

United States International Trade Commission

# A Centennial History of the USITC



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# A Centennial History of the United States International Trade Commission

*The Commission wishes to express its gratitude to the contributors who prepared the chapters of the Centennial History and to the following individuals for their work in reviewing those chapters:*

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Most contributors were not currently Commissioners or part of agency staff at the time of writing. As such, they are unlikely to have had full access to information on the capabilities and internal deliberations of the agency.

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I rise today to commemorate the centennial of the creation of the United States International Trade Commission and to congratulate the Commission and its exceptional staff on their distinguished service. . . .

Therefore I ask my colleagues to join me in offering my sincerest thanks to the U.S. International Trade Commission and its staff for their commendable work over the last one hundred years. We look forward to continuing to rely on the professionalism, objectivity, and neutrality of this vitally important agency in providing us with independent and sound advice, which allows us to effectively carry out our Constitutional duties in establishing U.S. trade policy.

**Chairman Kevin Brady** (R-TX), Committee on Ways and Means, U.S. House of Representatives, 162 Cong. Rec. E1187 (daily ed. September 6, 2016).

As Ranking Member of the Committee on Ways and Means, the committee that oversees the Commission, I want to congratulate the Commission on this anniversary and the Commission's staff who do important work . . . . I look forward to working with the Commission, as it begins its second century of work, to ensure that the analysis of international trade addresses 21st century economic issues.

**Ranking Minority Member Sander M. Levin** (D-MI), Committee on Ways and Means, 162 Cong. Rec. E1228 (daily ed. September 8, 2016).

**Mr. HATCH.** Mr. President, today the U.S. International Trade Commission, or the USITC, is celebrating its 100th anniversary. That makes today an appropriate day for us to acknowledge the distinguished service that this independent and nonpartisan Federal agency has provided, and continues to provide in the field of international trade.

**Mr. WYDEN.** Mr. President, I concur with **Senator HATCH** and also congratulate the USITC on its centennial and commend the agency for its service over the last century.

**Chairman Orrin Hatch** (R-UT) and **Ranking Minority Member Ron Wyden** (D-OR), Committee on Finance, U.S. Senate, 162 Cong. Rec. S5455 (daily ed. September 8, 2016).

When the Commission turned 100, President Obama sent his congratulations, saying “Your tireless efforts support American businesses and workers, and I am confident that your dedication will continue to leave a lasting impact for generations to come.” The Commission has helped 17 Presidents and 50 Congresses on matters such as trade negotiations, intellectual property and safeguard investigations, and enforcement cases.

The Commission's upcoming Centennial History book will be helpful in shedding light on the distinguished history of an agency that has done so much to shape the direction of our country.

**Ambassador Michael Froman, United States Trade Representative, 2013–17.**

# Message from the Chairman

On behalf of my fellow Commissioners, I am proud to present *A Centennial History of the United States International Trade Commission*. Since its creation on September 8, 1916, the Commission provided independent, non-partisan, expert, and objective information to Congress and the Executive Branch to assist in setting tariffs and formulating U.S. trade policies. In the last half century, the Commission's role in investigating and making determinations in disputes regarding unfair imports and unfair trade practices has grown significantly.

Early chapters of this book describe the events leading up to the creation of the agency as the United States Tariff Commission and its early years. Subsequent chapters of the book discuss the evolution of the Commission as an institution. They discuss the steady growth in the mission of the agency as well as how changes in legislation, policy, and practice have affected the agency's programmatic role. Specifically, these chapters document the Commission's evolving role in tariff related affairs, antidumping and countervailing duty proceedings, intellectual property-related proceedings, safeguards investigations, and industry and economic analysis for Congress and executive branch. Other chapters of the book discuss evolving administrative issues about how the Commission has governed, including such issues as the number of Commissioners, the authority of the Chairman, and the history of the agency's headquarters and field offices.

The independent, non-partisan, and objective nature of the Commission is a recurring theme as the book illustrates how the agency has reliably served the American people throughout the one hundred years of its existence.



Rhonda K. Schmidlein  
Chairman



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# Chapter 1

## Introduction



**Photo:** The Commissioners as of September 2016, from left to right: Vice Chairman David S. Johanson, Commissioner Rhonda K. Schmidtlein, Commissioner Dean A. Pinkert, Commissioner Meredith M. Broadbent, Chairman Irving A. Williamson, Commissioner F. Scott Kieff.

**Paul R. Bardos<sup>1</sup>**

On September 8, 1916, President Woodrow Wilson signed the Revenue Act of 1916, which created the United States Tariff Commission.<sup>2</sup> The agency was later renamed the United States International Trade Commission (Commission).<sup>3</sup> This book presents a history of the Commission from its inception to 2016 in commemoration of the one hundredth anniversary of the agency's founding.

In 1916, and on that day, the United States was in a time of relative peace before U.S. involvement in World War I. Aside from the passage of the Revenue Act, Friday, September 8, seems chiefly notable for a baseball milestone: in Philadelphia's Shibe Field that afternoon, Wally Shang became the first switch hitter to hit home runs from both sides of the plate in a single game. The Athletics pummeled the New York Yankees, 8–2.<sup>4</sup> Meanwhile, in New London, Connecticut, U.S. and Mexican commissioners had just begun talks on the withdrawal of John J. “Black Jack” Pershing's expeditionary force from Mexico after his failed attempt to capture Francisco “Pancho” Villa.<sup>5</sup> In Europe, the Battle of the Somme continued on the Western Front and the Brusilov Offensive in the east. As part of the effort on the Somme, British generals were putting the finishing touches on a new push that would result in the Battle of Flers-Courcelette, in which tanks would be used for the first time in history.<sup>6</sup> Seven months would pass before the United States was drawn into the conflict raging overseas.

Already in progress for more than two years, World War I had severely disrupted international trade. The British had imposed a blockade on the Central Powers, and German U-boats were preying on Allied merchant shipping. The United States, however, was still relatively safe in its neutrality—Germany would not institute unrestricted submarine warfare until early 1917. Bolstered by the needs of belligerents, U.S. exports to Europe rose from \$1.479 billion dollars in 1913 to \$4.062 billion in 1917.<sup>7</sup>

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<sup>1</sup> Mr. Bardos is Editor-in-Chief of the present work, and was previously the Commission's Assistant General Counsel for Administration.

<sup>2</sup> 39 Stat. 756 (September 8, 1916). Title VII of the act (39 Stat. 795) applies to the Commission.

<sup>3</sup> Pub. L. No. 93–618, title I, § 171, January 3, 1975, codified at 19 U.S.C. § 2231.

<sup>4</sup> The Society for American Baseball Research, [sabr.org/bioproj/person/629ca705](http://sabr.org/bioproj/person/629ca705); <http://www.baseball-reference.com/boxes/PHA/PHA191609080.shtml> (accessed December 1, 2015).

<sup>5</sup> John D. Eisenhower, *Intervention: the United States and the Mexican Revolution, 1913–1917* (New York: W. W. Norton & Co., 1993), 303.

<sup>6</sup> Charles Messenger, *Trench Fighting, 1914–1918* (New York: Ballantine Books, 1972), 86.

<sup>7</sup> U.S. Bureau of the Census (1975), series U324, cited in <http://eh.net/encyclopedia/u-s-economy-in-world-war-i/>.

By 1916, many in the United States supported, for a variety of reasons, the creation of a tariff commission. One concern, cited in the report accompanying the Revenue Act, was that the war was bringing about far-reaching economic changes in the world, and a tariff commission could ascertain how those changes would affect U.S. trade.<sup>8</sup> As later chapters will detail, tariffs had long played an important role in the nation's budget and economy. In a context explained in Chapter 3, President Wilson had declared in 1911: "The tariff question is at the heart of every other economic question we have to deal with, and until we have dealt with that properly we can deal with nothing in a way that will be satisfactory and lasting."<sup>9</sup> An agency that would study tariff-related issues was expected to be helpful to Congress in shaping tariff and trade laws.

The present book is not the first historical work relating to the Commission. *Two Centuries of Tariffs* (1976) traced the development of U.S. tariffs from the beginning of the republic and chronicled the operations of the Commission from 1916 to 1976.<sup>10</sup> Frank Taussig, the first Chairman of the U.S. Tariff Commission, published several editions of *The Tariff History of the United States*.<sup>11</sup> The Commission produced a *History of the Tariff Commission Building*, in 1940 and 1968, and a similar pamphlet, *The United States International Trade Commission Building*, in 1980. The present work builds on these earlier ones to present a comprehensive history of the Commission's first 100 years.

The book is part of a centennial celebration that also included a conference on the history of the Commission held on September 8, 2016. Speakers at the event included Chairman Kevin Brady (R-TX) of the House Ways and Means Committee, U.S. Trade Representative (USTR) Michael Froman, Chief Judge Sharon Prost of the U.S. Court of Appeals for the Federal Circuit, Judge Leo Gordon of the U.S. Court of International Trade, and a distinguished group of Senate and House officials, academics, practitioners, and current and former Commissioners and Commission staff members.

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<sup>8</sup> H.R. Rep. 64-922, 9 (July 5, 1916).

<sup>9</sup> Woodrow Wilson, "Interview," *New York Times*, December 24, 1911, in Link, ed., *PWW*, vol. 23 (1977), 611.

<sup>10</sup> *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission*, U.S. International Trade Commission (Washington, DC: U.S. Government Printing Office (GPO), 1976). The book was written by John M. Dobson, Associate Professor of History at Iowa State University. It was published in December 1976. The earliest history of the agency is covered in Joshua Bernhardt, *The Tariff Commission: Its History, Activities, and Organization* (New York: D. Appleton and Co., 1922).

<sup>11</sup> The first edition appeared in 1892. The eighth edition was published in 1931 and reprinted in 1967 (New York: Augustus M. Kelley, 1967).

On August 31, 2016, President Barack Obama sent a letter to the Commission commemorating the agency's anniversary. He wrote that the Commission's "mission is critical now more than ever as we continue to expand our Nation's reach in an ever-changing global economy."<sup>12</sup>

A number of Senators and Representatives made statements about the Commission that are included in the *Congressional Record* and cited at the beginning of this book. Chairman Brady congratulated "the Commission and its exceptional staff on their distinguished service."<sup>13</sup> Ranking Minority Member Sander M. Levin (D-MI) of the House Ways and Means Committee said that he looked forward to "working with the Commission, as it begins its second century of work, to ensure that the analysis of international trade addresses 21st century economic issues."<sup>14</sup>

Chairman Orrin Hatch (R-UT) and Ranking Minority Member Ron Wyden (D-OR) of the Senate Finance Committee made joint remarks. Chairman Hatch stated that September 8 was an appropriate day to "acknowledge the distinguished service that this independent and nonpartisan Federal agency has provided, and continues to provide, in the field of international trade."<sup>15</sup>

The Commission began the process of preparing this book by publishing a notice calling for submissions in the *Federal Register* and on its website.<sup>16</sup> As a result of this and other outreach efforts, contributors from a variety of backgrounds agreed to submit draft chapters. These contributors include academics, trade practitioners, former staff of Congress and the Office of the USTR, and former Commissioners and Commission staff. The contributors brought a wealth of knowledge, experience, and expertise to the preparation of their parts of the book.

Once draft chapters had been submitted, they were subjected to three rounds of review. The first round was conducted by a group similar to the contributors, in that it included academics, practitioners, and former government employees, all of whom were knowledgeable about the Commission. The second round of review was by current Commission staff. The Commissioners conducted a third round of review and then approved the book for publication. During the review process, contributors were given opportunities to respond to the annotations made by reviewers.

The result of these efforts is a book whose chapters cover many topics, from Congress's efforts to gather tariff data in the 19th century through the development of unfair trade investigations

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<sup>12</sup> <https://www.usitc.gov/publications/332/tradeshifts/obamaletter.pdf> (accessed October 17, 2016).

<sup>13</sup> 162 Cong. Rec. E1187 (daily ed. September 6, 2016).

<sup>14</sup> 162 Cong. Rec. E1228 (daily ed. September 8, 2016).

<sup>15</sup> 162 Cong. Rec. S5455 (daily ed. September 8, 2016).

<sup>16</sup> 81 Fed. Reg. 812 (January 7, 2016).

to the history of industry and economic analysis. This chapter begins by describing the Commission and its mission as they exist today. The chapter then sets out the structure of the book and summarizes the chapters to come.

## The Commission's Mission

The Commission is “an independent, nonpartisan Federal agency with broad investigative responsibilities on matters of trade.”<sup>17</sup> The Commission’s Strategic Plan for 2014–18 sets out the agency’s mission:

Consistent with its statutory mandate, the Commission makes determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights; provides independent tariff, trade and competitiveness-related analysis and information; and maintains the U.S. tariff schedule.<sup>18</sup>

International trade has long been important to the economy of the United States. In recent decades, it has assumed an even larger role. To cite one example, merchandise trade grew as a share of U.S. gross domestic product from just under 16 percent in 1981 to over 23 percent in 2014.<sup>19</sup>

A comparison over ten years shows substantial increases in trade. From 2005 to 2015, U.S. exports of goods rose by 65 percent from \$913.016 billion to \$1,513.453 billion, while imports of goods increased by 34 percent from \$1,695.820 billion to \$2,272.760 billion.<sup>20</sup>

The nature of commerce has changed substantially over time. Successive multilateral and bilateral agreements have driven down tariff rates, while nontariff measures, such as testing, labeling, and standards requirements, as well as intellectual property rights, have become more important. Trade in services has more than doubled in the past decade: U.S. services exports rose from \$373.006 billion to \$710.165 billion in 2005–15, as the U.S. trade surplus in services grew from \$68.558 billion to \$219.552 billion.<sup>21</sup> At the same time, digital trade—trade conducted via the Internet—has expanded rapidly. In a 2014 report, the Commission estimated

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<sup>17</sup> Office of Management and Budget, *The Budget of the United States Government, Fiscal Year 2016*, Appendix, 1281, <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/oia.pdf> (accessed December 1, 2015).

<sup>18</sup> [https://www.usitc.gov/press\\_room/documents/usitc\\_2014-2018\\_strategicplan\\_final.pdf](https://www.usitc.gov/press_room/documents/usitc_2014-2018_strategicplan_final.pdf).

<sup>19</sup> World Bank, <http://data.worldbank.org/indicator/TG.VAL.TOTL.GD.ZS> (accessed December 30, 2015).

<sup>20</sup> U.S. Census Bureau statistics, <http://www.census.gov/foreign-trade/statistics/historical/index.html>.

<sup>21</sup> *Ibid.*

that digital trade had increased U.S. real GDP by 3.4–4.8 percent, or \$517.1–\$710.7 billion, in 2011.<sup>22</sup>

The Commission plays a crucial role in its service to the American people within the increasingly important and ever-changing trade arena. First, the Commission gives the President and Congress clear and accurate information and analysis on a wide range of trade-related issues. These include examining how changes in trade and competitiveness affect the health of the U.S. economy. At the request of the Administration or Congress, the Commission recently produced reports on such topics as the likely impact of the Trans-Pacific Partnership Agreement on the U.S. economy and specific industry sectors, trade and investment policies in India, and trade barriers that U.S. small and medium-sized enterprises see as affecting exports to the European Union.<sup>23</sup>

The Commission also investigates certain unfair trade practices. Enforcing laws in these areas helps ensure that U.S. firms can compete on a level playing field in the global marketplace. Under one of its authorities, the Commission investigates allegations of intellectual property rights infringement and other unfair acts and methods of competition with respect to imported articles. For example, the Commission recently conducted proceedings involving wireless headsets, network devices, and ink cartridges.<sup>24</sup>

In addition, the Commission determines whether allegedly dumped or subsidized imports have caused material injury to a domestic industry. Recent proceedings have covered imports ranging from steel pipe to chlorinated isocyanurates and wooden bedroom furniture.<sup>25</sup> And although its authority has not been used in some years, the Commission can conduct global and bilateral “safeguard” investigations into whether increased imports cause serious injury to domestic industries.<sup>26</sup>

When it was formed, the Commission’s first responsibility related to tariffs, and it remains active in this area. Most importantly, the Commission maintains the Harmonized Tariff Schedule of the United States. This is the official legal document that specifies the appropriate tariff, if any, applied to an imported good. In a related activity, the Commission takes part in the work of the World Customs Organization.

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<sup>22</sup> *Digital Trade in the U.S. and Global Economies, Part 2*, USITC Publication 4485 (Washington, DC: USITC, 2014), 13.

<sup>23</sup> 19 U.S.C. §§ 1332 *et al.*; Investigation Nos. TPA-105-001 332-550, and 332-541.

<sup>24</sup> 19 U.S.C. § 1337; Investigation Nos. 337-TA-943, 945, and 946.

<sup>25</sup> 19 U.S.C. §§ 1671 *et seq.*; Investigation Nos. 701-TA-469 and 731-TA-1168, 731-TA-1082-1083, and 731-TA-1058.

<sup>26</sup> 19 U.S.C. § 2252 *et al.*

It is important to note that the Commission does not formulate trade policy.<sup>27</sup> That function is reserved to the President and Congress.

## The Commission's Structure

### Commissioners and Staff

The Commission's organic statute provides for six Commissioners to head the agency and a Secretary to assist them. Each Commissioner is nominated by the President and confirmed by the Senate. No more than three can be of the same political party. As of this writing, two Democratic Commissioners are serving, including Irving A. Williamson and Rhonda K. Schmidtlein; and two Republicans: David S. Johanson and Meredith M. Broadbent. A Commissioner normally serves a nine-year term, but can hold over until his or her successor is appointed and qualified.<sup>28</sup>

The President designates one of the Commissioners to be the Chairman of the agency for a term of two years. Another Commissioner is designated as Vice Chairman. The Chairman and Vice Chairman cannot be of the same political party, and the Chairman cannot be of the same party as the preceding Chairman.<sup>29</sup> The current Chairman is Rhonda Schmidtlein, and the current Vice Chairman is David Johanson.

Although the statute specifically provides only for Commissioners and a Secretary, these seven are not expected to work alone. Currently, the Commission employs a staff of nearly 400 people. These include economists, attorneys, commodity analysts, and others, assigned to 28 Commissioner and staff offices.<sup>30</sup> All agency personnel are located in the Commission's headquarters building at 500 E Street, SW, in Washington, DC.

Each Commissioner's office employs a small staff of aides. Other personnel work in the staff offices that support the work of the Commission:

- The Office of the Administrative Law Judges holds hearings and makes determinations in investigations involving alleged infringement of intellectual property rights and other unfair acts and methods of competition.
- The Office of the General Counsel serves as the Commission's chief legal advisor.

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<sup>27</sup> Dobson, *Two Centuries of Tariffs*, 116.

<sup>28</sup> The term is nine years unless a Commissioner is appointed to fill an unexpired term. The terms are set by statute and are staggered with the intent that a different term expires every 18 months. A Commissioner who has served for more than five years is ineligible for reappointment. 19 U.S.C. § 1330.

