessary elements to impose a duty, (2) contains reasonably available information, and (3) is filed by or on behalf of an interested party. Id. § 5-1, at 498.

52. See supra notes 37-38.

53. BHALA & KENNEDY, supra note 3, § 5-1, at 490-92. A countervailing duty shall be imposed on merchandise when Commerce determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and ... the Commission determines that (A) an industry in the United States (i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise .... 19 U.S.C. § 1671(a)(1)-(2). Similarly, an antidumping duty shall be imposed when Commerce
be a finding of dumping or subsidization of imports. Second, there must be a finding of harm ("material injury" or "threat of material injury") to the domestic industry.\textsuperscript{54} The responsibility for these two determinations is divided between Commerce and the ITC.\textsuperscript{55} Commerce is responsible for the dumping or subsidy determination,\textsuperscript{56} and the ITC assumes responsibility for the injury determination.\textsuperscript{57} If both Commerce and the ITC make affirmative determinations, the statute directs Commerce to impose AD or CVD orders.\textsuperscript{58}

It is important to note that the "material injury" determination itself consists of two separate findings. Not only must the ITC find that the domestic industry is harmed, it must be shown that the subject imports caused the injury.\textsuperscript{59} Therefore, if evidence of
causation is lacking, the ITC cannot make an affirmative determination of material injury.\textsuperscript{60} Ultimately, harm to the domestic industry alone, without ample evidence that the subject imports caused such harm, is insufficient to impose or prolong AD or CVD orders.\textsuperscript{61}

\textit{Removal of AD and CVD Orders: Traditional Appeal Mechanisms and Annual Administrative Reviews}

As noted previously, the duration of AD and CVD orders is not predetermined and, unfortunately for foreign producers, the removal of AD and CVD orders traditionally has been an arduous and lengthy process.\textsuperscript{62} The endurance of AD and CVD orders is not due to the lack of appeal mechanisms, but rather is attributable in part to the unavailability of certain mechanisms to private parties and the strict standards of review applied during such appeals.

The imposition of AD and CVD orders by Commerce can be appealed via several different channels, including the Court of International Trade, NAFTA binational panels, and WTO panels.\textsuperscript{63} As private parties, foreign producers can appeal Commerce's decision immediately to the Court of International Trade (CIT).\textsuperscript{64}

investigations). The statute directs the ITC to "make a final determination of whether—(A) an industry in the United States (i) is materially injured, or (ii) is threatened with material injury ... by reason of imports ...." \textit{Id.} (emphasis added). \textit{See also} \textit{Gerald Metals}, 132 F.3d at 719.

\textsuperscript{60} \textit{Gerald Metals}, 132 F.3d at 719-20. As stated by the Court of Appeals for the Federal Circuit, "[a]n affirmative injury determination requires both (1) present material injury and (2) a finding that the material injury is 'by reason of the subject imports. Hence, the antidumping statute mandates a showing of causal—not merely temporal—connection between the LTFV goods and the material injury." \textit{Id.} (citation omitted).

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{See supra} note 13. It is estimated that prior to the Uruguay Round, Commerce removed only thirty percent of the 533 antidumping and countervailing duty orders established between 1980 and 1994; during the same time period, AD and CVD orders remained in effect on average 8.28 years before being revoked. \textit{See BHALA & KENNEDY, supra} note 3, § 5-10(c)(1), at 628 (citing Barbara R. Stafford & Linda S. Chang, \textit{The Sunset Provisions, Mortality and the Uruguay Round, in} \textit{THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT} 721, 727 n.12 (1994)).

\textsuperscript{63} \textit{BHALA & KENNEDY, supra} note 3, § 5-5(a), at 603-08.