<sup>29</sup> *Ibid.*

<sup>30</sup> Organization charts for the Commission are contained in an appendix to the book.

- The Office of Operations supervises the following offices:
  - The Office of Economics provides economic analysis for import injury investigations, industry and economic analysis reports, and other products.
  - The Office of Industries maintains technical expertise related to the performance and global competitiveness of U.S. industries and the impact of international trade on those industries, for studies and import injury investigations.
  - The Office of Investigations conducts import injury investigations.
  - The Office of Tariff Affairs and Trade Agreements implements the Commission’s responsibilities with respect to the Harmonized Tariff Schedule and the International Harmonized System.
  - The Office of Unfair Import Investigations participates in adjudicatory investigations.
  - The Office of Analysis and Research Services provides research and investigative support.
- The Office of External Relations, which also includes the Office of Trade Remedy Assistance, serves as a liaison to executive branch agencies, Congress, foreign governments, international organizations, the public, and the media.
- The Office of the Chief Information Officer provides information technology support to the agency.
- The Office of the Chief Financial Officer and its subordinate Offices of Budget, Finance, and Procurement carry out functions in those areas.
- The Office of Administrative Services and its subordinate Offices of Human Resources, Security and Support Services, and the Secretary, provide a wide range of administrative support services.
- The Office of the Inspector General provides audit, evaluation, inspection, and investigative support services covering all Commission programs and strategic operations.

## A Day in the Life of the Agency

A description of a typical day in 2016 at the Commission can help illustrate how the agency functions and its scope of responsibility has grown. The following summarizes a particularly busy day; normally, not all possible events happen on the same day.

The Commission opens for business at 8:45 a.m. Many employees have been at work for hours already, but this is the official start time set by regulation.<sup>31</sup> Members of the trade bar and the public begin filing documents, such as notices of appearance and briefs, with the Office of the

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<sup>31</sup> 19 C.F.R. § 201.3.



Secretary. Much filing is done electronically, through the agency's Electronic Document Information System, but many documents still are filed in paper form.<sup>32</sup>

On the first floor of the Commission building, in one of the agency's three courtrooms, an Administrative Law Judge, aided by a law clerk, opens the trial in an intellectual property-related import investigation conducted under section 337 of the Tariff Act of 1930.<sup>33</sup> As required under the Administrative Procedure Act (APA), the proceeding is similar to a trial in a court. Counsel for the holder of a U.S. patent and counsel for importers present arguments, and witnesses provide testimony. An attorney and supervisor from the Office of Unfair Import Investigations also appear as a party. An elaborate computer setup allows a court reporter to provide real-time transcription to the participants in the trial.

At 9:30 a.m., the Chairman convenes a meeting of the Commission in the Main Hearing Room, across the hall from the courtroom being used for the trial. The Commissioners are arrayed on the large dais at the far end of the room. The principal item on the agenda is a vote on an antidumping and countervailing duty review. In addition to Commissioner aides, members of the investigative team who took part in the review are present to assist the Commissioners as needed. The team includes a supervisory investigator and an investigator from the Office of Investigations, an economist from the Office of Economics, a commodity analyst from the Office of Industries, and an attorney from the Office of the General Counsel. The Secretary calls the roll and the Commissioners vote on whether to approve a report on the investigation prepared by agency staff, and then whether to make an affirmative or negative determination.

Immediately following the meeting described above, the Commission begins a hearing. Its purpose is to hear statements and testimony in a study requested by the U.S. Trade Representative; other studies may be requested by the House Ways and Means Committee, the Senate Finance Committee, or both. Senators, members of Congress, and governors testify while news cameras roll. Industry representatives, attorneys, and others follow with their own statements. Commissioners take turns asking questions. Also present are Commissioner aides and staff from the Offices of Economics, Industries, and the Secretary. Although some hearings, such as one in early 2016 concerning the Trans-Pacific Partnership, can run as many as three days; today's event is more normal in that it will take only one day.

Meanwhile, up on the seventh floor, aides in each Commissioner's office are reading action jackets, briefs, hearing transcripts, and exhibits in the administrative record. Each jacket is a red plastic file folder containing a request for a Commission decision and background materials on that decision.

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<sup>32</sup> [Http://edis.usitc.gov](http://edis.usitc.gov).

<sup>33</sup> 19 U.S.C. § 1337.

During the day, each staff office is carrying out various functions of the agency. In many cases, two or more offices act together. As noted, an antidumping investigation is conducted by an investigative team drawn from several staff offices. The use of teams allows for a matrix approach that brings an effective mix of abilities and experience (e.g., economic analysis, legal knowledge, commodity expertise) to bear in an investigation; a team member may answer to one supervisor administratively and another substantively. Teams around the agency are preparing investigative reports, as well as related documents such as legal issues memoranda that are issued by the General Counsel.

In other cases, an office acts alone. For example, an attorney from the Office of Tariff Affairs and Trade Agreements is in Brussels, Belgium, participating in the activities of the World Customs Organization. An editor in the Office of Analysis and Research Services is reviewing a draft report on possible modifications to the Harmonized Tariff Schedule to be issued under section 1205 of the Omnibus Trade and Competitiveness Act of 1988.

A significant element of how the staff functions is the considerable amount of discretion it exercises in carrying out its duties. This is particularly true of the Administrative Law Judge in a section 337 investigation because of the requirements of the APA. However, it is also true of staff in other contexts. Although the Commissioners make the final determination in an investigation, they delegate authority to the staff to carry out most of the proceeding without close supervision by the Commission.

For instance, the Office of Industries obtains approval from the Commission by action jacket to conduct an investigation under section 332 of the Tariff Act of 1930. The jacket describes the general approach the staff will take, defining the terms of reference, listing the resources assigned, and scheduling milestones. Essential planning has been done without prejudicing the outcome of the study. Staff from Industries and other offices will now proceed with the investigation without significant intervention by Commissioners until the end of the study.

Moreover, the Office of Procurement is working with the Office of Economics to acquire economic modeling services. The Office of Budget is preparing the annual budget estimate that must be sent to the President for inclusion in the Budget of the United States Government. The Office of Human Resources is making an offer to a candidate for a commodity analyst position in the Office of Industries. One staff member in the Office of Security and Support Services is arranging for a background check on an existing employee who needs an upgraded clearance, while others are meeting with officials of the General Services Administration to discuss the agency's office space lease. Employees in the Office of the Chief Information Officer are testing the security of the agency's information systems. The Senior Analyst at the Office of Inspector General is putting the finishing touches on a report on the agency's telework program.

The Administrative Law Judge’s trial and the Commission’s hearing will last into the evening, and other personnel are also staying late, but the Office of the Secretary shuts its doors to paper document filers at the official closing time of 5:15 p.m.<sup>34</sup>

## The Independence of the Commission

A number of characteristics define the Commission. That it is designed to be nonpartisan is clear, given the statutory requirement that no more than three Commissioners be of the same political party. Another characteristic—one that is less obvious—is its independence. The Commission is often described, including by the executive and legislative branch authorities, as an independent agency.<sup>35</sup> Notably, the United States Government Manual, which is published pursuant to a delegation of authority from the President and is the official handbook of the federal government, lists the Commission as one of the “Independent Establishments and Government Corporations” in the executive branch and is included among agencies categorized as “Executive Agencies.”<sup>36</sup> This points up the fact that some agencies can be described in statute as both “independent” and within the executive branch.<sup>37</sup>

However, the agency’s organic statute does not use the word “independent.” This is in contrast to certain other agencies, such as the Nuclear Regulatory Commission and the Consumer Product Safety Commission, each described in statute as an “independent regulatory agency.”<sup>38</sup>

An initial question concerning the word “independent” is: independent from whom? The Commission clearly is not independent of Congressional control. Armed with the power of the purse, Congress could shut down the Commission quickly by denying it appropriated funds.<sup>39</sup> And the judicial branch, particularly in the form of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade, has statutory jurisdiction to review certain Commission decisions and issue orders binding on the agency.

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<sup>34</sup> 19 C.F.R. § 201.3.

<sup>35</sup> Office of Management and Budget, *The Budget of the United States Government, Fiscal Year 2017*, Appendix, at 1300 (“The U.S. International Trade Commission (Commission) is an independent, nonpartisan Federal agency.”); S. Rep. No. 114-239, Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017 (April 21, 2016), Title IV, at 123 (“The International Trade Commission [ITC] is an independent, quasi-judicial agency.”).

<sup>36</sup> See 1 C.F.R. §§ 9.1 and 9.2(a) and the authorities listed in the authority citation for 1 C.F.R. Part 9, as well as the Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 2015*, <http://www.usgovernmentmanual.gov>.

<sup>37</sup> See, e.g., 5 U.S.C. § 104 (defining “independent establishment” for purposes of title 5, U.S. Code, as within the executive branch); 12 U.S.C. § 1752a (the National Credit Union Administration was established “in the executive branch of the Government [as] an independent agency”).

<sup>38</sup> 42 U.S.C. § 5841(a)(1); 15 U.S.C. § 2053(a).

<sup>39</sup> This happened to another agency, the Administrative Conference of the United States, in 1995. Alternatively, Congress could remove the statutory basis for the Commission’s existence, as happened when it allowed the authorization for the Export-Import Bank of the United States to expire.

As is made clear in the legislative history described below, the Commission's independence is from control by the executive branch.

The Commission interacts with the President and other executive branch officials in diverse ways as it carries out its mission. The President reviews the Commission's determinations in investigations conducted under section 337 of the Tariff Act of 1930.<sup>40</sup> The President also makes determinations based on Commission recommendations in safeguard cases, such as those conducted under section 202 of the Trade Act of 1974.<sup>41</sup> The Commission often conducts studies requested, in theory, by the President under section 332 of the Tariff Act of 1930, though the President has delegated this authority to the U.S. Trade Representative.<sup>42</sup> In antidumping and countervailing duty investigations, the Commission takes into account the calculations of the Commerce Department.

Although in some of these relationships, executive branch officials provide input on Commission actions—e.g., in section 332 studies, the USTR determines what topics the Commission examines—these officials do not have the authority to dictate how the Commission makes its determinations.

Congress made this clear at the time of the Kennedy Round of multinational trade negotiations (1964–67), when the executive branch negotiated an International Antidumping Code with foreign nations. A Senate Finance Committee report objected to the President's attempt to use an executive agreement negotiated without Congressional approval in an attempt to bind the Commission's predecessor, the Tariff Commission. The report noted:

While it is true that the President has authority to instruct the Treasury Department, an agency of the executive branch, with respect to the duties and functions entrusted to it under the Antidumping Act of 1921, he has no similar authority with respect to the duties and functions entrusted to the Tariff Commission under that act. The more important functions dealt with by the International Antidumping Code that are in question—the scope of an industry and the degree of injury required to invoke a dumping duty—are functions entrusted to the Tariff Commission and the Tariff Commission's determinations as to these matters are final without regard to the attitude of the executive branch. In the opinion of the committee because of the unique position of the Tariff Commission as an arm of the Congress, the ordinary rules which

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<sup>40</sup> 19 U.S.C. § 1337. The President has delegated this responsibility to the USTR.

<sup>41</sup> 19 U.S.C. § 2252.

<sup>42</sup> 19 U.S.C. § 1332.

bind the executive departments to positions taken by the President in international agreements do not apply.<sup>43</sup>

Indeed, the Senate committee relied on a report issued by a majority of the Tariff Commission outlining the many inconsistencies between the International Antidumping Code and domestic statutes. The committee also noted that the Tariff Commission majority's preparation of the report attested to the Tariff Commission's "independence from the executive branch."<sup>44</sup>

Previously, in 1948, Congress had acted to reinforce the Commission's independence in another way. Starting in 1934, Commission personnel had taken part as full members of U.S. delegations in trade negotiations. Congress now prohibited this participation. The law was revoked, enacted again, and again revoked. The result has been that while the Commission assists negotiators, agency employees are not full members of negotiating teams. Similarly, Commission personnel attend some meetings of the executive branch Trade Policy Staff Committee, but only to provide technical assistance and not as full voting members of the Committee.<sup>45</sup>

The statutes that set out the Commission's mission define, in effect, the independent role the Commission plays in its work, although they do not make explicit statements about that independence. A number of statutes and other authorities more explicitly establish the Commission's independence in certain areas.

## Limitations on Authority to Remove a Commissioner from Office

Certain senior officials, such as the Secretary of Commerce, serve at the pleasure of the President. As a result, the President has plenary power to remove such an official without stating a cause, as and when he chooses.<sup>46</sup> The ability to remove a government official from office is one of the most powerful means the President has to ensure the official complies with the Administration's policies.

The President's removal authority with respect to a Commissioner is significantly different. As explained below, a Commissioner can be removed during his or her statutory term of office only for cause; after the end of the term, the Commissioner can be replaced. The President's inability to easily fire a Commissioner during his or her term bolsters the Commission's independence from executive branch control.

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<sup>43</sup> S. Rep. No. 90-1385, Part II, 90th Cong., 2d sess. (July 11, 1968).

<sup>44</sup> *Ibid.*

<sup>45</sup> Donald R. Whitnah, ed., *Government Agencies* (Westport: Greenwood Press, 1983), 563; 15 C.F.R. § 2002.2.

<sup>46</sup> See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602, 627–29 (1935) (referring to the removal of an "executive officer restricted to the performance of executive functions.").

The Commission's organic statute provides that a Commissioner is appointed by the President, with the advice and consent of the Senate, to a term of nine years.<sup>47</sup> However, the statute is silent on the issue of whether the President can remove a Commissioner from office. In contrast, the organic statutes of certain other federal agencies expressly address the issue of Presidential removal power, indicating that a member of such an agency can only be removed for cause. For example, the organic statutes of the Commission on Civil Rights and the Consumer Product Safety Commission (CPSC) allow for the removal of a Commission member "for neglect of duty or malfeasance in office."<sup>48</sup> Similarly, the organic statutes of the Federal Maritime Commission and the Federal Trade Commission provide for Presidential removal of a Commissioner for "inefficiency, neglect of duty, or malfeasance in office."<sup>49</sup>

Although the Commission's statute lacks such language, legislative history and judicial decisions establish that Commissioners enjoy a significant degree of protection from Presidential removal.

A House report concerning the Commission's 1978 authorization stated: "The Commission is an independent agency with quasi-legislative and quasi-judicial responsibilities and removal of the Commissioners is subject to the standards set down by the Supreme Court (e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958))."<sup>50</sup>

In *Humphrey's Executor v. United States* (*Humphrey's*), the Supreme Court considered the question of whether the President had the authority to remove a member of the Federal Trade Commission from office. As noted above, the FTC statute provided for removal based on "inefficiency, neglect of duty, or malfeasance in office." The Court held that the President could not remove the commissioner in the absence of one of the listed circumstances, i.e., without cause. The Court cited a number of indications that Congress intended the FTC to be independent. Commissioners were appointed to a fixed term; the agency was to be nonpartisan; the FTC's "duties are neither political nor executive, but predominantly quasi-

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<sup>47</sup> 19 U.S.C. § 1330(a).

<sup>48</sup> 42 U.S.C. § 1975(e); 15 U.S.C. § 2053(a). The President may have a different level of authority with respect to the removal of a chairman from that position than he does as to removal from office as a commissioner. See Office of Legal Counsel, *President's Authority to Remove the Chairman of the Consumer Product Safety Commission*, July 31, 2001, <http://biotech.law.lsu.edu/blaw/olc/cpscchairmanremoval.htm>, stating that the CPSC chairman serves as chairman at the pleasure of President, although the President cannot remove the chairman from his or her post as commissioner without cause).

<sup>49</sup> *E.g.*, 15 U.S.C. § 41.

<sup>50</sup> H.R. Rep. No. 518, 95<sup>th</sup> Cong., 1<sup>st</sup> sess. (1977) (concerning H.R. 6370, International Trade Commission Authorization, 1978) at 6.

judicial and quasi-legislative.” The Court found that “Congress was of the opinion that length and certainty of tenure would vitally contribute” to the agency’s independence.<sup>51</sup>

The Commission shares with the FTC the indications of independence cited by the Court. Commissioners serve for fixed terms, and are appointed in a nonpartisan procedure. Most importantly, the House report cited above specifies that the Commission’s duties are primarily quasi-judicial and quasi-legislative.

Again, the Commission’s statute does not contain language similar to the FTC’s concerning removal for malfeasance *et al.* But 23 years after *Humphrey’s*, the Supreme Court decision in *Weiner v. U.S.* showed that this difference is immaterial to the issue of Presidential removal power. In *Weiner*, the Court considered whether the President could remove a member of the War Claims Commission (WCC), whose organic statute made no provision for removing a commissioner. Citing the “intrinsic judicial character” of the WCC’s mission, the Court held that the reasoning of *Humphrey’s* applied even in the absence of specific language in the statute. Thus, the Court held that the President could not remove a member of the WCC without cause.<sup>52</sup>

The *Humphrey’s* and *Weiner* decisions, and the Commission’s legislative history that cites them, make clear that the President cannot remove any Commissioner without cause. As in the case of the FTC and other similar agencies, this limitation on the President’s authority stems from Congressional intent to accord the Commission independence from executive branch control.

The expiration of a Commissioner’s term gives the President the opportunity to name a replacement, who then normally must be confirmed by the Senate. Meanwhile, as noted above, “any [USITC] commissioner may continue to serve as a commissioner after an expiration

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<sup>51</sup> 295 U.S. at 624, 629 (“[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will”). The Court found that the FTC was designed to be “independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.” *Ibid.* at 625–26 (emphasis added). The emphasized phrase recognizes that the President has the power to appoint commissioners, but the decision shows that such power does not equate to the power to remove an appointee.

<sup>52</sup> *Weiner v. United States*, 357 U.S. 349, 355–56 (1958) (“Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”). See also *S.E.C. v. Blinder*, 855 F.2d 677, 681 (10th Cir. 1988).

of his [statutory] term of office until his successor is appointed and qualified.”<sup>53</sup> During the holdover period after the end of the Commissioner’s term, the President may be able to replace the Commissioner without Senate action by making a recess appointment.

The President’s authority in this area was confirmed in 2002 by a decision of the Court of International Trade (CIT). The case involved President Clinton’s 2001 replacement of USITC Commissioner Thelma Askey by Commissioner Dennis Devaney as a recess appointment. Commissioner Devaney then participated in the determination in an antidumping review concerning steel imports from Italy and Japan.<sup>54</sup> Plaintiffs brought suit in the CIT challenging the determination as not in accordance with law because Commissioner Devaney had not validly been appointed a Commissioner. The court upheld the validity of Commissioner Devaney’s recess appointment, recognizing that the President had the authority to replace Commissioner Askey during her holdover period.<sup>55</sup>

## Budgetary Independence

Under 31 U.S.C. § 1104, “The President shall prepare budgets of the United States Government.” This authority gives the President control over the budgets of executive branch agencies, and consequently extensive control over their operations. However, another statute, 19 U.S.C. § 2232, invests the Commission with independent budget authority:

Effective with respect to the fiscal year beginning October 1, 1976, for purposes of chapter 11 of title 31, estimated expenditures and proposed appropriations for the United States International Trade Commission shall be transmitted to the President on or before October 15 of the year preceding the beginning of each fiscal year and shall be included by him in the Budget without revision, and the Commission shall not be considered to be a department or establishment for purposes of such chapter.

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<sup>53</sup> 19 U.S.C. § 1330(b)(2). Many holdover statutes of regulatory agencies employ nearly identical language to that of the USITC’s holdover provision. See *Wilkinson*, 865 F. Supp. at 898 (listing various holdover statutes of regulatory agencies: 5 U.S.C. §1202(b) (a Merit Systems Protection Board member “may continue to serve until a successor has been appointed and has qualified”); 16 U.S.C. § 792 (a member of the Federal Power Commission “shall be appointed . . . until his successor is appointed and has qualified”); 49 U.S.C. § 10301 (an Interstate Commerce Commission member “may continue to serve until a successor is appointed and qualified”); 15 U.S.C. § 41 (a Federal Trade Commission member “upon the expiration of his term of office . . . shall continue to serve until his successor shall have been appointed and shall have qualified”); 15 U.S.C. § 78d(a) (a member of the Securities and Exchange Commission “shall hold office . . . until his successor is appointed and has qualified”).

<sup>54</sup> 731-TA-355 (Review), USITC Publication 3396 (February 2001).

<sup>55</sup> *Nippon Steel v. United States Int’l Trade Comm’n*, 239 F. Supp. 2d 1367 (August 30, 2002). See also *Swan v. Clinton*, 932 F. Supp. 8, 13 (D.D.C. 1996).



This language prevents the President from modifying the Commission's budget request before it is submitted to Congress. It also exempts the Commission from being considered a "department or establishment" for the purposes of chapter 11 of title 31, U.S. Code.<sup>56</sup>

Congressional pronouncements made clear that the purpose of the provision on the budget was to guarantee the Commission's independence. Congress' intent is strongly evident in the legislative history of the Trade Act of 1974. The report of the Senate Finance Committee states:

The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch. . . . The committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference by the Executive Branch is to place its budget directly under the control of the Congress. Consequently, section 175 of the bill would more specifically identify the Commission as an agency independent from the Executive departments, would provide that the budget of the Commission shall not be subject to revision by the President under the Budget and Accounting Act, 1921, but rather shall be included by the President in the Budget without revision. Further, any necessary apportionment or reapportionment of appropriations required by [31 U.S.C. 1512] would not be subject to the control of the Director of the Bureau of the Budget, but rather by the Commission officer having administrative control of such appropriation.<sup>57</sup>

The Committee's report also characterized the Commission as "a permanent, independent, nonpartisan agency."<sup>58</sup>

In 1979, Congress reaffirmed its intent to guarantee the Commission's budgetary independence. During 1978, the Office of Management and Budget (OMB) told the Commission it intended to impose a hiring freeze on the agency's budget following Presidential instructions to limit the number of full-time positions in each Federal agency. OMB revised the Commission's budget for fiscal year (FY) 1980 before submitting it to Congress. The Commission's oversight committees rejected this interference in the Commission's budget formulation. The House Ways and Means Committee stated:

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<sup>56</sup> 19 U.S.C. § 2232. Two other statutory provisions are related to section 2232. These provisions, in chapter 15 of title 31, U.S. Code, give the Commission special status in certain financial matters. 31 U.S.C. §§ 1513 and 1514.

<sup>57</sup> S. Rep. No. 1298, 93d Cong., 2d sess. at 115–118 (1974).

<sup>58</sup> S. Rep. No. 1298, 93d Cong., 2d sess. at 115–118 (1974), 115. This characterization was echoed by Congressman Charles Vanik (D.-OH) in remarks on the floor concerning the Commission's 1977 authorization act: "[T]he Congress has always intended the Commission to be a nonpartisan, semijudicial, semilegislative body capable of providing impartial and objective advice to the President and the Congress." Cong. Rec. H8673, August 4, 1977.

Because of the unique role of the Commission as a quasijudicial and independent agency designed to provide trade expertise to both legislative and executive branches of Government, the Congress provided that the budget of the [Commission] would not be subject to control by [OMB], but would instead be submitted directly to the Congress. The Committee believes that this budgetary independence has been useful in insuring the independence and objectivity of the Commission, and the actions of Congress in recent years in reducing the Commission's budget request have insured a careful use of the taxpayers' moneys. The Committee makes these observations in light of material included in the fiscal year 1980 budget Appendix in which the administration suggests a budget figure for the Commission in light of temporary Civil Service employment limitations. This Budget Appendix addition is gratuitous and has no binding effect on the Commission or Congress. Your Committee trusts this Appendix reference does not indicate any attempt to infringe on the Commission's budget independence.<sup>59</sup>

It should be noted that the Commission also has a budgetary advantage over other agencies in that it has “no-year” funding. Since 1993, the Commission’s appropriation has contained the phrase “to remain available until expended.” This language permits the Commission to carry forward any unexpended monies from that year’s appropriation from one fiscal year to later years.<sup>60</sup> However, although the no-year funding provision gives the Commission flexibility in spending its appropriations, it does not enhance the Commission’s independence from executive control.

More recent legislation has eroded the significance of the budgetary independence provision, specifically the statement that the Commission is not a department or establishment for the purposes of chapter 11 of title 31. Chapter 11 now generally imposes requirements on “agencies,” not on departments and establishments.<sup>61</sup> For example, 31 U.S.C. § 1115, enacted as part of the Government Performance and Results Act, provides that “the Director of the Office of Management and Budget shall require each agency to prepare an annual performance

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<sup>59</sup> See H.R. Rep. No. 62, 96th Cong., 1st sess. at 4 (1979). See also S. Rep. No. 96-143, 96th Cong., 1st sess. at 3 (1979) (wherein the Senate Finance Committee stated that OMB's revision of the Commission's budget was a “clear violation of the spirit if not the letter of section 175”).

<sup>60</sup> Government Accountability Office, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, GAO-05-734SP, September 1, 2005 (“budget authority” at “no-year authority” on page 22); and 31 U.S.C. § 1301(c)(2). The legislative history of the no-year funding provision indicates that Congress was concerned about the Commission having unused funds at year-end. See Conference Report on H.R. 5678, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (House of Representatives, September 28, 1992) (“The conferees note that the Commission has lapsed significant portions of its appropriations in recent years. Therefore, the conferees have included language which permits the appropriation to remain available until expended to make available any unused balances to fund a portion of the Commission's budget request in fiscal year 1994.”).

<sup>61</sup> Even without section 2232, it would have been difficult to argue that the Commission is a “department,” given the normal definition of that term as meaning one of the cabinet departments. See, e.g., 5 U.S.C. § 101.

plan.” The Commission’s budgetary independence provision does not explicitly exempt the agency from this performance plan requirement, because the Commission’s provision speaks of departments and establishments, whereas section 1115 refers to agencies.

The Accountability of Tax Dollars Act (ATDA), codified at 31 U.S.C. § 3515, requires certain agencies to prepare audited financial statements. Although the statute does not explicitly refer to the Commission, the legislative history indicates that the Commission is covered by the statute’s requirements.<sup>62</sup>

Note that the placing of the Commission among the agencies covered by the ATDA reflects a shift in the attitude of Congress toward the agency. In the period 1975–85, Congress took pains to guarantee the Commission’s independence from the President’s oversight, at least in budgetary matters. More recently, Congress has not shown the same degree of concern about the agency’s independence. Statutes such as the ATDA apply to the Commission even though such application may subject the Commission to Presidential oversight.

## The Paperwork Reduction Act

The Commission’s organic statute establishes its independence in another way as well. At 19 U.S.C. § 1330(f), the statute states: “The Commission shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44.” This provision makes it clear that the Commission is subject to the Paperwork Reduction Act, or PRA (44 U.S.C. chapter 35), which among many other things requires approval from OMB for certain Commission information collection efforts, such as a questionnaire in an antidumping investigation.<sup>63</sup> But the provision also gives the agency the authority to override an OMB disapproval of such an effort. The Commission has rarely if ever exercised its authority under this provision, but the authority exists, and would allow the Commission to proceed with necessary fact-finding in an investigation over OMB’s objection.

In some cases, OMB has delayed taking action on a questionnaire. Because Commission investigations are subject to tight statutory and administrative deadlines, a delay in clearing a questionnaire could hamper the Commission’s fact-finding. The PRA permits an agency requesting OMB clearance to proceed with its information collection if OMB has failed to take action within a specified period.<sup>64</sup> This provision does not apply to emergency requests, which

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<sup>62</sup> S. Rep. No. 107-331, 107th Cong., 2nd sess., 2002 (November 4, 2002), 2002 WL 31474288 (Leg. Hist.), at 3-4; S. Rep. No. 108-144, 108th Cong., 1st sess., 2003 (September 5, 2003), 2003 WL 22067742 (Leg. Hist.) at 70.

<sup>63</sup> 44 U.S.C. §§ 3502(1), 3507(f).

<sup>64</sup> 44 U.S.C. § 3507(c)(3).

the Commission often has made in section 332 studies, but OMB is required to respond to an emergency request by a deadline set by the requesting agency.<sup>65</sup>

Ironically, the provision specifying that the Commission is an independent regulatory agency—intended to enhance the Commission’s independence—has had the effect of ensuring that the agency is subject to executive branch control in a number of areas. For example, the PRA assigns oversight authority over the government’s use of information resources to OMB’s Office of Information and Regulatory Affairs.<sup>66</sup> Thus, the PRA imposes a degree of executive oversight on the Commission.

One provision of the PRA, concerning chief information officers (CIOs), illustrates the sometimes complicated analysis necessary to determine the Commission’s status within statutory schemes. Under section 3506(a)(2)(A) of the PRA, “the head of each agency shall designate a Chief Information Officer.” The PRA assigns certain duties to all CIOs.<sup>67</sup> Another statute, the Chief Financial Officers Act, assigns additional duties to the CIOs of certain specified departments and agencies, but the Commission is not one of the specified agencies.<sup>68</sup> Thus, although the Commission, in common with other agencies, must appoint a CIO, the Commission’s independence limits the extent to which it must delegate responsibilities to that officer.

## Litigating Authority

The organic statute, at 19 U.S.C. § 1333, also gives the Commission independent litigating authority: “The Commission shall be represented in all judicial proceedings by attorneys who are employees of the Commission or, at the request of the Commission, by the Attorney General of the United States.” Thus, unlike most Federal agencies, the Commission need not rely on the Justice Department to represent it in litigation. Consequently, the Justice Department (and by extension the President) cannot dictate the positions the Commission takes in court. A similar provision (19 U.S.C. § 1516a(g)(9)) governs representation before panels under the North American Free Trade Agreement (NAFTA): “In the case of binational panel proceedings convened under chapter 19 of the NAFTA or of the Agreement, the administering authority and the Commission shall be represented by attorneys who are employees of the administering authority or the Commission, respectively.”

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<sup>65</sup> 44 U.S.C. § 3507(j).

<sup>66</sup> 44 U.S.C. § 3504.

<sup>67</sup> 44 U.S.C. § 3506(a)(3).

<sup>68</sup> 40 U.S.C. § 1425(c), 31 U.S.C. § 901. Nevertheless, legislative history indicates an intent that CIOs in agencies other than the specified ones are to “perform essentially the same duties” as CIOs in specified agencies. H.R. Conf. Rep. 150, 104th Cong., 2d sess. 977 (January 22, 1996).

In contrast, the Commission has no authority to represent the U.S. government in dispute resolution proceedings before the World Trade Organization (WTO). Commission staff prepare the briefs and make oral presentations to WTO panels, but it is the Office of the U.S. Trade Representative that represents the United States in panel proceedings and determines the litigation posture that the Commission must adopt. In proceedings before the Supreme Court of the United States, the Commission has been represented by attorneys of the Office of the Solicitor General.

## The Framework of This Book

The book is divided into parts and chapters that set out the history of the Commission through a mixture of straight narration and thematic discussion.

**Part I** includes two chapters that address how the Commission came to be created.

**Chapter 2**, prepared by Professor Andrew Reamer, describes what could be called the “pre-history” of the Commission. It covers the attempts by Congress during the 19th century to obtain adequate information for making decisions on tariffs. Congress’ inability to find an agency capable of providing that kind of information paved the way for the creation of the Commission.

**Chapter 3**, by Professor W. Elliot Brownlee, addresses the creation of the Tariff Commission. Topics include why the President, Congress, and others perceived a need for such an agency; the President’s initiative; communications between the Administration, Congress, and others on the subject of creating the agency; the evolution of the organic legislation; and the enactment of the Revenue Act of 1916.

**Part II** covers various aspects of the evolution of the agency over the past century.

**Chapter 4**, by former Chairman Bill Leonard and trade practitioner F. David Foster, gives a narrative history of the Commission from both a functional and an institutional point of view. The chapter also serves as an overview of the material that follows.

**Chapter 5**, offers the insights of three former Chairmen of the Commission—Shara Aranoff, Deanna Okun, and Daniel Pearson—into the nature of the Chairmanship.

**Chapter 6**, by the author of the current chapter, describes the headquarters and field offices that the Commission has occupied during its existence.

**Part III** is the first of several that address in detail various parts of the agency's mission.

**Chapter 7**, covers tariff-related activities. It was prepared by Gene Rosengarden, former Director of the Office of Tariff Affairs and Trade Agreements, and by Janis Summers and Arun Butcher, currently of that office. This topic includes Commission work on the Tariff Schedule of the United States and the Harmonized Tariff Schedule of the United States. The chapter addresses the role of the Office of Tariff Affairs and Trade Agreements and other offices, and describes the Commission's participation in international tariff activities, including work with the World Customs Organization.

**Chapter 8**, by former Chairman and Professor Alfred Eckes, provides a detailed look at the Commission in its first several decades, from 1917 to 1974, focusing particularly on tariff-related functions.

**Part IV** addresses the investigative functions of the Commission.

**Chapter 9**, was written by Lynn Featherstone, former Director of Investigations, and James Lyons, former General Counsel. It focuses on antidumping and countervailing duty (AD/CVD) investigations and related proceedings under Title VII of the Tariff Act of 1930. The chapter discusses both original investigations and five-year reviews. The chapter closes with a description of the agency's experience in AD/CVD litigation.

**Chapter 10**, by Professor Kara Reynolds, covers safeguard investigations conducted under several statutes. The chapter discusses different types of safeguards, including global safeguards and those based on bilateral agreements, such as ones with China. Major cases are summarized.

**Chapter 11**, by former Chairman Eckes and practitioner Terence Stewart, is a compilation of interviews with senior trade practitioners over many years. These provide perspectives on the experiences of the trade bar as it has practiced before the agency.

**Chapter 12**, was provided by former Chairman Deanna Okun and practitioners James Adduci, Sarah Hamblin, Louis Mastriani, and Tom Schaumberg. It addresses intellectual property-related import investigations pursuant to section 337 of the Tariff Act of 1930.

**Part V** covers industry and economic analysis.

**Chapter 13**, by Dr. Robert Koopman, former Director of Operations, and Dr. Michael Ferrantino, formerly of the Office of Economics, provides an overview of this area of the Commission's mission, which encompasses individual studies and recurring reports undertaken under several statutory authorities. The chapter

examines how Commission offices such as Economics and Industries have contributed to these analyses, and the growing role that economic modeling has played in the Commission's activities.

**Chapter 14**, prepared by Professor Michael Moore, examines economic analysis in more detail.

**Chapter 15**, by former Commissioner Thelma Askey, describes the assistance that the Commission provides to Congress. The principal statutory customers are the Ways and Means Committee of the House of Representatives and the Finance Committee of the Senate.

**Chapter 16**, by Catherine Field, formerly of the Office of the U.S. Trade Representative, addresses industry and economic analysis that the Commission has provided to the Executive Branch. The chapter examines section 332 studies that the executive branch requested, as well as those that Congress required the Commission to provide to the executive.

**A brief conclusion recaps the themes of the book.**





# Part I

## Creation



# Chapter 2

## Before the U.S. Tariff Commission: Congressional Efforts to Obtain Statistics and Analysis for Tariff- setting, 1789–1916



Photo: Political cartoons circa 1844 concerning tariffs; political poster for William McKinley asserting that “The Tariff Is an Issue.”

Andrew Reamer<sup>69</sup>

## Introduction

The U.S. Tariff Commission’s establishment in 1916 was the culmination of a long series of efforts—beginning at the nation’s founding—to give Congress the data and analyses it needed to knowledgeably set tariffs.<sup>70</sup>

Congress enacted 42 tariff laws between 1789 and 1916.<sup>71</sup> Debates over these bills reflected profound differences in perspectives about the economic interests of various constituents. Members invoked combinations of values—regarding the rights and needs of states, businesses, workers, and consumers—and assertions—such as a proposed tariff’s expected impacts on those various constituents. Key tensions—between protectionism and free trade, between producers and consumers, between employers and workers—were present decade after decade. Deliberations were complex, passionate, divisive, and lengthy.

While aspects of arguments over tariffs remained constant, the complexity of Congress’s tariff-setting task grew dramatically with economic and technological development—as evidenced by the increasing length of the tariff acts. The Tariff Act of 1789 was three pages long. The Smoot-Hawley Act of 1930 (the last enacted tariff before Congress delegated tariff-setting authority to the President) required nearly 200 pages to set tariff levels for nearly 3,300 items.<sup>72</sup>

Whatever their perspective, members of Congress sought tariff-related data and analysis to inform their views and bolster their arguments. From the 1790s forward, Congress periodically passed legislation directing the executive branch to provide reports so that Congress could intelligently set a tariff rate for each commodity. The progression of legislative efforts was born of frustration. Congress would try one approach, find that insufficient, try another, find that

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<sup>69</sup> Research Professor, George Washington Institute of Public Policy, George Washington University.

<sup>70</sup> Congress’s tariff-setting authority is provided by Article 1, Section 8 of the U.S. Constitution.

<sup>71</sup> As the nation developed, and as the government’s revenue sources diversified, the frequency of these bills fell dramatically. Thirty-nine bills were passed between 1789 and 1875 (about one every 2.2 years) and six between 1876 and 1913 (one every 6.2 years). For laws from 1789 through 1875: Bureau of Statistics, *Special Report on Customs-Tariff Legislation of the United States*, third ed. (Washington, DC: Government Printing Office, 1877).

<sup>72</sup> To produce that document, the Senate Finance Committee “heard from 1,004 witnesses in testimony that ran 8,618 pages in eighteen volumes” and the House Ways and Means Committee “heard statements from 1,100 individuals in what came to 10,684 pages of testimony published in eighteen volumes.” The Senate floor debate covered 2,638 pages of the *Congressional Record*. Douglas A. Irwin, *Peddling Protectionism: Smoot-Hawley and the Great Depression*, Princeton, NJ: Princeton University Press, 2011, 36, 47, and 67.

somewhat better but still not satisfactory, and so on in a multi-decade trajectory of trial and error that led, ultimately, to the creation of the Tariff Commission.