\textsuperscript{64} \textit{Id.} at 603-04 (discussing the procedural requirements of appeal to the CIT and the exclusive domestic jurisdiction of the CIT over antidumping and countervailing duty matters); \textit{see also} Gantz, \textit{supra} note 40, at 120-31. Decisions of the CIT may then be appealed
In reviewing agency decisions, however, the CIT is mandated to give extraordinary deference to the final determinations of Commerce and the ITC. The CIT, therefore, cannot re-evaluate factual findings and cannot overturn the imposition of an order unless the determination by Commerce or the ITC is "arbitrary and capricious" or is not supported by "substantial evidence." Even if the CIT disagrees with Commerce's findings, the CIT overturns very few AD and CVD decisions due to the strict standards of review it must apply to prior agency determinations.

In addition to the appellate mechanisms within the U.S. domestic judicial system, both NAFTA and GATT provide dispute resolution forums in which foreign producers can challenge AD and CVD orders. Although these international treaties provide alternative appeal mechanisms, they are available to private producers only to the extent that the countries from which they export are parties to the treaties. Moreover, under GATT only sovereign member states have standing to submit matters to the Dispute Settlement Body of the WTO. Thus, for a foreign producer to take advantage of the appellate mechanism provided in the WTO, the producer must convince his own national government to file an appeal on his behalf.

Traditionally, if these appeal mechanisms failed and the imposition of the duties were upheld, the foreign producer had the
burden of requesting annual reviews with Commerce in the hope that after several years the very same regulatory agency that initially imposed the orders would eventually revoke them.\textsuperscript{72}

\textbf{SUNSET REVIEWS: A NEW PHENOMENON}

During the Uruguay Round, exporting nations vehemently voiced their objections to the United States' lack of mandatory and automatic reviews of existing AD and CVD orders.\textsuperscript{73} The United States and other importing nations yielded to the demands of exporters by agreeing to conduct mandatory and automatic reviews of AD and CVD orders no later than five years after publication and to terminate such orders unless the agency conducting the review determines that both the injury and dumping or subsidization are likely to continue or reoccur.\textsuperscript{74} With the enactment of the Uruguay Round Agreements Act in 1994, the United States amended its trade laws to include these mandatory and automatic "sunset reviews" of AD and CVD orders.\textsuperscript{75}

Foreign producers whose products were subject to AD and CVD orders were understandably encouraged by the fact that sunset reviews were automatic and mandatory. Such elation on the part of foreign producers, however, was tempered by the inclusion of a broad exception to the language concerning mandatory termination of orders.\textsuperscript{76} Thus, even after the sunset review came into existence,
two important questions remained: (1) what legal standards would apply to sunset reviews, and (2) how would Commerce and the ITC interpret these legal standards? The answers to both of these questions reveal that, in practice, sunset reviews have neither produced meaningful change in the U.S. trade regulations nor provided foreign producers with any substantial import duty relief.

Statutory Language Mandating Termination of Orders

A sunset review closely resembles an initial AD or CVD investigation with respect to the required agency determinations and the division of responsibilities between Commerce and the ITC. Commerce is responsible for assessing whether the subsidization or dumping is likely to continue or reoccur\(^\text{77}\) and the ITC is responsible for the injury determination.\(^\text{78}\) In a sunset review, once Commerce determines that the response from domestic parties is sufficient,\(^\text{79}\) Commerce and the ITC begin their investigations.

Simply stated, Commerce is directed to revoke an AD or CVD order except in two circumstances.\(^\text{80}\) If Commerce determines that revocation of an order is likely to lead to the continuation or recurrence of a countervailable subsidy or dumping, the order must not be revoked.\(^\text{81}\) Commerce is also directed not to revoke the order if the ITC makes a final determination that such revocation is likely to lead to the continuation or recurrence of material injury.\(^\text{82}\) Failure to revoke an order, therefore, can only be justified if Commerce finds that the dumping or subsidization will likely

\(^{77}\) 19 U.S.C. § 1675a(b) (Commerce's determination of the likelihood of continuation or recurrence of a countervailable subsidy upon revocation); id. § 1675a(c) (Commerce's determination of the likelihood of continuation or recurrence of dumping upon revocation).

\(^{78}\) Id. § 1675a(a)(1) (ITC's determination of the likelihood of continuation or recurrence of material injury upon revocation).