This chapter provides an overview of these pre-Tariff Commission efforts. It also shows that, as a byproduct, these efforts created the first incarnations of today's three primary federal economic statistical agencies—the U.S. Census Bureau's Economic Directorate, the U.S. Bureau of Economic Analysis, and the U.S. Bureau of Labor Statistics. The details of the Tariff Commission's founding are the focus of chapter 3.

This chapter begins with a brief discussion of the relative importance of tariffs as a source of federal revenue over time; identifies the breadth and nature of the various interests and concerns of members of Congress as they set tariffs; and then chronologically reviews the approaches Congress took to generate data and reports useful for tariff-setting.

## Tariffs as a Source of Federal Revenue

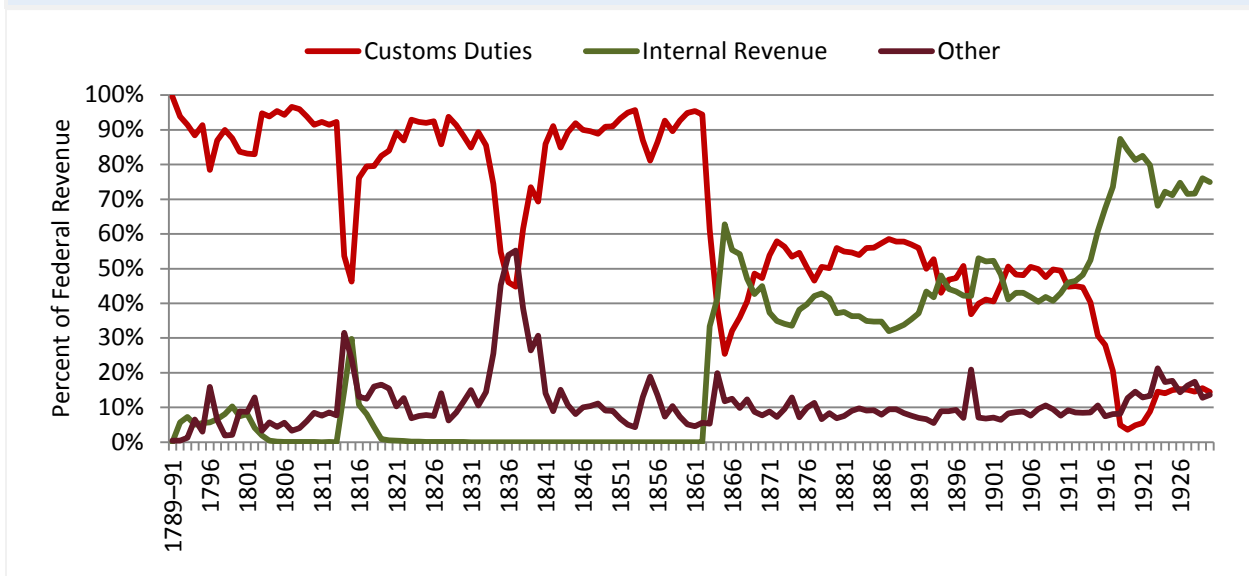
As Figure 2.1 illustrates, the history of the distribution of federal revenue by source can be divided into three phases.

- **1789 to 1862:** Nearly all of federal revenue was derived from customs duties.
- **1863 to 1914:** Approximately half of federal revenue came from customs duties and half from internal revenue sources (such as excise taxes).
- **1915 forward:** As the result of the 16th Amendment making the income tax constitutional, the large majority of federal receipts came from internal revenue. For the first time, customs duties were a relatively minor contributor.

Figure 2.2 places the streams of federal revenue in the context of the size of the economy. Generally speaking, federal revenue as a percent of gross domestic product (GDP) grew substantially in times of war (War of 1812, Civil War, World War I) and then declined until the next war. A relatively smaller upsurge took place in 1930, at the start of the Great Depression, due to a 12 percent increase in revenue and a 12 percent decline in GDP.

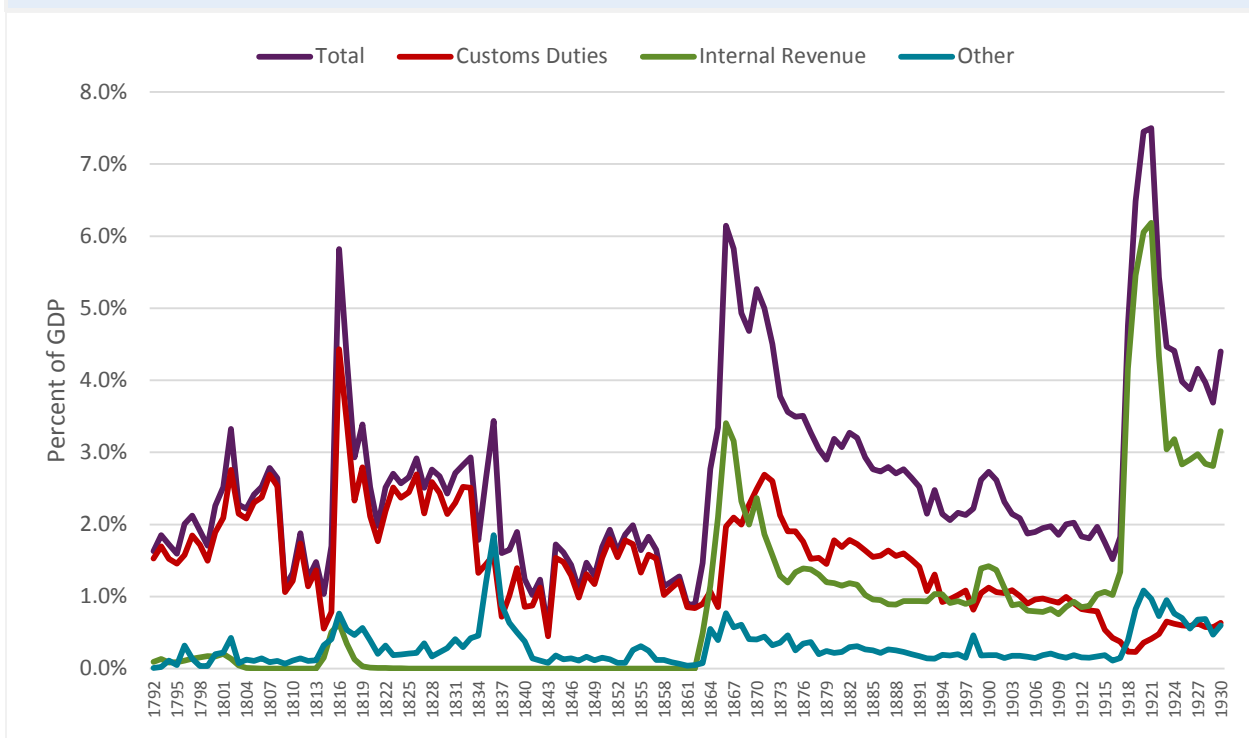
Tariff revenue as a percentage of GDP was largest between 1816 and 1833, peaking at 4.4 percent in 1816. This high level came about in response to a combination of the War of 1812 and trade wars with Britain. It then served as a key aspect of the Whig Party's four-part program for national economic development: high tariffs, federal land sales, a national bank to stabilize financial markets, and internal transportation improvements financed by tariffs and land sales.

**Figure 2.1:** Distribution of federal revenue by major source, 1789–1930



Source: U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970*, Washington, DC: GPO, 1975, 1106.

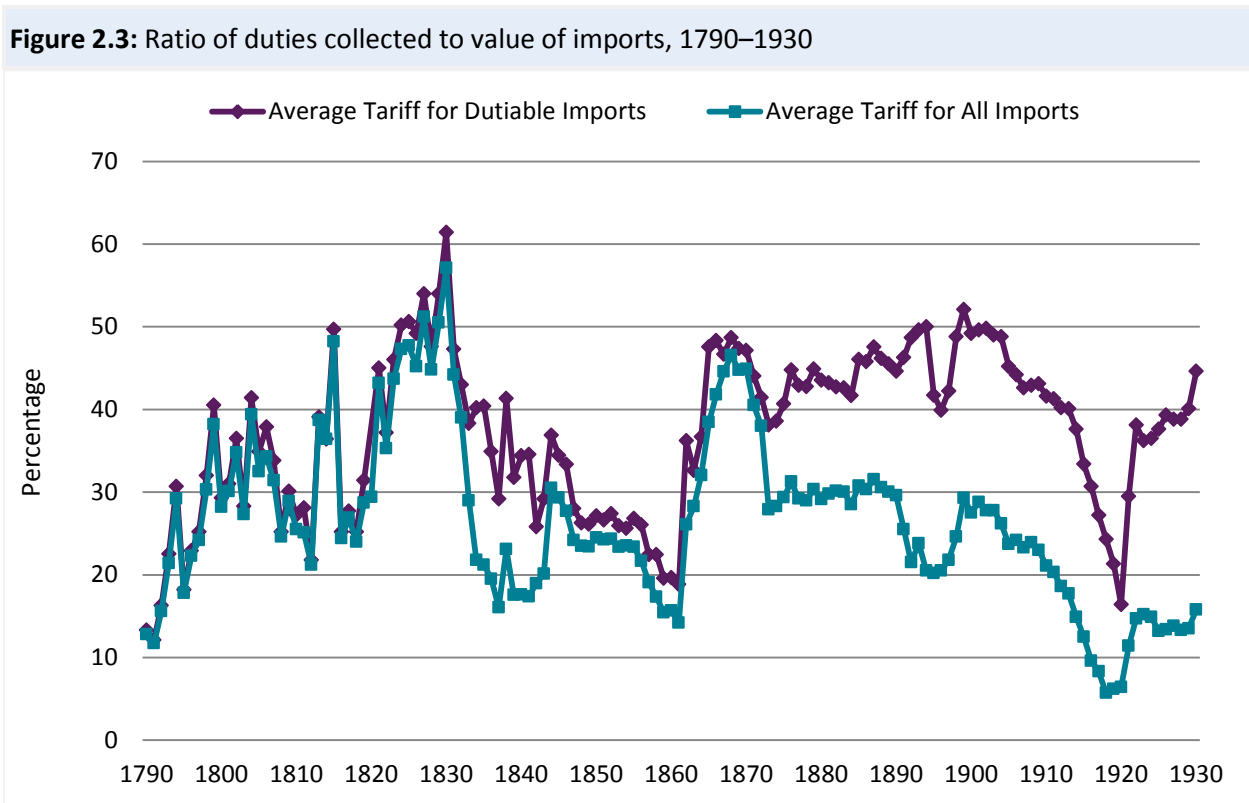
**Figure 2.2:** Federal revenue as percent of GDP, by source, 1792–1930



Source of GDP data: Samuel H. Williamson, “What Was the U.S. GDP Then?” MeasuringWorth, 2016, <https://www.measuringworth.com/usgdp/>.

Between 1818 and 1833, tariff revenue as a percent of GDP was consistently over two percent (excepting one year). With the Compromise Tariff of 1833 and following tariff laws, that figure fell to below one percent by 1840. From 1842 to 1860, it moved up into the range of 1.0-to-1.8 percent. Then for most of the Civil War, the figure dropped to slightly below one percent.. Under the postwar Republicans, the figure rose again, attaining 2.7 percent by 1871. That number, however, declined over the next half-century as the economy grew. It bottomed at 0.2 percent in 1918–19, following Democratic assumption of control over government and the ratification of the 16th amendment, both in 1913.

Figure 2.3 shows the ratio of duties collected to the value of U.S. imports from 1790 to 1930. Two observations of note: First, the trend in duties collected as a percent of all imports is consistent with the trend line for tariffs as a percentage of GDP in figure 2.2.



Sources: For 1790-1836, Douglas A. Irwin, "New Estimates of the Average Tariff of the United States, 1790-1820," *Journal of Economic History* 63 (June 2003): 506-513; for 1837-1890, Census Bureau, *Historical Statistics of the United States: Colonial Times to 1970*, GPO, 1975, Series U 207-212 table; for 1891-1930, tables available from Interactive Tariff and Trade Dataweb, U.S. International Trade Commission, 2017.

Second, for much of U.S. history, tariff revenue was a substantial percentage of the total value of imports. The number hit 48 percent in 1815; climbed to over 50 percent in the 1827-1830 period; was in the 20–30 percent range between the mid-1830s and the Civil War; came close to 50 percent in the late 1860s; and moved back to the 20–30 percent range from the mid-1870s to the start of the Wilson administration.

## The Politics of Tariff-setting: Conflicting Values, Interests, and Perspectives

Congressional deliberations over tariffs sought to resolve several broad, conflicting sets of values, interests, and perspectives. These included:

- The appropriate economic, legislative, and constitutional role of the federal government vis-à-vis the states, particularly with regard to economic development, monetary policy, and slavery.
- The federal government's need for revenue with which to operate and pay its debts, and the place of tariffs in the array of revenue options.
- Military self-sufficiency—the capacity of U.S. industry to meet War Department requirements for matériel.
- The desires of producing industries (business owners and their workers) for tariff protection, particularly so they could increase their share of domestic markets.<sup>73</sup>
- The desires of consumers and consuming industries (particularly agriculture) for low or no tariffs on certain commodities, to reduce the cost of living and doing business and to increase exports.

To a large extent, a Congressional member's geographic base determined his priorities, proposals, and concerns about tariffs. Conflict was endemic to tariff-setting, not only because each member represented a unique mix of producing and consuming industries, but also because individual members with similar interests and values tended to coalesce into antagonistic coalitions of North and South. Traditionally, the North and the Whig and Republican parties were protectionist, while the South and the Democratic Party sought free trade and low tariffs. Beginning with the Nullification Crisis of 1832, South-North tensions over tariff levels substantially increased the likelihood of a civil war.<sup>74</sup>

Moreover, as each member had multiple values, priorities, and constituencies, it was difficult for him to figure out a set of tariff proposals that appeared to fully satisfy them all. To use a modern term, every member struggled with optimization.

In 1872, the U.S. Treasury Department's Bureau of Statistics published a detailed history of tariff legislation. The report notes the constancy of both the centrality of tariffs in national

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<sup>73</sup> Historical review suggests that producing industries were less interested in tariff policy that promoted exports. G. G. Huebner, "Tariff Provisions for Promotion of Foreign Trade of the United States," *Annals of the American Academy of Political and Social Science* 29 (May 1907), 58–74.

<sup>74</sup> William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836*, New York: Oxford University Press, 1965.



policy and the nature of the arguments for and against tariffs. After quoting at length the House floor discussion on the Tariff Act of 1789, the report says:

[T]he foregoing speeches . . . were, in fact, the initial arguments in a discussion which, with occasional intermission, has been prominently before the public for eighty-two years. Touching, as it does, the practical pecuniary interests of large classes of our people, and more or less directly those of the entire country, the subject has received a degree of attention in Congress and by the nation at large which no other public question, save one [slavery], has elicited. The same, or substantially the same, arguments which were urged pro and con by the advocates of the great rival policies at the very threshold of our national career, may still be heard upon the floors of the respective houses of Congress whenever any revision of the tariff duties is under consideration.<sup>75</sup>

Compounding the conflicts among values and perspectives was the absence of good information. Members very much wanted data and analysis that would give them confidence in making “if-then” statements, such as “If Congress places a 20 percent tariff on molasses imports, then its impact on jobs, wages, profits, material, costs, and competitiveness by industry and region is expected to be as follows: . . .” Of particular importance—again, using a modern term—members wanted to understand the elasticity of demand for goods produced by constituents’ businesses in response to shifts in the tariffs on those goods and their inputs.

But members did not have adequate “if-then” information. So they made politically appropriate assertions on the basis of what little information they did have. And every decade or two, a few members proposed a new scheme for getting Congress the information it needed to make reliable “if-then” determinations and set tariffs at levels that best satisfied multiple, often conflicting, needs.

The next section briefly chronicles the various approaches that Congress attempted between the 1790s and the creation of the Tariff Commission.

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<sup>75</sup> Bureau of Statistics, *Special Report on Customs-Tariff Legislation of the United States*, first ed., Washington, DC: Government Printing Office, 1872, VIII. A more recent review of tariff policy controversies over the years is Alfred E. Eckes, Jr., *Opening America’s Market: U.S. Foreign Trade Policy Since 1776*, Chapel Hill: University of North Carolina Press, 1995.

# Congressional Efforts to Obtain Statistics and Analysis for Tariff-setting: 1789–1916

## Overview

Before creating the Tariff Commission, Congress sought information to guide tariff-setting by mandating four types of executive branch efforts: manufacturing plans, statistical reports on trade and manufacturing, statistical bureaus, and expert panels and offices (box 2.1). Generally speaking, Congress emphasized the first two types before the Civil War and the second two afterwards.

**Box 2.1:** Congressional efforts to create statistics and analysis to guide tariff-setting, 1789–1916

### Manufacturing Plans

- Treasury Department (1790, 1809, 1815, 1832)

### Statistical Reports

- Series of annual reports on imports, exports, and navigation, Treasury Department (1796–98)
- Decennial census of manufactures, Treasury Department (1810)
- Comprehensive annual report on trade, Treasury Department (1820)
- Report on commercial relations, State Department (1842)
- Annual economic report, Treasury Department (1844)

### Statistical Bureaus

- Superintendent of Statistics, State Department (1856)
- Bureau of Statistics, Treasury Department (1866)
- Bureau of Statistics, State Department (1874)
- Department of Labor (now Bureau of Labor Statistics) (1888)
- Census Office (now Census Bureau), Interior Department (1902)
- Bureau of Statistics, Commerce and Labor Department (1903)
- Bureau of Foreign and Domestic Commerce, Commerce and Labor Department (1912)

### Experts

- U.S. Revenue Commission, Treasury Department (1865)
- Office of the Special Commissioner of the Revenue, Treasury Department (1866)
- Tariff Commission (1882)
- Industrial Commission (1898)
- Tariff Board (1909)
- U.S. Tariff Commission (1916)

The list reflects the progression of Congressional learning in the context of substantial economic growth, radical technological developments, major civil strife, and remarkable advancements in social science methods. In essence, to create the U.S. Tariff Commission in 1916, Congress went through a long process of developing understanding in four realms:

- **Statistics:** The types of data useful for tariff-setting, methods for transforming administrative records into reliable statistics, and methods for collecting reliable survey data.
- **Analysis:** The expertise needed to examine descriptive statistics to produce guidance for tariff-setting.
- **Administration:** The incentives and resources needed by the executive branch to comply with Congressional mandates to produce statistics and analysis; and the proper role of Congress in overseeing statistical efforts.
- **Nonpartisanship:** The value of analysis aimed at serving public, not private, interests.

## Congressionally-mandated Statistics and Analysis for Tariff-setting: A History

From the nation's beginning, tariffs were seen as an essential mechanism for raising federal funds and promoting manufacturing. However, the first tariff proposals and policies had to be put forward in the absence of trustworthy economic information, as little existed.

When the First Congress convened in April 1789, it needed to immediately find a way to raise revenues so the new government could operate and pay off its large debts. Representative James Madison introduced the Tariff Act of 1789 to meet these ends. He sought an approach that met four criteria:

- raised sufficient revenues,
- promoted free trade to the extent possible,
- was not “oppressive to our constituents,” and
- did not depend on detailed economic information, as little existed.<sup>76</sup>

The core of Madison’s proposal was a five percent tariff on select items. He did not seek to use the tariff to promote and protect certain industries. Multiple members of Congress, however, wanted to craft tariffs that fit the interests of their respective business constituencies.<sup>77</sup>

Consequently, the final bill, passed three months later, was quite different from what Madison proposed. In the process, Congress had articulated the essential elements of a debate over tariffs that persisted into the 1930s.

Tariffs were deemed of such importance that the bill was completed two months before Congress created the Department of Treasury on September 2, 1789. Alexander Hamilton was sworn in as Secretary a week later. On September 21, the House ordered Hamilton to prepare a plan for the support of the public credit, which it deemed “a matter of high importance to the national honor and prosperity.”<sup>78</sup>

Hamilton was a strong proponent of fiscal soundness and industrial development and the use of tariffs to support both. He convinced President George Washington to support his views.<sup>79</sup> In Washington’s first annual address to Congress on January 8, 1790, he proposed that Congress encourage a strong industrial base as part of the national defense:

A free people ought not only to be armed, but disciplined; to which end, a uniform and well digested plan is requisite; and their safety and interest require that they should promote such manufactories, as tend to render them independent on others for essential, particularly for military supplies.<sup>80</sup>

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<sup>76</sup> Bureau of Statistics, *Special Report on Customs-Tariff Legislation of the United States*, first ed., Washington, DC: Government Printing Office, 1872, V.

<sup>77</sup> “The same arguments were offered over and over again, and the result was always the same. Each member asked for and secured protection on the articles produced in his state, and each member opposed taxes which he thought were likely to prove burdensome to his constituents. . . . Naturally, the states which were more densely populated, and had already made some progress in manufactures, asked for the greatest amount of protection. Equally natural was it that South Carolina and other thinly settled states, whose products found a ready market in foreign countries, and whose wants were supplied almost entirely by imports, should object to taxes on imports which they did not produce at all.” William Hill, “Protective Purpose of the Tariff Act of 1789,” *Journal of Political Economy*, v.2, n.1 (December 1893), 54–76. (Quote on 68–69).

<sup>78</sup> *Gales & Seaton’s History of Debates in Congress*, 939 (September 21, 1789).

<sup>79</sup> Hill, *op. cit.*, 72.

<sup>80</sup> George Washington, “First Annual Address to Congress,” January 8, 1790.

On January 15, on the basis of Washington's recommendation, the House of Representatives directed the Treasury Secretary to prepare "a proper plan or plans" to encourage and promote manufacturing.<sup>81</sup>

The same week, Hamilton sent the "First Report on the Public Credit" to the House. To ensure sufficient federal revenues, Hamilton recommended a series of tariff increases, largely on goods he deemed luxuries, including wines, spirits, teas, and coffee. Similar to Madison, he noted the proposal had to take into account "a considerable degree of uncertainty in the data."<sup>82</sup>

In March 1790, the House told Hamilton to insert an additional factor in his calculations: "ascertain the resources that may be applied to the payment of the State debts, provided they should be assumed by the United States." In reply, Hamilton suggested that the federal government could assume State debts in large part by revising and expanding the proposed tariffs he had proposed in January to include additional commodities and goods.<sup>83</sup> Again, his analysis was not based on data. The Tariff of 1790 became law in September.<sup>84</sup>

In December 1791, Secretary Hamilton published his famous Report on the Subject of Manufactures, fulfilling the House resolution of January 1790. The report provided strategies, including the judicious and targeted use of tariffs, to promote the manufacture of 16 distinct classes of goods. As before, Hamilton's strategies were largely based on assertions and observations.

While the nation's difficult fiscal circumstances forced the federal government to quickly make tariff policy with little information, as the new government found its footing Congress began to create processes and capabilities for developing data to guide tariff-setting.

Between 1792 and 1798, each house of Congress used resolutions to incrementally develop a process by which Treasury provided annual reports on trade and duties based on customs and shipping records. Initially, Hamilton had sent each house a short fiscal report summarizing the amount of duties raised on imports and tonnage. In April 1792, the House of Representatives directed Hamilton to provide data on exports by state. In February 1793, he sent each house a

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<sup>81</sup> *Journal of the House of Representatives*, January 15, 1790, 141–42.

<sup>82</sup> Alexander Hamilton, *First Report on the Public Credit*, January 14, 1790.

<sup>83</sup> Alexander Hamilton, "State Debts," communicated to the House of Representatives, March 4, 1790.

<sup>84</sup> Mary Stockwell, "Tariff of 1790," in *Encyclopedia of Tariffs and Trade in U.S. History*, edited by Cynthia Northrup and Elaine C. P. Turney (Westport: Greenwood Press, 2003), vol. 1, 357. Congress agreed to substantially increase tariffs, but amended Hamilton's proposals in multiple ways, including adding protection for certain industries, such as steel and rope.

detailed accounting of imports, tonnage, and exports, with data by commodity and state. These two reports differed in format, time period, and statistical detail.<sup>85</sup>

Realizing that these sporadic reports were inadequate, each house independently directed the Treasury Department to regularize and expand its trade reports. In January 1796, the House requested annual data from 1789 through 1795 on imports, distinguishing between those brought in on U.S. ships and on those of other nations. The next month, the Senate told the Treasury Secretary to give it an annual report that included statements on tonnage, exports, and imports, with breakouts by nation and commodity. In March 1797 and May 1798, the House ordered the Treasury Secretary to provide an annual report on imports for the previous year.<sup>86</sup> This system of regular, but separate and distinct, reports to the House and Senate remained in place until 1820.

In the meantime, the nation, its economy, and its well-being were growing by leaps and bounds.<sup>87</sup> In the context of remarkable growth, Congress revisited the idea of creating information-based industrial and tariff policies. In June 1809, it told Treasury Secretary Albert Gallatin to prepare “a plan . . . for the purpose of protecting and fostering the manufactures of the United States,” together with a description of the state of the nation’s manufacturing industries.<sup>88</sup>

Secretary Gallatin provided his report in April 1810.<sup>89</sup> It categorized manufacturing industries into those that can meet domestic demand, those that can meet “a considerable part” of domestic demand, and those for which progress has been made. It then assessed the condition and competitiveness of 19 industries. After a declaration of the importance of manufacturing growth to the nation, a general analysis of its competitive position, and the weakness of the argument that the government should not interfere in the workings of the market, the report recommended implementation of policies targeted to particular industries—bounties, moderate tariffs, and federal loans, as “want of capital is the principal obstacle to the introduction and advancement of manufactures in America . . . .”

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<sup>85</sup> See the report provided to the House on February 27, 1793, and the one given the Senate on February 28, 1793.

<sup>86</sup> For context, Congress passed tariff acts in 1789, 1790, 1791, 1792, 1794, 1795, 1797, 1800, and 1804.

<sup>87</sup> Between 1790 and 1810, population rose 84 percent (from 3.9 million to 7.2 million); real annual gross domestic product was up 164 percent; real GDP per capita climbed 44 percent; industrial production increased by 139 percent; and the real value of exports was 136 percent greater, and that for imports, 161 percent. Data sources include Census Bureau, *Historical Statistics of the United States: Colonial Times to 1970*, Government Printing Office, 1975, Series A 7 and U 190 and 193; Samuel H. Williamson, “What Was the U.S. GDP Then?” MeasuringWorth, 2016; and Joseph H. Davis, “An Annual Index of U.S. Industrial Production, 1790-1915,” *The Quarterly Journal of Economics*, vol. 119, no. 4 (November 2004), 1177–1215.

<sup>88</sup> *History of Congress*, May 31, 1809, 162.

<sup>89</sup> Albert Gallatin, “Manufactures,” communication to the House of Representatives, April 19, 1810, in *Proceedings of the 11th Congress*, 425.

Gallatin's report found that the quality of information available for the manufacturing plan was "partial and defective." "To obtain detailed and correct information," it recommended that Congress revise the just-passed Census Act of 1810 to add a census of manufactures. Congress agreed, amending the Census Act of 1810 to direct census officials to carry out "an account of the several manufacturing establishments and manufactures within their several districts, territories and divisions" under the direction of the Secretary of the Treasury. In this way, Congress created a second information-gathering effort to complement Treasury's annual trade reports.<sup>90</sup>

In March 1812, the House of Representatives authorized Secretary Gallatin to hire a person to analyze the results of the 1810 census of manufactures. Gallatin retained Tench Coxe, a political economist and former Treasury official who had written the first draft of Alexander Hamilton's 1791 report on manufactures. Coxe's report said that while the census had some useful information, it was "unavoidably imperfect." More specifically, "several of the states in the north and in the south" provided returns that were "manifestly and greatly defective."<sup>91</sup> So, unfortunately, the first census of manufactures was not particularly useful for public policy purposes.

In February 1815, the House directed Treasury Secretary Alexander Dallas to "report to Congress . . . a general tariff of duties proper to be imposed upon imported goods, wares, and merchandise . . ." A year later, Secretary Dallas forwarded a comprehensive, detailed proposal, "Tariff of Duties on Imports." The report declared that "the establishment of domestic manufactures" is "a chief object of public policy" and said the Embargo Act of 1807 and the War of 1812 made clear the inadequacies of U.S. manufacturers to provide weapons, ammunition, clothing, and "the comforts of living." Recognizing the lack of "detailed and accurate information" available from the 1810 Census, the report divided manufactured products into three categories: those that can meet domestic demand, those that have the potential to meet domestic demand, and those for which the nation is dependent on foreign suppliers. It proposed prohibitions or very high tariffs on the first class, milder tariffs on the second class (determined on a case-by-case basis), and no tariffs on the third class.<sup>92</sup> Congress approved a version of the Dallas proposal in April 1816. The Tariff of 1816 was the first one with the primary, rather than secondary, aim of promoting U.S. manufacturing.

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<sup>90</sup> The 1810 census of manufactures was the first in the series of decennial and quinquennial business censuses that continues to the present day.

<sup>91</sup> Tench Coxe, *A Statement of the Arts and Manufactures of the United States of America, for the Year 1810*, Philadelphia: A. Cornman, June 1814, liii. For context, Congress revised tariffs in 1807, 1808, 1812, 1813, 1815, and 1816.

<sup>92</sup> Alexander James Dallas, "Tariffs of Duties on Imports," communicated to the House of Representatives, February 13, 1816.

As it debated tariff bills, Congress realized that the resolution-mandated annual trade statistic reports from the Treasury Department were not adequate for its needs. In December 1819, Senator Nathan Sanford of New York offered a report from the Senate Committee of Commerce and Manufactures that described the deficiencies of current commerce and navigation statistics and proposed a more comprehensive and directed approach.

At present, the duty of preparing and rendering the annual statements of exports and imports depends merely upon the separate resolutions of the Senate and House of Representatives . . . . It is only in those resolutions that any account of the matters required to be stated concerning the exports and imports can be found; and those resolutions are very general and loose in their description of the facts which they require. The subjects which are proper to be stated should be defined by law; and the duty of compiling and rendering the annual statements should be imposed upon proper officers by law. A suitable and permanent system, adequate to the objects proposed, should be established. When this shall be done, a complete report of facts, showing the state of our commerce with every foreign country, and with all the world, in each year, may be annually laid before Congress.<sup>93</sup>

On the basis of Sanford's report, in early 1820 Congress directed the Treasury Secretary to provide an annual report on U.S. exports, imports, and navigation, with detail by article and nation and with consistent approaches to valuation. The report was to include duty-free imports, which had not been reported previously.<sup>94</sup> Immediately afterwards, Congress mandated a second census of manufactures as part of the Census Act of 1820, though this time under the auspices of the Secretary of State.<sup>95</sup>

The implementation of both efforts was problematic. While the Treasury Department created a Division of Commerce and Navigation to carry out Sanford's proposal, the reports suffered from omissions, inconsistent methods, and human error.<sup>96</sup> In addition, the results of 1820 census of

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<sup>93</sup> Senate Committee of Commerce and Manufactures, *Statistical Accounts of Commerce and Navigation*, communicated to the Senate, December 20, 1819.

<sup>94</sup> Sixteenth Congress, sess. I, Ch. XI, "An Act to provide for obtaining accurate statements of foreign commerce of the United States," signed February 10, 1820.

<sup>95</sup> In December 1819, President James Monroe, in his annual address to Congress, had asked for guidance on manufacturing policy.

<sup>96</sup> These difficulties worsened as the amount of trade, and trade records, grew dramatically over time. John Cummings, "Statistical Work of the Federal Government of the United States," *The History of Statistics: Their Development and Progress in Many Countries*, edited by John Koren (Washington, DC: Macmillan Company for the American Statistical Association, 1918), 573–689. The 1821 report was 165 pages long; the 1867 report, 704 pages. The clerical records serving as the basis for the 1867 report came to 10,404 pages. That said, the Census Bureau has been able to construct a consistent data series from 1821 forward (evidenced in *Historical Statistics of the United States: Colonial Times to 1970*, Government Printing Office, 1975, Series U 187–200).



manufactures were not usable for public policy purposes.<sup>97</sup> Disappointed, Congress did not mandate a manufacturing census for 1830.

In January 1832, the House returned once more to a plan to promote U.S. manufacturing.<sup>98</sup> It directed the Treasury Secretary to collect comprehensive information on manufacturing and recommend a tariff bill based on the findings.<sup>99</sup> Secretary Louis McLane provided a report and draft bill in April. In the report's introduction, he noted the problem of incomplete information, which he attributed to poor response rates.<sup>100</sup> While McLane's proposed bill sought to address Southern concerns regarding the Tariff of 1828 ("The Tariff of Abominations"), Congress scaled back his recommendations and in July 1832 passed a tariff bill more attuned to Northern interests. This led the South Carolina legislature to declare the tariff law null and void, bringing about the Nullification Crisis.<sup>101</sup>

In his annual message to Congress in 1838, President Martin Van Buren asked if the decennial census "might not be usefully extended by causing it to embrace authentic statistical returns of the great interests specially entrusted to or necessarily effected by the legislation of Congress."<sup>102</sup> For the 1840 Census, Congress reinstated the manufacturing census and authorized a census of agriculture for the first time. Once more, however, design and implementation problems led to unsatisfactory results.<sup>103</sup>

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<sup>97</sup> "The deficiencies were attributed to insufficient funds to pay the marshals and the fact that many establishments apparently neglected (or refused) to provide the required information." Census Bureau, *History of the 1997 Census*, Washington, DC: Government Printing Office, 2000, B-3.

<sup>98</sup> Since the last time Congress sought a plan, U.S. industrial production had tripled. Davis, *op. cit.*, Table III.

<sup>99</sup> "Resolved, That the Secretary of the Treasury be directed to obtain information as to the quantities and kinds of the several articles manufactured in the United States during the year, particularly those of iron, cotton, wool, hemp, and sugar, and the cost thereof; and also the quantities and cost of similar articles imported from abroad during the same year; and that he lay the same before this House as early as may be practicable during the present session of Congress, together with such information as he may deem material, and such suggestions as he may think useful, with a view to the adjustment of the tariff, after the payment of the public debt." *Register of Debates in Congress*, House of Representatives, January 19, 1832, 1585. Congress had revised tariffs in 1824, 1828, and 1830.

<sup>100</sup> "These returns have but recently begun to come in, and have yet been only partially received; but rather than incur greater delay, at this advanced period of the session or longer disappoint the expectations of the House, the undersigned has now the honor to communicate the returns as far as they have come to hand, and will continue to transmit others as they may be received at the department." *Report of the Secretary of the Treasury, on the Adjustment of the Tariff of Duties on Imports*, April 27, 1832, 1.

<sup>101</sup> Congress sought to allay that crisis by passing the Compromise Tariff of 1833 that revised duties downward.

<sup>102</sup> Martin Van Buren, "Second Annual Message," December 3, 1838.

<sup>103</sup> "The attempts to collect economic data in the censuses of 1810, 1820, and 1840 are considered to be of little value except as indicators of the gross outlines of manufacturing development. The inauspicious beginnings of the economic census were the result of several interrelated factors." These included too few federal marshals, insufficient enumerator training, differing enumerator practices, uncooperative businesses, and inadequate business records. Census Bureau, *History of the 1997 Census*, Washington, DC: Government Printing Office, 2000, B-3-B-4.

More than 50 years after the nation's founding, then, Congress continued to have difficulty getting adequate information for tariff-setting and manufacturing policy-making. In the 1840s, it directed the executive branch to implement two new efforts. Together, these significantly expanded the subjects on which information was collected. One also included the new dimension of economic analysis. Both efforts seemed to begin well, then fell apart.

Congress recognized that effective tariff-setting required it to learn about the tariff laws of other nations. In September 1841 and January 1842, the House directed the Secretary of State to provide "a statement of the privileges and restrictions of commercial intercourse of the United States with all foreign nations" and "a table exhibiting a comparative statement between the tariffs of other nations and that of the United States." Secretary of State Daniel Webster delivered the mandated report in March 1842. Appreciating what it received, Congress passed a law in August 1842 mandating the Secretary of State to prepare an annual statement of all changes and modifications in foreign commercial systems, whether by treaties, duties on imports and exports, or other regulations. However, the State Department did not produce the required annual report after 1844.

In January 1844, Representative Zadock Pratt of New York convinced the House to create a select committee to look into establishing a central statistical bureau in the Treasury Department "whose duty it should be to take charge of the statistics of the country; that is, gather all the information of that character, as connected with the agriculture, commerce, and manufactures of the country, and to reduce the same to convenient tabular form, so systemized and simplified as to make it easy of reference."<sup>104</sup> Pratt observed that "The sessions of Congress are protracted in some measure, in consequence of the delay in procuring information from the departments, upon which to base legislation."<sup>105</sup>

In March 1844, the Pratt committee report laid out the need for and multiple advantages of a new central statistics bureau. It said the proposed bureau, essentially the primary federal statistical agency, would maintain a data and information repository from which it could produce reports "at a moment's notice" on whatever subjects Congress desired, including, and particularly, trade.

Such a bureau would, in a comparatively short time, furnish correct information respecting the commercial, the financial, the navigating and shipping, the manufacturing, and the agricultural interests of the country; a digested body of facts relative to the revenue, the custom-house, the post-office, the land-office, and the Indian department; correct statements respecting the population, the expenses and

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<sup>104</sup> *Congressional Globe*, January 29, 1844, 204.

<sup>105</sup> *Ibid.*

details of the army and navy, the progress of internal improvements, the state of banks and other institutions, and of monetary affairs and exchanges; and, in short, a regular, connected and methodized arrangement of every subject to which facts and figures bear any relation, and which are in any way connected with the history, the progress and the condition, of the nation at large, and those of the various States and Territories.