\(^{79}\) Commerce must revoke an AD or CVD order if, within ninety days after notice of initiation of the sunset review, no interested domestic party responds to the notice of initiation. Id. § 1675(c)(3).

\(^{80}\) Id. § 1675(d)(2).

\(^{81}\) Id.

\(^{82}\) Id.
continue or reoccur if the order is revoked and if the ITC finds that material injury will likely continue or reoccur upon revocation.\footnote{83. \textit{Id.}}

\textit{Burdens of Proof in a Sunset Review}

Perhaps one of the more anticipated changes created by the sunset review provision was the shift in the burden of proof from the foreign producer to the domestic industry.\footnote{84. BHAI \& KENNEDY, supra note 3, § 5-10(c)(2), at 630 n.666 (acknowledging that the Uruguay Round AD and SCM Agreements shifted the burden of proof from the respondent to Commerce).} Prior to the sunset reviews, foreign producers had the burden of proving the discontinuation of dumping and subsidization as well as the absence of material injury.\footnote{85. See supra note 72 and accompanying text (discussing foreign producers' reliance on annual administrative reviews to seek removal of AD and CVD orders).} Given the tremendous difficulties associated with proving the absence of injury to the U.S. domestic industry, few foreign producers were able to successfully challenge AD and CVD orders during annual administrative reviews.\footnote{86. See supra note 62 and accompanying text (discussing the rate of removal and the average durations of AD and CVD orders).} Now, under the sunset review mandate, the domestic industry has the burden of proving that either dumping or a subsidy is likely to reoccur or continue and that material injury to the domestic industry likely will result if the order is revoked. If the domestic industry fails in its burden of proof or fails to participate in the sunset review, AD and CVD orders will be revoked.

On its face, the statutory language of the sunset review shifted the burden of proof, which suggested that a greater percentage of AD and CVD orders would be revoked. In practice, however, the burden never really shifted because Commerce and the ITC adopted regulations allowing them to rely upon calculations from
their original investigations to evaluate the likelihood of future behavior.87

CASE STUDY: MAGNESIUM FROM CANADA

In 1992, Commerce imposed an AD order on pure magnesium and CVD orders on pure and alloy magnesium.88 Pursuant to the sunset review statute, the ITC began its five-year review of these orders in August of 1999.89 At the conclusion of the sunset review in July 2000, the Commissioners of the ITC determined that revocation of the AD and CVD orders would likely lead to a continuation or recurrence of material injury to the domestic industry.90 As such, the AD and CVD orders remained firmly intact, much to the dismay of automobile manufacturers and other industrial users of magnesium.

As noted above, magnesium is highly valued by automobile manufacturers who envision using magnesium automobile components in the future to meet strict vehicle emissions standards.91 At present, however, the domestic magnesium industry is unable to meet the demand for magnesium.92 Moreover,

87. BHALA & KENNEDY, supra note 3, § 5-10(c)(2), at 631.
88. Pure Magnesium From Canada, 57 Fed. Reg. 39,390 (Dep't Commerce Aug. 31, 1992) (antidumping duty order); Pure Magnesium and Alloy Magnesium From Canada, 57 Fed. Reg. 39,392 (Dep't Commerce Aug. 31, 1992) (countervailing duty order); see also infra notes 94-106 (discussing Commerce and the ITC's original AD and CVD investigations of magnesium from Canada).
89. The orders reviewed during the Magnesium from Canada sunset review included both CVD and AD orders on pure magnesium and a CVD order on alloy magnesium. The original determination by the Commission from August 1992, Magnesium from Canada, 57 Fed. Reg. 38,696 (Int'l Trade Comm'n Aug. 26, 1992) (determination) (announcing INT'L TRADE COMM'N, MAGNESIUM FROM CANADA INVESTIGATIONS Nos. 701-TA-309 AND 731-TA-528 (FINAL) (1992) (USITC Pub. No. 2550)), was challenged by the respondents before a United States-Canada Binational Panel. This challenge focused primarily on the classification of pure and alloy magnesium as one industry rather than as two separate and distinct industries. See MAGNESIUM, supra note 19, at 3-4. On remand from the Binational Panel, the Commission based its determination on the existence of two separate industries. Id. at 3. It is important to note this Commission's recognition of alloy magnesium and pure magnesium as two distinct industries for the purposes of captive production analysis.
90. MAGNESIUM, supra note 19, at 2.
91. See supra notes 19 and 36-38 and accompanying text.
92. Thelma J. Askey, Dissenting Views, in MAGNESIUM, supra note 19, at 30. Commissioner Askey acknowledged in her dissent that in 1999, even if the U.S. domestic industry had operated at full capacity, it would have been unable to satisfy the total demand
as acknowledged by General Motors and Northern Diecast Corporation, the domestic demand for magnesium would be even greater if the quantity and quality of magnesium were more reliable (i.e., if the orders on Canadian magnesium were revoked). 93