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The duties of the bureau would extend to the arrangement, condensation, and elucidation, of *the statistics of foreign nations*, and to all the various branches of *international commercial intercourse*.<sup>106</sup> [Emphasis in original.]

While Congress did not to create a new statistics bureau, in June 1844 it authorized the Treasury Secretary to assign existing clerks to new duties of “collecting, arranging and classifying such statistical information as may be procured, showing or tending to show each year the condition of the agriculture, manufactures, domestic trade, currency and banks of the several States and Territories of the United States.” Further, Congress told the Treasury Department to provide an annual economic report every January.<sup>107</sup>

In 1845 and 1846, the Treasury Secretary provided Congress with an annual report on “Statistics of the United States.” However, as with the State Department’s commercial relations report, the Treasury Department did not produce the required update in subsequent years. A later Treasury report noted, “Probably the neglect of Congress to give adequate support to the enterprise, and the diversion of public interest to the war with Mexico, caused the suspension of efforts in this direction.”<sup>108</sup>

Building on its experience, Congress made progress on two fronts in the 1850s. The first was in the realm of statistical practice. For the 1850 Census, Congress engaged expert opinion in the rapidly advancing field of statistics and delineated in far greater legislative detail the scope and process of the census, including the creation of a census board. Innovations included firm confidentiality, explanation of the questions, and tabulation process improvements. Finally, the 1850 census of manufactures provided useful, comprehensive, and reliable data. With much

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<sup>106</sup> House of Representatives Select Committee, *Bureau of Statistics and Commerce*, March 8, 1844, 3.

<sup>107</sup> Twenty-Eighth Congress, sess. I, Joint Resolution No. 16, “A Joint Resolution authorizing the transfer of certain clerks in the Treasury Department,” June 15, 1844.

<sup>108</sup> U.S. Department of Treasury, *Report on the Bureau of Statistics of the Treasury Department*, 1877, 29. For context, Congress revised tariffs in 1836, 1841, 1842, and 1846 (Walker Act).

greater confidence, the federal government now was able to track the development of the nation's industries at a high level of detail and with a fair amount of accuracy.<sup>109</sup>

Second, realizing it was problematic to mandate reports without providing the capacity to produce them, Congress authorized the creation of a statistics office for the first time. In 1853, the House asked President Franklin Pierce to revive the annual State Department report on commercial relations. Secretary of State William Marcy provided the requested report in 1856. He said the report would have been more accurate and required less time and money to prepare if it could "have been committed to an organized and practised bureau of commercial statistics, promptly supplied by consular agents with all the requisite material from abroad."<sup>110</sup>

Congress agreed and created a new Office of the Superintendent of Statistics in the State Department to annually report to Congress on U.S. commercial relations. From 1857 forward, this office prepared an "Annual Report on the Commercial Relations between the United States and Foreign Nations." However, later evaluators said the annual report usually came out "many months after the subjects of which it treats had ceased to be of real value or particular interest to either the legislator or the commercial public of the country."<sup>111</sup>

In the mid-1860s, Congress significantly expanded the nature and breadth of federal resources devoted to providing information to guide economic policy in general and tariff-setting in particular. First, it created a temporary commission, then an office, to provide expert advice on revenue sources. Second, it established the first central economic statistics bureau.

The Civil War had triggered large increases in the federal government's need for revenue and the diversification of revenue sources to include internal revenue on par with tariffs.<sup>112</sup> In March 1865, Congress directed the Treasury Secretary to create a three-person commission to provide advice regarding revenue sources.<sup>113</sup> To chair the commission, Treasury Secretary Hugh

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<sup>109</sup> The index of industrial production (Davis, *op. cit.*) uses the census year 1849/1850 as the index base year (= 100). The Secretary of the Interior was responsible for the census from 1850 to 1900, the Department of Commerce and Labor in 1910, and the Department of Commerce thereafter.

<sup>110</sup> Cummings, *op. cit.*, 628.

<sup>111</sup> U.S. Department of Treasury, *Report on the Bureau of Statistics*, 1877, 23.

<sup>112</sup> The Tariff Act of 1857 had cut duties to their lowest point in some time. At the outset of the Civil War, Congress revised tariffs significantly upwards through the Morrill Tariff, passed in March 1861 after Southerners had resigned from Congress. Congress further revised tariffs in 1862, 1863, 1864, and 1865. The Civil War period also saw the introduction of the first U.S. income taxes, which ended in 1872.

<sup>113</sup> The commission was charged with researching and reporting on "the subject of raising by taxation such revenue as may be necessary in order to supply the wants of the government, having regard to and including the sources from which such revenue should be drawn, and the best and most efficient mode of raising the same, and to report the form of a bill." *Report of the United States Revenue Commission* (New York: D. Appleton & Co., 1866), 3.

McCulloch appointed David Wells, a 36-year-old budding political economist, trained as an engineer.<sup>114</sup> Congress did not prescribe the commissioners' qualifications.

The U.S. Revenue Commission's report, issued January 1866, focused in great detail on appropriate approaches to raising internal revenue. It also asserted that raising tariffs would inhibit national economic development, criticized the ad hoc tariff-making process, and recommended future tariffs be determined by experts employing statistical analysis. It did not provide specific recommendations on tariff levels. The commissioners complained at length about the lack of useful, reliable data:

One of the greatest difficulties encountered from the outset has been to obtain exact and comprehensive information; and the Commission, as the result of their experience, feel [*sic*] warranted in asserting that no full and reliable statistics concerning any branch of trade or industry in the United States, with possibly a few exceptions, are now or have ever been available.

The census of 1860, only made available for detailed reference some four or five years after its enumeration, had been to the Commission of but little service. . . .

The returns furnished by the Treasury Department do not, in any degree, correspond with those furnished to the Commission by the trade or published in the various commercial circulars; and these latter, furthermore, do not always agree with each other.<sup>115</sup>

Congress found the Revenue Commission's report useful and in July 1866 mandated this form of analysis on an ongoing basis. Specifically, Congress created the Office of the Special Commissioner of the Revenue in the Treasury Department to provide advice to Congress on tax and tariff rates, revenue collection methods, and, more broadly, "such other facts pertaining to the trade, industry, commerce, or taxation of the country . . . conducive to the public interest." David Wells was appointed by Secretary McCulloch to be the Special Commissioner.

In the same month, and 22 years after Representative Pratt's proposal, Congress created a new Bureau of Statistics in the Treasury Department as part of the Tariff Act of 1866. In the debate over the law, Representative James Garfield of Ohio and Representative John Kasson of Iowa expressed strong concerns about the inadequacies of existing statistics for guiding tariff-setting, consistent with the Revenue Commission's observations:

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<sup>114</sup> Wells was brought to President Lincoln's attention in 1864 with a public address on "Our Burden and Our Strength," regarding the nation's abilities to raise revenue and pay debt. Fred Bunyan Joyner, *David Ames Wells: Champion of Free Trade* (Cedar Rapids: The Torch Press, 1939), 29.

<sup>115</sup> "Report of the United States Revenue Commission," 1866, 6 and 76.

Mr. Garfield: The Census Bureau is as valueless for all practical purposes of legislation as any bureau of statistics could well be. We really have no Census Bureau in any efficient or potential sense. We have not yet received the results of what was taken as the census of 1860, and the whole condition of our affairs has so changed since then that the report on the census of 1860 will be almost valueless. But what is more, the Census Bureau never has furnished statistics at all. We do get something from them about manufactures and something on the subject of imports and exports, but we have nothing on earth that is called for in the consideration of propositions of this kind. Let the gentleman look at it for a moment. I hold that the excuse which the Committee of Ways and Means is compelled to make and is entitled to make to the House and the country for not having perfected much earlier in the session a complete tariff bill is because they have had to work in the original quarry and have had nothing furnished to their hands.

The revenue commission . . . did nobly for us in the internal revenue department; but they had not time to go forward and perform the immense work of preparing anything reliable or complete on the subject of imports. . . .

Now when a question comes up here and I am asked to say whether the tariff on a given article shall be ten per cent. or a hundred per cent., I want to know all the circumstances and all the facts about the article; where it is produced, whether we can produce it or not, what price it bears in the market, what capital is invested in producing it, and all the other circumstances connected with it. But now I am compelled to come here with empty hands, and I cannot from all the volumes of our Library find out what I desire to know. . . .

Mr. Kasson: The fact is that the Census Bureau does not now exist. We have made no appropriations for it for two years past, and its duties are now being wound up by the officers and clerks of the General Land Office in the Department of the Interior. And thus it is that the statistical bureau connected with the census, or established for that purpose, has ceased to exist.

And in regard to other officers still existing, charged with the aggregation and presentation of such statistics, I have to say that the statistics for the year 1865, which we ought to have had one year ago, are not even laid before Congress. Our statistics in regard to commerce and navigation are so far behind also as to be nearly useless. . . . Now, sir, no legislation touching the commerce of the country is of any account unless it rests upon statistics of our own production and commerce and the production and commerce of other countries. And those statistics should be recent, as gentlemen

around me remark, in order that we may keep up in the great commercial race with the other nations of the world.”<sup>116</sup>

Congress came to the conclusion that it needed to build new institutional capacity to generate the desired information. The law charged the new Bureau of Statistics with preparing a series of detailed reports, including:

- Monthly reports of U.S. exports and imports.
- Annual statistics on commerce, navigation, exports, and imports.
- An annual statement of vessels registered, enrolled, and licensed under the laws of the United States.
- An annual statement of all merchandise passing in transit through the United States to foreign countries.
- Annual statistics of the manufactures of the United States, their localities, sources of raw material, markets, exchanges with the producing regions of the country.
- transportation of products, wages, and other conditions affecting their prosperity.<sup>117</sup>

To be first director of the Bureau of Statistics, Secretary McCulloch appointed Alexander Del Mar, a 30-year-old civil engineer, financial journalist, and prolific writer on monetary systems. Del Mar started work on September 1866.

Within a few weeks, then, Congress created two offices to inform its economic policy decisions, particularly with regard to tariffs. However, the two offices did not work out as Congress had hoped. The reasons are multiple and reflect aspects of the Congressional learning curve.

One aspect was personal. The two McCulloch appointees—Wells and Del Mar—were quite similar in terms of personal characteristics, approaches to their respective jobs, and their experiences with the reactions of the powers-that-be to their approaches. Each was in his thirties and technically trained; came to economics as a young man; produced publications that caught the attention of those in power; was very smart, ambitious, entrepreneurial, opinionated, and public-spirited; provided cogent, highly detailed analyses; and pulled few punches in doing so, to the point of political insensitivity. Both lost their jobs largely as a result of the last tendency.

Between December 1866 and December 1869, Special Commissioner Wells delivered four annual reports to Congress that were remarkable for their breadth, depth, aspirations, and clarity. They contained a rudimentary combination of data and analysis now seen in present day efforts of the Bureau of Economic Analysis, the Census Bureau, the Council of Economic

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<sup>116</sup> *The Congressional Globe*, July 9, 1866, 3693–94.

<sup>117</sup> Thirty-ninth Congress, sess. I, Ch. 298, “An Act to protect the Revenue, and for other Purposes” (*sic*), Section 13.

Advisers, the Federal Reserve, and the International Trade Commission. At the same time, these reports differ from anything written today in that they offered a regularly updated national economic development plan, with strategies and approaches by industry.

Wells' 1869 report, for example, included estimates of national economic activity (such as gross annual product and present value of real and personal property); data on production by industry; analysis of federal finances; review of population trends, including immigration; overviews of industrial development by region; assessment of the factors supporting and impeding national economic development; a review of the state of agriculture; discussions of trade, natural resource utilization, the distribution of net product of labor and capital, and the elasticity of revenue; the importance of basing a currency on specie (e.g., gold, silver), not fiat (law); and, at length, "remedies" in the realms of currency, taxation, the tariff, and revenue administration. Analyses and recommendations were made regarding tariffs for commodities including copper, leather goods, iron, salt, coal, lumber, wool and woolens, firewood, hemp, glass, paper, chemicals, liquor, hats, and gunny cloth and bags.<sup>118</sup>

To the displeasure of many in Congress, Wells was direct and emphatic regarding the need for U.S. currency to be based on specie and the need to reduce tariffs to promote economic well-being. On the latter subject, Wells forcefully wrote that many tariffs served the parochial interests of industry, not the nation.<sup>119</sup>

Wells' views did not accord with those of the overwhelmingly Republican majorities in Congress. He was pilloried by several members and Congress discontinued his office in 1870.<sup>120</sup> Available records do not make clear why Congress did not ask Treasury Secretary George Boutwell to replace Wells with someone with protectionist views. Perhaps it was concerned

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<sup>118</sup> Office of the Special Commissioner of the Revenue, *Report of the Special Commissioner of the Revenue for 1869*, U.S. Department of the Treasury, December 1869.

<sup>119</sup> For instance: "[I]n carrying out . . . the idea of protection, but one rule for guidance would appear to have been adopted for legislation, viz: the assumption that whatever rate of duty could be shown to be for the advantage of any private interest, the same would prove equally advantageous to the interests of the whole country. The result has been a tariff based upon small issues rather than upon any great national principle; a tariff which is unjust and unequal; which needlessly enhances prices; which takes far more indirectly from the people than is received into the treasury; which renders an exchange of domestic for foreign commodities nearly impossible; which necessitates the continual exportation of obligations of national indebtedness and of the precious metals; and which, while professing to protect American industry, really, in many cases, discriminates against it. But as it is facts not assertions that are wanted, let us examine the existing tariff and see if the facts make good the assertions. One of the first things that an analysis will show is, that every interest that has been strong enough or sufficiently persistent to secure efficient representation at Washington has received a full measure of attention, while every other interest that has not had sufficient strength behind it to prompt to action has been imperfectly treated, or entirely neglected. Thus let any one glance at the great departments of wool and iron, and he will find that the duties on all the leading products have been carefully increased, harmonized, and adjusted, in a great degree, in accordance with the wishes of those interested." Office of the Special Commissioner of the Revenue, *Report of the Special Commissioner of the Revenue for 1868*, U.S. Department of the Treasury, January 1869, 34.

<sup>120</sup> For context, Congress revised tariffs in 1866, 1867, 1869, 1870, 1872, and 1875.



that any advisor able to speak his mind might unexpectedly make trouble by calling into question tariff policies in the economic interests of Republican Party supporters. In any case, Congress decided it no longer wanted a dedicated advisor on the subject of tariffs.

Alexander Del Mar suffered a similar fate, although his office lived on (and ultimately led to today's Bureau of Economic Analysis). In Del Mar's first full annual report, he criticized in detail and at length multiple aspects of the Treasury Department's statistical operations created to fulfill the 1820 and 1844 laws. Noting his findings were consistent with those of the U.S. Revenue Commission, he cited incomplete and inaccurate data, inconsistent and illogical accounting practices, a large backlog of annual statistics to be completed, discrepancies in import and export totals reported by various Treasury offices, lack of legal authority to require businesses to provide information, and inefficient management and distribution of staff resources. He also said that he did not have enough staff to collect the manufacturing statistics required by law.<sup>121</sup> He described the many ways that he reorganized staff and practices to meet Congressional mandates for the trade data.

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<sup>121</sup> Alexander Del Mar, "First Annual Report of the Director of the Bureau of Statistics," *Report of the Secretary of the Treasury on the State of the Finances for the Year 1867* (Washington, DC: Government Printing Office, 1868), 240–55. Relevant quotes:

- [I]t was painfully evident that, at least so far as regards the commerce and navigation tables, instead of being relied upon as authority in such matters, our official reports, though distributed gratuitously, and in large numbers, were but rarely quoted, except to be confuted by the less pretentious, but obviously more correct, statistics of boards of trade, chambers of commerce, and other local organizations. (241)
- Numerous statistical tables had been called for both by law and regulation. Of these, but few—the import, export, re-export, indirect trade, and shipping tables—were regularly compiled and published; and these few were faulty, though to what extent faulty was not known, even by those who compiled them. A careful scrutiny has resulted in the discovery that in the imports were included . . . a portion of the products of the State of Maine—as though the same had been received from foreign countries . . . (243)
- [T]he custom-houses were given to the strangest errors—errors, too, for which the commerce and navigation division of the Register's office was in no way responsible. . . . As for attempting to portray the chronic confusion of arrangement and arithmetical inaccuracy that, with little or no exception, distinguished all the returns, it were [*sic*] useless. (244)
- The director would have wished at the outset to take the accounts rendered by the various offices of the government, and "digest and arrange" them for the use of the executive departments, and the houses of Congress, and also to obtain and publish statistics of manufactures, mines, and the other important industrial interests of our country; but, for some time yet, this will be impracticable. The law provides neither mode nor means for the director to obtain any original statistics, except those of foreign commerce. This as to one point; as to the other: to collate and arrange statistics requires officers and clerks qualified in each special branch of knowledge. Such persons are not easily found; and a single effort convinced me of the hopelessness of creditably accomplishing tasks of this general character without trained aid. The law made the compilation of the statistics of commerce and navigation the especial duty of the director, and this of itself was so heavy a task, that it occupied all the clerical force which the department could well assign for this purpose There were thirty-one male, and fifteen female clerks employed in this bureau on the 30th of September last. To attempt a systematic collation and digest of the publications of the other offices of the government, with so slight a force as this, was out of the question. (245)

While complaining about insufficient resources to fulfill legislated mandates, Del Mar initiated several “out-of-scope” statistical efforts, including annual population estimates by region, “the price of wages in fifty-four different occupations, and in over three thousand localities,” and an estimate of the current cotton crop. On the basis of his first year’s accomplishments, he suggested that his unit was best suited to conduct the 1870 Census.<sup>122</sup>

In February 1868, a few weeks after Congress received Del Mar’s report, a resolution was filed in Congress to eliminate the position of director of the Bureau of Statistics, with management responsibility transferred to a new Deputy Special Commissioner of Revenue reporting to David Wells, who was still in Congress’s good graces. The resolution was filed by the Joint Committee on Retrenchment, established in 1866 to recommend ways to reduce federal spending. The proposed action was approved in July 1868 as part of the annual appropriations bill, with the director’s position to be terminated as of January 1, 1869.

While Del Mar’s job was terminated ostensibly to save money, Congress created the new Deputy Special Commissioner position at the same time, so it seems other reasons were at work. One observer suggests that Del Mar was fired because his open criticism displeased his superiors.<sup>123</sup> Others note that Del Mar’s strong pro-fiat currency opinion was at odds with the Wells’ equally fervent pro-specie view.<sup>124</sup> One asserts Del Mar was fired because it was thought his cotton crop estimates triggered a speculative bubble.<sup>125</sup> In any case, several members of Congress publicly said Del Mar was not appropriate for the job.<sup>126</sup> Contrary to these negative views, a 20th-century observer thought that Del Mar had instituted a scientific approach that provided the basis for modern statistical agency practice.<sup>127</sup>

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<sup>122</sup> “[I]t appears evident that the next decennial census could be placed in no better hands than those of the Treasury Department. The permanent nature of the internal revenue organization affords time and opportunity for the necessary statistical instruction and discipline to be given and acquired, and would insure greater accuracy in the result, and entail less expense upon the country.” *Ibid.*, 249. At that time, the decennial census was the responsibility of the Interior Department.

<sup>123</sup> Cummings, *op. cit.*, 586.

<sup>124</sup> Joseph Aschheim and George S. Tavlas, “Academic exclusion: the case of Alexander Del Mar,” *European Journal of Political Economy*, vol. 20 (2004), 31–60.

<sup>125</sup> George S. Tavlas, “Retroview: the Money Man,” *The American Interest*, vol. 7 no. 2 (October 3, 2011).

<sup>126</sup> Remarks of Senator Charles Sumner of Massachusetts and Senator Roscoe Conkling of New York, *The Congressional Globe*, June 22, 1868, 3355, 3359.

<sup>127</sup> “[T]he fundamental techniques associated with 20th century statistical administration were developed during the quarter century following the civil war. This administration and methodological development was chiefly an outgrowth of the establishment of a statistical bureaucracy directed by professional, though as yet self-trained, statisticians. . . . The formative statistical profession was fortunate in the first choice for a director of the Bureau of Statistics. Alexander Del Mar was intractable, but a lesser man might have set back the bureaucratic development of statistics for years. . . . Del Mar had a dogmatic faith in the statistical or inductive method of arriving at immutable laws of economic behavior.” Meyer H. Fishbein, “Early business statistical operations of the federal government,” National Archives, 1956, 21–23.

In any case, in January 1869 Del Mar was replaced by the new Deputy Special Commissioner of Revenue, 28-year-old Francis Amasa Walker, Civil War veteran, journalist, and future president of the American Statistical Association, the American Economic Association, and the Massachusetts Institute of Technology. Walker was in the job for little more than a year when he was placed in charge of the 1870 Census. Once the Office of the Special Commissioner of the Revenue was eliminated, George Young, a career official with a plodding writing style quite different from that of Del Mar and Walker, became the new chief of the Bureau of Statistics.

At the same time Congress was discussing eliminating Del Mar's position as part of the retrenchment effort, it also considered a proposal to shut the State Department's Office of the Superintendent of Statistics. Some backers of this idea sought to transfer the functions to the Treasury Department's Bureau of Statistics on the grounds that the federal government should have one statistics office. The proposal did not pass and the State Department statistical office remained in place.<sup>128</sup>

A few observations are in order regarding the principal actors in this drama. Quite different from what one expects in the 21st century, Wells and Del Mar appeared free to speak their minds and act without much constraint from the Treasury Secretary or the White House. It may be that the Treasury Secretary thought Congress set up these offices to advise and inform it and he was simply giving them an administrative home. After establishing offices to provide information to guide tariff-setting, Congress seemed to dislike what it had created and legislated the removal of Del Mar, came close to eliminating the State Department Statistics Office, and terminated Wells' unit. Congress, not the Treasury Secretary, handled management oversight. While Congress clearly viewed the problems as specific to two individuals, its remedy was to legislate organizational changes.

In October 1869, Deputy Special Commissioner Walker wrote Congress that he decided to focus the work of the Bureau of Statistics entirely on commerce and navigation accounts and step back from estimates of population, manufacturing, and transportation. Walker said that the bureau's specified duty to collect manufacturing statistics was "permissive rather than mandatory" because data collection was useless in the absence of a law requiring businesses to submit data. A second reason for a moratorium was the forthcoming 1870 census of manufactures, which he thought might be used as the basis for intercensal research. He

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<sup>128</sup> *The Congressional Globe*, June 22, 1868, 3355-60, and June 23, 1868, 3389-94.

expressed hope that increased public confidence in federal statistical efforts would allow manufacturing data collection to recommence at a future date.<sup>129</sup>

In June 1877, soon after taking office, Treasury Secretary John Sherman appointed an internal commission of three senior Treasury officials to review the operations of the Bureau of Statistics. While Sherman's letter of appointment did not indicate the nature of his concerns, the commission found a disorderly state of affairs, which it said affected its approach and ability to gather information:

Your Commission ventured to follow a somewhat unusual course in taking . . . [its] testimony privately, for more than one reason. It will suffice to say that its preliminary and personal investigation at the rooms of the Bureau developed such a state of impending disorganization in the office itself and so many antagonisms in its *personnel*, that the Commission unhesitatingly and unanimously decided that no other way remained by which it could learn the whole truth. . . .

Great difficulty has been experienced by the Commission in ascertaining what action, legislative and otherwise, has been taken by the Government towards obtaining accurate statistical information, owing to the imperfect system of arranging and indexing the documents annually issued under the authority of Congress.<sup>130</sup> [Emphasis in original]

While the commission was pleased with the statistical skills it found at the bureau, it was disturbed by several problems:

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<sup>129</sup> "The act approved July 28, 1866, makes it the duty of the head of the bureau to 'collect, digest, and arrange, for the use of Congress, statistics of the manufactures of the United States, their localities, sources of raw materials, markets, exchanges with the producing regions of the country, transportation of products, wages, and such other conditions as are found to affect their prosperity.' This duty, however, I have judged to be dependent upon circumstances, and the law to be, to a considerable extent, permissive rather than mandatory. I cannot think that it was intended that the director of the bureau . . . should persist in efforts to secure such statistics, after it had been fully proved that the absence of any legal right to exact information and the general temper of the corporations and individuals, who are expected voluntarily to furnish the material of such statistics, render it impossible to secure results worthy of publication. This latter condition I have found so distinctly existing as to justify the temporary cessation of efforts to accomplish the intention of Congress in this respect. So little had the conduct of the bureau commanded the confidence of the business community generally, that not seven per cent. in number, nor probably one per cent., if capital and production were counted, of the manufacturers of the country made any response to the calls for information, by which it was intended to enumerate the industry of the country, in anticipation of the ninth census. Under these circumstances, to persist in the efforts was so manifestly a waste of public money, that no hesitation was felt in discontinuing every enterprise of this nature." Francis A. Walker, "Report of the Deputy Special Commissioner of the Revenue in Charge of the Bureau of Statistics," U.S. Department of Treasury, *Report on the Secretary of the Treasury on the State of Finances for the Year 1869*, Washington, DC: Government Printing Office, 1869, 339–42.

<sup>130</sup> U.S. Department of Treasury, *Report of the Commission on the Bureau of Statistics of the Treasury Department*, Washington, DC: Government Printing Office, 1877, 6.

- Poor data—This situation had several causes, including indifferent customs house personnel, incomplete administrative record systems, and the refusal of manufacturers to return surveys.
- Mismanagement—The director was not overseeing a key division.
- Malfeasance—Senior staff, including the director, were doing private work on public time.
- Duplication of tasks carried out by other federal offices.
- The continued absence of manufacturing data collection.<sup>131</sup>

After the commission made its report, the data agency drama seemed to fade and, very importantly, the federal government’s capacity for statistical analysis substantially grew. The 1880s saw the advance of data collection and statistical methods, the professionalization of the federal workforce, the development of workable administrative processes, and better understanding how Congress could facilitate the generation of useful data, analysis, and advice.

In May 1882, Congress again sought expert advice on tariff-setting, creating a temporary nine-member Tariff Commission, appointed by the President, to “investigate all the various questions relating to the agricultural, commercial, mercantile, manufacturing, mining, and industrial interests of the United States, so far as the same may be necessary to the establishment of a judicious tariff, or a revision of the existing tariff, upon a scale of justice to all interests . . . .”<sup>132</sup> The Commission provided Congress with a voluminous report in December 1882, in which it, similar to David Wells, called for a reduction in tariffs:

Early in its deliberations the Commission became convinced that a substantial reduction of tariff duties is demanded, not by a mere indiscriminate popular clamor, but by the best conservative opinion of the country, including that which has in former times been most strenuous for the preservation of our national industrial defenses. Such a

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<sup>131</sup> Regarding the last point: “Although it was not contemplated by General Walker that the suspension of efforts to gather social, industrial, and miscellaneous statistics would be permanent, but only temporary, and that, with better methods and under more favorable conditions, they might be resumed with reasonable prospect of success, and although the present chief of the bureau has, from time to time, in his annual reports expressed interest in the subject, and regretted the absence of legislation which he deemed necessary before full and satisfactory information could be obtained, yet eight years have passed without any attempt having been made to resume those efforts . . . . Nor is it certain that the administration of the bureau during these years has been, in all respects such as to command that degree of public confidence regarded by General Walker as so essential a condition of success in this field of statistical inquiry, or that the “more favorable conditions” which, in 1869, he seemed to think were then in the near future, have been at any time sufficiently realized to justify the renewal of efforts which have remained so long suspended or abandoned. If true, the fact is greatly to be deplored, for the time seems near at hand when questions of an economic character, requiring for their proper consideration accurate statistical information in regard to industry, population, and social condition, will absorb the attention of Congress and the people to a greater extent than ever before, while almost nothing is being done to provide that information.” *Ibid.*, 72.

<sup>132</sup> *Report of the Tariff Commission* (Washington, DC: Government Printing Office, vol. 1, 1882), 1.

reduction of the existing tariff the Commission regards not only as a due recognition of public sentiment and a measure of justice to consumers, but one conducive to the general industrial prosperity, and which, though it may be temporarily inconvenient, will be ultimately beneficial to the special interests affected by such reduction.<sup>133</sup>

The Commission based its recommendations on witness opinion, not statistics, which remained insufficient to the task. In January 1883, the House Ways and Means Committee asked the Treasury Secretary to provide an analysis of the impacts of the Tariff Commission's recommendations. Statistics Bureau Chief Joseph Nimmo responded that the task was impossible because of differing merchandise classifications:

The report of the Tariff Commission, the debates in Congress, and the testimony of appraisers of customs and of men whose studies and practical experience have afforded them knowledge of the technical and practical questions invoked in the adjustment of the tariff, clearly indicate that it is impossible to prepare a tabular statement showing fully and in detail the comparative results of the present tariff and of the provisions of the bill proposed by the Tariff Commission. . . .

Both the Tariff Commission bill and the Ways and Means Committee bill vary from the present tariff with respect to the classification of merchandise. In regard to many articles, it is utterly impossible to institute any comparison between either of those bills and the present law.<sup>134</sup>

The Tariff Commission report made regular reference to two increasingly popular ideas in economic thinking: that tariffs should be set to equalize foreign and domestic production costs, and that this could be done "scientifically"—that is, on the basis of data, not politics. The Tariff Commission said it did not have the capacity to scientifically analyze tariffs and that, in any case, scientifically set tariffs would be enormously disruptive of markets in the near term.

With the expansion of U.S. industry and the working class in this period, tensions between capital and labor increased. As one response, several states created labor statistics bureaus to gather information to inform public opinion and policy. Congress followed suit in 1884 and set

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<sup>133</sup> *Ibid.*, 5.

<sup>134</sup> Bureau of Statistics, *Comparative Duties and the Relation of the Treasury Department to Tariff Legislation*, 1883, 4–5. With control of the House set to shift to the Democrats as a result of the 1882 midterm elections, in March 1883 the lame duck Republican Congress passed the "Mongrel Tariff," a mixture of tariff increases and modest reductions.

up a Bureau of Labor in the Department of the Interior. In January 1885, Carroll Wright, head of the Massachusetts labor statistics bureau, became the first U.S. Commissioner of Labor.<sup>135</sup> However, labor interests were unhappy with the narrow scope of the new bureau and sought to have it transformed into an independent Department of Labor. In 1888, Congress created the new department, without Cabinet status, but with Wright still at the helm.<sup>136</sup>

A few years earlier, Wright had presented a paper in which he described the methods by which tariffs could be set scientifically.<sup>137</sup> As Congress was crafting the legislation to establish the Department of Labor, Wright convinced it to include a mandate for the new department to produce data for scientific tariff-setting:

[T]he Commissioner of Labor . . . is specially charged to ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of the manufacturers and producers of such articles; and the comparative cost of living, and the kind of living.<sup>138</sup>

Congress also told the Labor Department to prepare the industrial reports that the Treasury Department was not providing: “[The Commissioner] shall also establish a system of reports by which, at intervals of not less than two years, he can report the general condition, so far as production is concerned, of the leading industries of the country.”

To fulfill the charge to provide data for scientific tariffs, Wright published two massive reports—one in 1890 on iron, steel, and coal and one in 1891 on textiles and glass. Each report covered the costs of production, wages, and cost of living. These industries were chosen because they represented a substantial proportion of dutiable imports. However, according to historian Joseph Kenkel, “Wright’s reports demonstrated the near futility of any attempt to construct a tariff system that would equalize the difference between domestic and foreign

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<sup>135</sup> In a letter to the Interior Secretary soon after his appointment, Wright “pointed out that the Bureau could not be expected to solve industrial or social problems, but that ‘its work must be classed among educational efforts,’ and expressed the conviction that, by judicious investigation and fearless publication of results, it ‘should enable the people to comprehend more clearly and fully many of the problems which now vex them.’” Cummings, *op. cit.*, 635.

<sup>136</sup> The new department’s overall mission was “to acquire and diffuse among the people of the United States useful information on subjects connected with labor.”

<sup>137</sup> Carroll D. Wright, “The Scientific Basis of Tariff Legislation,” address to the American Social Science Association, September 10, 1884.

<sup>138</sup> Fiftieth Congress, sess. I, Chapter 389, 1888.

costs. He presented a mass of statistics arranged in hundreds of tables but from these one could not compute a precise figure that would represent a manufacturer's advantage."<sup>139</sup>

Regarding the department's charge to provide a biannual overview of U.S. industries, Wright said he was postponing that duty until after the completion of the 1890 Census, emulating Francis Walker's action of 20 years earlier. It does not appear that Wright ever fulfilled this charge.

While Wright's reports demonstrated the great difficulty of scientifically setting tariffs, "they did not discourage belief in the hypothesis" that it was possible to do so.<sup>140</sup> The concept of scientific tariffs, and their attractiveness as a means to bypass politics, remained central in Congressional tariff-setting discussions.

In the meantime, Wright's office pursued an additional line of tariff-related inquiry requested by the Senate Finance Committee, chaired by Nelson Aldrich of Rhode Island. In March 1891, the Senate resolved:

That the Committee on Finance be . . . authorized and directed . . . to ascertain in every practicable way, and to report from time to time to the Senate, the effect of the tariff laws upon the imports and exports, the growth, development, introduction, and prices of agricultural and manufactured articles, at home and abroad; and upon wages, domestic and foreign.<sup>141</sup>

The committee sought to use statistics to determine the effect of tariffs on consumer welfare. At the request of the Finance Committee, the Department of Labor produced a series of large volumes providing time series on retail prices and wages (1892) and wholesale prices and wages (1893). However, the Senate Finance Committee did not attempt to use these data to carry out its charge. It indicated: "Any attempt to trace the results shown by the report to their original causes would undoubtedly lead to a divergence of opinion among the members of the

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<sup>139</sup> Joseph F. Kenkel, *Progressives and Protection: The Search for a Tariff Policy, 1866–1936* (Lanham: University Press of America, 1983), 28–29. For context, in 1890 Congress passed the McKinley Tariff, which substantially raised tariff levels.

<sup>140</sup> *Ibid.*, 31.

<sup>141</sup> Senate Finance Committee, *Wholesale Price, Wages, and Transportation*, Report 1394, Part 1, March 3, 1893, 5.



committee and possibly add nothing to the economic value of the investigation.”<sup>142</sup> At the same time, the Labor Department’s work reflected substantial advancements in statistical science.<sup>143</sup>

In 1898, in response to concerns about industrial monopolies, railroad pricing, and the impact of immigration on labor markets, Congress created an Industrial Commission with a mix of Congressional and Presidential appointees.<sup>144</sup> The Commission was given a broad mandate “to investigate questions pertaining to immigration, to labor, to agriculture, to manufacturing, and to business, and to report to Congress and to suggest such legislation as it may deem best upon these subjects.” The Commission produced 19 large volumes on all these subjects. In its final report, the Commission recommended the creation of:

- a department of commerce and industry with functions that included recommending tariff modifications in light of economic changes, reciprocal opportunities, and “any evils incident to combinations,” and
- a commission to examine and report on “what concessions in duties may be made without endangering wages or employment at home” to address “the practice by some exporters of making lower prices abroad than at home . . . .”<sup>145</sup>

In its pursuit of reliable data for tariff-setting, by the early 20th century Congress was able to take advantage of improvements in administrative capacity and practice, accounting and

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<sup>142</sup> *Ibid.*, 5–6. For context, Congress passed the Wilson-Gorman Tariff in 1894 and the Dingley Tariff in 1897. The former, passed by a Democratic Congress, lowered tariffs somewhat, and the latter, passed by a Republican Congress, raised them back.

<sup>143</sup> According to an assessment published in 1918: “These reports, extending back, in the case of wholesale prices and wages, over a period of more than fifty years, presented one of the most detailed compilations of price and wage data which had been undertaken by any government, and provided the raw material upon which exhaustive studies of the course of prices in the United States since the Civil War have been based. The data of the Aldrich reports are still used in determining index figures of price movements in tables extending over this period.” Cummings, *op. cit.*, 683.

<sup>144</sup> Eric Arnesen, *Encyclopedia of U.S. Labor and Working-class History, Volume 1*, (New York: Taylor & Francis, 2007), 1451.

<sup>145</sup> *Final Report of the Industrial Commission*, vol. XIX, 1902, 651. The full text of these recommendations:

- [I]f a department of commerce and industry shall be established, one of its functions should be to call attention from time to time to such economic changes in the world's progress as may suggest tariff modifications, and also to such commercial opportunities as may suggest reciprocal legislation or arrangements, and furthermore to any evils incident to combinations which changes in the tariff will correct.
- [I]n view of the extent and perfection of our manufactures, of our growing export trade and the sharp competition it encounters in foreign markets, of the practice by some exporters of making lower prices abroad than at home, and of the desirability of protecting the consumer as well as the producer, without awaiting other legislation, the Congress provide for a commission to investigate and study the subject, and to report as soon as possible what concessions in duties may be made without endangering wages or employment at home, what advantages abroad may be obtained therefor, and also to suggest measures best suited to gain the ends desired.

statistics, education and training, communications technologies, calculating machines, civil service, and understanding of the relative effectiveness of various roles of Congress in governance. In the century's first decade, Congress chartered several new executive branch organizations to facilitate, direct, and organize the collection, analysis, and dissemination of socioeconomic statistics. Compared to the 19th century, Congress was more directive and specific about duties and responsibilities. After many not particularly successful experiments, it had learned much about the extent and nature of the capacity and effort required to generate useful, reliable data and analysis.