Original Determinations

Prior to analyzing the sunset review conducted in 2000, it is essential to explore the original investigations and determinations to better understand the rationale for imposing these AD and CVD orders on magnesium from Canada in the first place. In September 1991, Magcorp, a domestic producer of pure and alloy magnesium, 94 filed AD and CVD petitions with Commerce and the ITC. 95 In its petitions, Magcorp alleged that the imports of magnesium from Canada injured or threatened injury to the domestic magnesium industry 96 by virtue of dumping and producers' receipt of subsidies from the Canadian and Quebecios governments. 97 In 1991, Norsk Hydro Canada, Inc. (NHCI) and Timminco Limited were the only two magnesium producers in Canada. 98

93. GM and Northern Diecast Corporation are industrial users of alloy magnesium and filed briefs supporting revocation of the orders on Canadian magnesium. MAGNESIUM, supra note 19, at 4 n.13.
94. On remand, the ITC recognized that pure magnesium and alloy magnesium constituted two separate industries. Id. at 3.
97. See sources cited supra note 95.
98. See Pure Magnesium and Alloy Magnesium From Canada, 57 Fed. Reg. 30,946 (Dep't Commerce July 13, 1992) (determination).
With respect to the countervailable subsidy allegation, both Commerce and the ITC made affirmative determinations. In its investigation, Commerce found that three of the seventeen programs originally identified in Magcorp's petition conferred countervailable benefits to NHCI. These programs included the exemption from payment of water bills, preferential electric rates, and grants from the Quebec Industrial Development Corporation. In its material injury determination, the ITC found that the subsidized production of magnesium from Canada injured the domestic industry.

In its antidumping investigation, Commerce found that pure magnesium from Canada was being dumped or was likely to be dumped, but dismissed the petition with respect to alloy magnesium because it determined that there was insufficient evidence to support the dumping allegation. The ITC then determined that the domestic magnesium industry was materially injured by dumped imports of pure magnesium.

In July 1992, at the conclusion of the investigations and pursuant to its statutory authority, Commerce issued a CVD order on magnesium from Canada at a margin for NHCI of 21.61% and an all-others rate of 21.61% but excluded Timminco from the CVD orders because Timminco did not receive any benefits from these programs. With respect to pure magnesium, Commerce issued an

100. Pure Magnesium and Alloy Magnesium From Canada, 57 Fed. Reg. at 30,946.
101. Id. at 30,948 to 30,950.
102. Magnesium From Canada, 57 Fed. Reg. at 38,696. For a complete discussion of the views of the ITC see Determinations of the Commission, in INT'L TRADE COMM'N, supra note 89.
104. See Magnesium From Canada, 57 Fed. Reg. at 38,696.
AD order on pure magnesium at a margin of 31.33% for NHCI, 31.33% for all others, and 0% for Timminco.\(^{106}\)

**Sunset Review of AD and CVD Orders**

In response to its request for participation in the sunset reviews involving magnesium from Canada, Commerce received responses from three respondent interested parties, NHCI, the Government of Canada, and the Gouvernement du Quebec (GOQ), and from one domestic interested party, Magcorp.\(^ {107}\) Based on the sufficiency of these responses, Commerce launched a full sunset review.\(^ {108}\)

*Legal Standard of Review: “Likelihood” of Continuation or Recurrence of Material Injury*

Following Commerce’s affirmative determination, the ITC found that the revocation of the AD and CVD orders would likely lead to a continuation or recurrence of material injury to the domestic industry.\(^ {109}\) Interestingly, the ITC based a substantial part of its material injury determination on the activity of a new Canadian company named Magnola, rather than on the activities of NHCI, upon whom the orders were originally imposed.\(^ {110}\) Therefore, to properly critique the ITC’s reliance on the future potential production of Magnola in its determinations, it is necessary to first discuss the legal standard of review to be applied during sunset reviews.

The amended statute directs both Commerce and the ITC to employ a “likelihood” standard to invoke the exception to the mandatory termination of orders.\(^ {111}\) In relevant part, the statute

\(^{106}\) See sources cited supra note 105; Pure and Alloy Magnesium From Canada, 57 Fed. Reg. at 30,939 (announcing AD margins).

\(^{107}\) MAGNESIUM, supra note 19, at 4.


\(^ {109}\) MAGNESIUM, supra note 19, at 2. Commissioner Askey dissented with respect to the CVD orders, finding instead that the revocation of the CVD orders on pure and alloy magnesium was not likely to lead to a continuation or recurrence of material injury. Id. at 27-36.

\(^ {110}\) Id. at 12-19.

states that Commerce and the ITC "shall conduct a review to determine ... whether revocation of the countervailing or antidumping duty order ... would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy ... and of material injury." In light of the legislative guidance provided by the Statement of Administrative Action (SAA), the ITC interpreted the "likelihood" standard to be "prospective in nature." The SAA, however, also limited the temporal application of the "likelihood" standard. Based on the SAA, any prospective analysis in which the ITC engages must not extend beyond a "reasonably foreseeable time." The SAA further noted that a "reasonably foreseeable time" will normally exceed the "imminent" standard applied during AD and CVD investigations.

Defining the Likely Volume of Subject Imports

During a sunset review, to assess the existence and cause of harm to the domestic industry, the ITC must "consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry [within the reasonably foreseeable future] if the order is revoked ...." In the sunset review of magnesium from Canada, the ITC found that Canadian producers were capable of substantially increasing imports to the United States. In large part, however, the ITC's determination stemmed from its inclusion of the prospective volumes of magnesium production from Magnola in calculating the likely volume of subject imports. Yet the legitimacy of the ITC's inclusion of Magnola's potential production capacity depends upon whether

112. Id. (emphasis added).
114. MAGNESIUM, supra note 19, at 7.
116. Id. at 887. According to the SAA, the likelihood standard calls upon the ITC to "engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo" upon revocation of the order. Id. at 884.
117. Id. at 887.
119. MAGNESIUM, supra note 19, at 13.
such production falls within the reasonably foreseeable future.\textsuperscript{120} Even if the temporal standard is satisfied, the ITC must still analyze whether Magnola will ship magnesium in such quantities to the U.S. that the subject imports cause the material injury.

Although at the time of the sunset review Magnola had not yet begun to make magnesium in commercial quantities,\textsuperscript{121} the ITC justified including Magnola's future production capacity in its calculations by describing the entry of Magnola in the magnesium industry as "imminent."\textsuperscript{122} In the ITC's opinion, the "imminence" of Magnola's production satisfied the reasonably foreseeable time frame, and therefore the ITC could include the potential production capacity of Magnola in its material injury evaluation.\textsuperscript{123} As recognized by Commissioner Askey, however, "[t]here is only one subject Canadian producer currently producing ... magnesium in commercial quantities: NHCI."\textsuperscript{124} Nonetheless, the ITC included the speculative production volume of Magnola in its calculation of the potential volume of Canadian imports.

Despite the statutory permissibility of looking beyond the imminent future, the ITC's inclusion of the volume of potential magnesium production at least two years from fruition runs contrary to the legislative intent of AD and CVD orders, and especially sunset reviews. Congress established AD and CVD orders to create a level playing field for domestic producers who compete with foreign manufacturers that engage in unfair trading practices.\textsuperscript{125} By their definition alone, AD and CVD orders are not intended to be prospective. They exist to punish foreign producers for past behavior, rather than to preemptively police foreign manufacturers by imposing duties in anticipation that they may dump or receive subsidies.

\textsuperscript{120} Id. at 13-16. By its own estimates, Magnola expects to reach full capacity of 63,000 metric tons of magnesium in 2002. Id. at 30. The ITC itself noted that "the additional available capacity attributable to Magnola by itself indicates that Canadian producers have the capability to increase significantly their shipments ... to the United States." Id. at 13.

\textsuperscript{121} Id. at 12-13.

\textsuperscript{122} Id. at 12.

\textsuperscript{123} Id. at 12-13.

\textsuperscript{124} Thelma J. Askey, \textit{Dissenting Views}, in \textit{MAGNESIUM}, supra note 19, at 30 (emphasis added). Commissioner Askey noted that Timminco is another current Canadian producer, yet is not subject to the orders. Id. at 30 n.205.

\textsuperscript{125} See supra notes 37-38 and accompanying text.
The sunset review provision was intended to discontinue AD and CVD orders when the justifications for their original imposition no longer exist. Magnola did not exist in 1992 when the AD and CVD orders were imposed. The ITC's use of Magnola's potential production capacity as one of the primary justifications for extending the AD and CVD orders is therefore logically flawed. Moreover, the extension of the orders had the practical effect of conveniently bypassing the need for Magcorp to petition Commerce and the ITC to conduct the statutorily required investigations if Magnola were to engage in unfair trade practices. If Magnola dumps or receives countervailable subsidies in the future, Magcorp can petition Commerce and the ITC to commence AD and CVD investigations. It is this petitioning process described in detail above, not the sunset review of pre-existing orders, that is the appropriate means by which Magcorp should seek relief, if such relief is warranted.

Improper Causation Standard and Failure of the ITC to Adequately Consider Fairly Traded Nonsubject Imports

The second error of the ITC during the sunset review of Magnesium from Canada involved its failure to fully evaluate the impact of low-priced nonsubject imports from third-party countries in its material injury analysis in light of the causation standard established in Gerald Metals, Inc. v. United States. In Gerald Metals, the ITC originally determined that LTFV imports of magnesium from China, Russia, and the Ukraine injured the U.S. industry. The domestic importer, named Gerald Metals, appealed the ITC's decision to the CIT; the CIT upheld the ITC's injury determination. The CAFC vacated the CIT's decision, however, because the ITC failed to incorporate the presence of fairly traded

126. See supra notes 42-61 and accompanying text.
127. Id. (detailing the administrative petitioning process through which domestic producers may obtain relief from unfair imports).
128. 132 F.3d 716, 719 (Fed. Cir. 1997).
129. Id. at 717 (citing Magnesium From China, Russia, and Ukraine, 60 Fed. Reg. 26,456 (Int'l Trade Comm'n May 17, 1995) (determination)).
130. Id. (citing Gerald Metals, Inc. v. United States, 937 F. Supp. 930, 942 (Ct. Int'l Trade 1996)).
imports into its causation analysis under the erroneous belief that minimal harm caused by unfairly traded imports alone satisfied the material injury causation requirement. Ultimately, the CAFC reasoned that when both fairly and unfairly traded imports exist in the same market and the domestic industry is harmed, the ITC must conclusively establish that such harm is substantially caused by the unfairly traded imports and not by the low-priced fairly traded imports.

As noted previously, and as expressed by the CAFC, the antidumping statute "requires the injury to occur 'by reason of' the LTFV imports." The circuit court rejected the CIT's reasoning that evidence of minimal or tangential causation of injury satisfies the statutory causal requirement. The CAFC concluded that "the statute requires adequate evidence to show that the harm occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods." Thus, the decision of the circuit court in Gerald Metals establishes that a showing of harm to the domestic industry which is caused minimally by unfairly traded imports is insufficient to substantiate the imposition of AD and CVD orders. When injury to the domestic market can be a "result of market forces other than unfair trading," such as low-priced and fairly traded imports, the ITC must carefully distinguish between the harm caused by dumping and subsidization, and that caused by normal market forces.

Based on Gerald Metals, if the injury caused by the subject Canadian imports was minimal or tangential, the ITC could not properly satisfy the causation standard. In the sunset review of Magnesium from Canada, the ITC failed to isolate the harm attributable to the Canadian imports from the harm attributable to

131. Id. at 723.
132. Id.
133. See supra notes 59-61 and accompanying text (outlining the two part material injury test).
135. Id. (stating that "evidence of de minimus (e.g., minimal or tangential) causation of injury does not reach the causation level required under the statute").
136. Id.
137. Id. at 722-23.
138. Id. at 719.
139. Id.
imports from third-party countries. Although the ITC recognized the presence of such low-priced nonsubject imports from countries other than Canada, it did not engage in any further consideration of the fairly traded imports as part of its causation inquiry. In Gerald Metals, the CAFC clearly identified the scope of the remedial intent of AD and CVD orders. "While the statute protects domestic magnesium producers from injury caused by LTFV imports, its scope of protection does not reach so far as to support artificially inflated prices when fairly-traded imports are underselling the domestic product ...." Without an assessment of the comparative degrees to which subject versus nonsubject imports caused injury to the U.S. industry, the ITC erred in concluding that upon revocation of the orders the subject Canadian imports would harm the U.S. industry.

Problems in Defining the Domestic Industry

To evaluate whether revocation of the AD and CVD orders would likely lead to a continuation or recurrence of material injury to the domestic market, the ITC must also define the scope of the domestic industry and identify the market participants. In sunset reviews, the ITC "makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole ...." The ITC has interpreted this statutory language to include as part of the domestic industry any and all producers of the like product, even if the like product is captively consumed. Therefore, despite Northwest Alloys' substantial

140. MAGNESIUM, supra note 19, at 12.
142. MAGNESIUM, supra note 19, at 6.
143. Id. at 8 (quoting COMMITTEE ON WAYS AND MEANS, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, vol. 1, at 886 (1994)). The statute defines "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." 19 U.S.C. § 1677(4)(A) (2000). In evaluating what constitutes a "domestic like product" the ITC does not rely upon any one single factor. MAGNESIUM, supra note 19, at 6 n.29. Rather, the ITC generally considers several factors in its analysis including physical characteristics, uses, interchangeability, channels of distribution, consumer perceptions, and price. Id.
144. MAGNESIUM, supra note 19, at 7.
captive production of magnesium, the ITC used both Northwest Alloys and Magcorp to calculate the capacity and capacity utilization of the U.S. magnesium industry.\textsuperscript{145}

The underlying premise of the theory of captive production is that imported goods do not compete with those materials that are essentially used as inputs in the manufacturing of downstream end products.\textsuperscript{146} Whereas the domestic like product that is sold in the open market may be disadvantaged by unfairly traded imports, the internally consumed domestic like product, by virtue of its captivity, cannot be injured by fluctuations in the volume or price of imports.\textsuperscript{147} To accurately gauge the extent to which the subject imports injured the U.S. industry, therefore, it seems reasonable that only those domestic products that are sold in the merchant market, and thus compete directly with the imported products, should be considered by the ITC in its material injury analysis.

The ITC does recognize the dilemma presented by the issue of captive production.\textsuperscript{148} As noted by Commissioner Askey, "subject imports do not compete with captive production of domestic merchandise in the same way that they compete with domestic production sold in the merchant market."\textsuperscript{149} Commissioner Askey acknowledged that, "[w]hile the subject imports may arguably have some indirect effect on captive domestic production as a result of competition in downstream markets, any competitive price or volume effects between the subject imports and captive domestic consumption is attenuated, at best."\textsuperscript{150}

The statute directs the ITC, in its material injury analysis, to focus primarily on the merchant market and to exclude captive production data from its material injury analysis in certain circumstances.\textsuperscript{151} In the sunset review of \textit{Magnesium from Canada},

\textsuperscript{145} Id.
\textsuperscript{146} Id. at 12 n.76.
\textsuperscript{147} Id.
\textsuperscript{148} Chung, \textit{supra} note 1, at 512-13.
\textsuperscript{149} \textit{MAGNESIUM, supra} note 19, at 12 n.76.
\textsuperscript{150} Id.
\begin{quote}
If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that—
\end{quote}
however, the ITC strictly construed the aforementioned qualifications.\textsuperscript{152} Three of the six Commissioners reasoned that the second criterion was not met because, based on the cost share of the pure magnesium in aluminum products, pure magnesium was not a predominant input in the production of the captively produced aluminum product.\textsuperscript{153} Instead, the ITC merely considered "the significant degree of captive production as a condition of competition."\textsuperscript{154} The ITC's strict statutory interpretation is not consistent with the remedial intent of AD and CVD orders because no remedy should be required for the portion of the domestic production that is captively consumed.

The ITC's decision is even more perplexing when contrasted with its decision regarding hot-rolled steel. The ITC applied a much different standard in the investigation of hot-rolled steel imports in 1993.\textsuperscript{155} In that investigation, the ITC found that the United States' hot-rolled carbon steel industry\textsuperscript{156} was not materially injured nor threatened with material injury. "The ITC concluded that a negative determination on injury was appropriate for all countries since it found there was a lack of a causal nexus between the subject imports and the industry's condition."\textsuperscript{157} The ITC's negative determinations were based largely on the rationale that because a "large percentage of domestic industry production was captively

\begin{itemize}
  \item[(I)] the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
  \item[(II)] the domestic like product is the predominant material input in the production of that downstream article, and
  \item[(III)] the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article, then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.
\end{itemize}

\textit{Id.}

\textsuperscript{152} MAGNESIUM, supra note 19, at 12 n.75.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 12 n.74.
\textsuperscript{155} CIT Affirms Negative Injury Rulings on Several Hot-Rolled Steel Decisions, 12 Int'l Trade Rep. (BNA), No. 4, at 189 (Jan. 25, 1995).
\textsuperscript{156} Hot-rolled steel is used in the construction, automotive, machinery, and equipment industries. \textit{Id.}
\textsuperscript{157} \textit{Id.}
consumed ... that the industry was affected only minimally by the subject imports.”

CONCLUSION

The analysis applied by the ITC in its sunset review of orders on *Magnesium from Canada* is misguided in several respects. First, the ITC expanded its statutory authority to consider developments within a reasonably foreseeable time by including the future production capacity of Magnola that is at least two years from initial commercial production runs. The ITC also erred by not distinguishing between harm to the domestic industry that was caused by nonsubject third-party imports and that caused by Canadian subject imports. Lastly, the ITC merely considered the captive production of Northwest Alloys as a “condition of competition” rather than excluding it entirely from its material injury analysis and focusing primarily on the merchant market. Given the legislative intent of AD and CVD to penalize past misbehavior, the standards of review that the ITC applied during the sunset review of *Magnesium from Canada* were grossly misguided.

During the sunset review of *Magnesium from Canada*, the ITC clearly expanded its already broad discretion to consider future behavior by engaging in prospective analysis of Magnola. Despite the inherent contradiction between the remedial intent of AD and CVD orders and the extension of such orders based on a new producer, it is highly unlikely that either Commerce or the ITC will refrain from “prospective” analyses. Therefore, if Commerce and the ITC wish to include potential producers in their determinations, they must adopt corresponding regulations to restore and enhance the legitimacy of sunset reviews.

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168. Id.