To begin, in 1902, Congress created a permanent Census Bureau, as part of the Department of the Interior. In 1903, after decades of consideration, Congress established a new Department of Commerce and Labor, with four units focused on statistics:

- The Census Bureau was transferred to the Commerce and Labor Department from the Interior Department.
- The Statistics Bureau in the Treasury Department and the Bureau of Foreign Commerce in the State Department (the renamed unit created in 1856) were combined into one Bureau of Statistics in the Department of Commerce and Labor. The law creating the new Statistics Bureau was eight pages in length. Reflecting prior learning, it included directions to customs collectors regarding accounting procedures.
- The Department of Labor was transferred into Commerce and Labor as the Bureau of Labor. The new bureau retained the authorities and mandates of the former department, including collecting data for scientifically determining tariffs. Carroll Wright continued as Commissioner of Labor.
- A new Bureau of Manufactures was established in the Department of Commerce and Labor "to foster, promote and develop the various manufacturing industries of the United States, and markets for the same at home and abroad, domestic and foreign, by gathering, compiling, publishing, and supplying all available and useful information concerning such industries and such markets, and by such other methods and means as may be prescribed by the Secretary or provided by law."

These four entities had somewhat overlapping responsibilities for generating statistics, which suggests that Congress was not fully rational in its organization of the new department. The Census Bureau was told to conduct the census of manufactures in 1905 and every 10 years thereafter. The Statistics Bureau was given the Treasury Department's 1866 mandate to prepare for Congress's use statistics of manufacturing in the United States. The Bureau of Labor kept its mandates to collect the data needed to scientifically set tariffs on manufactured goods and biennially report on the conditions of individual U.S. industries. And the Bureau of

Manufactures was to prepare “all available information” on manufacturing industries and their markets.

The Bureau of Manufactures soon underwent further development. On becoming operational in 1905, it took over the Statistics Bureau’s duties of preparing the annual commercial relations report and a compendium of foreign tariffs.<sup>146</sup> In 1906, it established an “intelligence office” to identify trade opportunities in foreign markets. So it might have a private sector partner to which to pass the identified opportunities, in 1912 the bureau organized a conference of business associations and chambers that led to the founding of the U.S. Chamber of Commerce.

The century’s second decade saw continued extensive Congressional efforts to generate information to guide tariff-setting. In 1911, Congress funded a new Division of Foreign Tariffs in the Bureau of Manufactures “because of the many measures under consideration in Congress that required, for their careful study, a knowledge of foreign legislation.”<sup>147</sup> Then, in 1912, Congress combined the Bureau of Manufactures and the Bureau of Statistics into the Bureau of Foreign and Domestic Commerce (BFDC) and transferred to the BFDC the Labor Bureau’s duties to collect the data for scientifically setting tariffs. As authorized by Congress, the BFDC set up a Cost of Production Division, which soon initiated investigations of the pottery and clothing industries. In 1913, Congress created a new Department of Labor (Cabinet-level this time), changed the name of the Department of Commerce and Labor to the Department of Commerce, and moved the Bureau of Labor into the new labor department as the Bureau of Labor Statistics (BLS).

This last reorganization has largely held for over 100 years. The organizational locations of BLS and the Census Bureau are the same as in 1913. In the mid-20th century, the BFDC was divided into units that became what now are the International Trade Administration and the Bureau of Economic Analysis, both in the Department of Commerce. In sum, Congressional efforts to develop useful statistics on trade and manufacturing provided the foundation for today’s federal economic statistics agencies.

Congress pursued a second organizational path that led to the creation of the U.S. Tariff Commission in 1916. Tariff-setting remained a major political battleground in the early 20th century.<sup>148</sup> Proposals were regularly put forward to create an independent board to scientifically settle tariff questions on the basis of data analysis. Complicating matters was the

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<sup>146</sup> Cummings, *op. cit.*, 627.

<sup>147</sup> Secretary of Commerce and Labor, “Report of the Secretary of Commerce and Labor,” *Reports of the Department of Commerce and Labor: 1912, 1913*, 76.

<sup>148</sup> Congress passed the Payne-Aldrich Act of 1909, which raised tariffs. However, by this time, Republican reformers wanted lower tariffs, so the new law exacerbated a rift in the Republican Party.

growing need for the federal government to create workable mechanisms for constructing reciprocal trade agreements with other nations.

In the Payne-Aldrich Tariff Act of 1909, Congress gave the President some flexibility to adjust tariffs and the authority to hire experts to help him in this process. President William Howard Taft, a proponent of scientific tariff-setting, used this opening to appoint a three-person Tariff Board with three mandates:

- To cooperate with the State Department in administering “the maximum and minimum clause” of the Payne-Aldrich Act,
- “To make a glossary or encyclopedia of the existing tariff” to make it understandable to the ordinary reader, and
- “To investigate industrial conditions and costs of production at home and abroad with a view to determining to what extent existing tariff rates actually exemplify the protective principle, viz., that duties should be made adequate, and only adequate, to equalize the difference in cost of production at home and abroad.”<sup>149</sup>

The Tariff Board sent two large reports to Congress—on Schedule K (Wool) in 1911 and Schedule I (Cotton) in 1912. In the letter transmitting the second report, President Taft highlighted the value of the Tariff Board in setting appropriately lower tariffs; noted the difficulty in measuring differences in domestic and foreign costs of production; said he “directed the board to take up the metal schedule, the leather schedule, the chemical schedule, and the sugar schedule”; and hoped that Congress would provide the funds so the Board could continue its important work.<sup>150</sup>

As had been the case previously, many members of Congress did not like the idea of cutting tariffs. For other reasons, tariff reductionists were also unhappy with the Tariff Board reports. So Congress did not provide appropriations in 1912 to continue the Tariff Board.<sup>151</sup> Instead, in

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<sup>149</sup> Tariff Board, *Wool and Manufactures of Wool: Report of the Tariff Board on Schedule K of the Tariff Law, 1911*, 3.

<sup>150</sup> Tariff Board, *Cotton Manufactures: Report of the Tariff Board on Schedule I of the Tariff Law, 1912*, 5.

<sup>151</sup> William Becker, *The Dynamics of Business-Government Relations: Industry and Exports, 1893–1921* (Chicago: University of Chicago Press, 1981), 86.

establishing the BFDC that year, Congress gave the new agency the responsibility for conducting comparative cost of production studies.<sup>152</sup>

Control of both elected branches of government shifted to the Democrats in 1913. That year, the new Congress assessed income taxes (after the ratification of the 16th Amendment); passed the Underwood-Simmons Tariff Act of 1913, which cut tariffs to their lowest levels since the Civil War; and created the separate Department of Labor.

In 1916, Congress passed the Revenue Act, which raised internal revenue. In light of its relatively positive view of Taft’s Tariff Board, the Democratic Congress included a Title VII of the Revenue Act establishing the U.S. Tariff Commission. The law gave the Tariff Commission a mandate to investigate and report on a wide range of topics and reflected Congressional efforts and learning over the previous century and a quarter.<sup>153</sup> That said, the role of this new entity was less focused on the Republican interest—scientific tariff-setting—and more on the Democratic concern—research and education regarding the consumer welfare impacts of tariff legislation.<sup>154</sup> The Tariff Commission’s mission was akin to that of the state and federal bureaus of labor created three decades previous, to inform and raise the quality of public discussion. Chapter 3 examines the making of the Tariff Commission in substantial detail.

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<sup>152</sup> The BFDC was given authority to “ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of manufacturers and producers of such articles; and the comparative cost of living, and the kind of living; what articles are controlled by trusts or other combinations of capital, business operations, or labor, and what effect said trusts, or other combinations of capital, business operations, or labor have on production and prices.” Quotation of legislation from Secretary of Commerce and Labor, “Report of the Secretary of Commerce and Labor,” *Reports of the Department of Commerce and Labor: 1912, 1913*, 12. The report goes on to say that “With proper appropriations the Bureau is thus in a position to pursue investigations in relation to tariff and similar questions affecting commerce.”

<sup>153</sup> The Tariff Commission had the legal mandate to investigate and report on:

- “The administration and fiscal and industrial effects” of U.S. customs laws, present and future.
- How rates of duty on raw materials related to those finished or partly finished products.
- The effects of *ad valorem* and specific duties, both single and compound.
- “All questions relative to the arrangement of schedules and classification of articles in the several schedules of the customs law.”
- The operation of customs laws, including how they affected federal revenues, industry, and labor.
- The tariff relations between the United States and foreign countries, including “the volume of importation compared with domestic production and consumption,” commercial treaties, preferential provisions, economic alliances, export bounties, and preferential transportation rates.
- “[C]onditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production.”

<sup>154</sup> Karen Schnietz, “Democrats’ 1916 Tariff Commission: Responding to Dumping Fears and Illustrating the Consumer Costs of Protectionism,” *Business History Review* 72, no. 1 (Spring 1998), 1–45.

## Conclusion

This chapter highlights the uneven, sometimes painful, forward progress made by successive Congresses, from the First to the Sixty-Fourth, in creating the federal capacity to produce data and analyses for tariff-setting. The box below lists the milestones in the four realms mentioned earlier—statistics, analysis, administration, and nonpartisanship. The bullets represent a remarkable story of aspiration, effort, failure, and success. Hopefully, they provide useful context for the discussions of the history of the U.S. Tariff Commission and the U.S. International Trade Commission that follow.

**Box 2.2:** Milestones in the development of statistics and analysis for Congressional tariff-setting

### Statistics

- 1792–98 – Mandated trade reports based on administrative records
- 1810 – First attempt at census of manufactures
- 1820 – One regularized set of trade reports
- 1850 – First reliable census of manufactures
- 1867 – Del Mar accounting methods
- 1877 – Evaluation of Bureau of Statistics
- 1884 – Wright’s paper on scientific tariff-setting
- 1890–93 – Department of Labor reports on costs of production and prices

**Analysis** (mandated plans, reports, advice)

### Treasury Department

- 1790 – Hamilton’s report on the public credit
- 1791 – Hamilton’s manufacturing plan
- 1810 – Gallatin’s manufacturing plan
- 1815 – Dallas’s tariff plan
- 1832 – McLean’s manufacturing plan
- 1844 – Annual economic report

### State Department

- 1842 – Annual report on commercial relations

### **Advisory commissions, boards, and offices**

- 1865 – U.S. Revenue Commission
- 1866 – Special Commissioner of the Revenue
- 1882 – U.S. Tariff Commission
- 1891 – Senate Finance Committee special study
- 1898 – U.S. Industrial Commission
- 1909 – Tariff Board
- 1912 – Cost of Production Division, Bureau of Foreign and Domestic Commerce
- 1916 – U.S. Tariff Commission

### **Administration**

- 1856 – Office of Superintendent of Statistics, State Department
- 1866 – Bureau of Statistics, Treasury Department
- 1888 – Department of Labor
- 1902 – Census Bureau
- 1903 – Department of Commerce and Labor (Bureau of Statistics, Bureau of Manufactures, Bureau of Labor)
- 1912 – Bureau of Foreign and Domestic Commerce
- 1913 – Bureau of Labor Statistics, Department of Labor

### **Nonpartisanship**

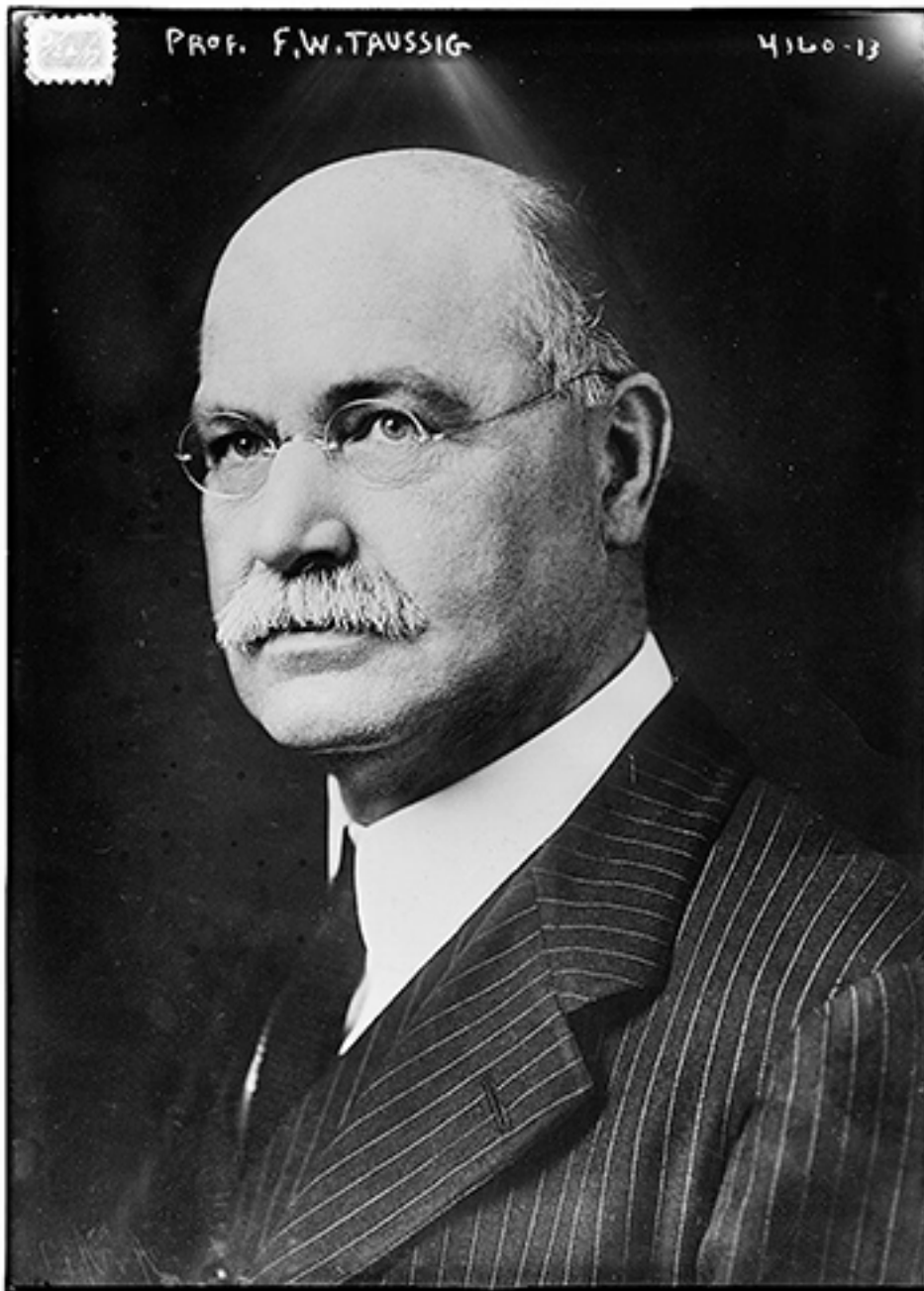
- 1867–69 – Views of David Wells, Special Commissioner of the Revenue
- 1882 – Views of U.S. Tariff Commission
- 1884 – Wright’s paper on scientific tariff-setting
- 1909 – Tariff Board
- 1912 – BFDC mandate to study comparative costs of production
- 1916 – U.S. Tariff Commission





# Chapter 3

## The Creation of the U.S. Tariff Commission



**Photo:** Frank Taussig, the first Commission Chairman.

W. Elliot Brownlee<sup>155</sup>

## Introduction

The great movement for economic and political reform that swept the nation in the early 20th century—the movement that historians commonly refer to as “progressivism”—provided the impetus for the creation of the U.S. Tariff Commission. At the national level, the progressive movement had as one of its major targets the tariff system that had emerged from the American Civil War. The high-water mark of progressive reform of tariffs was the enactment in 1913 of the Underwood-Simmons Tariff Act as a central expression of the “New Freedom” agenda that President Woodrow Wilson had championed in his successful bid for the presidency in 1912. (The sponsors of the act were Oscar W. Underwood, a Democratic Representative from Alabama, and Furnifold M. Simmons, a Democratic Senator from North Carolina.) In framing this agenda Wilson called for sweeping reforms that would constrain corporate power and expand economic opportunities for middle-class Americans. The result was an unprecedented burst of federal legislation. It began with the Underwood-Simmons Tariff (referred to below as the Underwood Tariff) and was followed in short order by the Federal Reserve Act (1913), the Federal Trade Commission Act (1914), and the Clayton Antitrust Act (1914). In the process of enacting these measures Wilson displayed more effective executive leadership than had any another President since Abraham Lincoln. And, the measures themselves permanently expanded the role of the federal government in the economy and, at the same time, enhanced the power of the executive branch.

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The creation of the Tariff Commission in 1916 was not, however, part of Wilson's New Freedom agenda, and he did not propose it until near the end of his first term in office. In fact, the idea of a Tariff Commission represented a departure from the New Freedom program of 1913. To explain how and why the Tariff Commission was a departure, it is necessary to understand the solidification of the tariff system during the Civil War era, the calls to reform that system in the late 19th century, the influence of President Wilson and his "New Freedom," and, finally, the tumultuous economic and political events between 1913 and 1916.<sup>156</sup>

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<sup>156</sup> Historians who have written broad-scope works on the tariff system, the economic history of the last century, politics and the progressive movement of the early twentieth century, or business-government relations have paid relatively little attention to the founding of the Tariff Commission. Even Frank W. Taussig's *The Tariff History of the United States, the Eighth Revised Edition* (New York: Capricorn Books, 1964), which still reigns as the most important survey of tariff history, devoted only a few pages (481–87) to the Tariff Commission. (The eighth edition first appeared in 1931.) There is relatively little as well on the founding of the Commission in the superb survey of U.S. trade and related industrial policies by Alfred E. Eckes, Jr., *Opening America's Market: U.S. Foreign Trade Policy since 1776* (Chapel Hill: University of North Carolina Press, 1995), 86–88, 261. Also brief is historian John Dobson's narrative of the founding of the Commission in his *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission* (Washington, DC: GPO, December 1976), 83–91. Paul Wolman, in his account, provides a trenchant linkage between U.S. tariff policy and expansionist ambitions, but ends his main narrative with only a brief analysis of the Wilson administration's shift of support to the formation of the Tariff Commission. See Wolman, *Most Favored Nation: The Republican Revisionists and U.S. Tariff Policy, 1897–1912* (Chapel Hill: University of North Carolina Press, 1992), 206–8. But a number of specialized works explore the founding of the Commission with insight and depth. The most important is Joseph F. Kenkel's *Progressives and Protection: The Search for a Tariff Policy, 1866–1936* (Lanham, MD: University Press of America, 1983), 37–117. In it, he concluded that the founding of the Commission reflected Wilson's belief that a tariff commission was necessary, in his words, "to prepare for the formulation of commercial policy for the new world"—a world of nationalism, "commercial rivalries and trade wars"—and to "educate the public, businessmen, and politicians, so that they might understand how duties actually affected American commerce and industry" (116–17). Arthur S. Link wrote a short but influential history of the founding. He regarded it as representing an effort by Wilson "to build support for a broad new coalition of Democrats, independents, and former Progressives" and "a movement in Wilson's thought" and "policies toward protectionism in particular circumstances and the idea that tariff policies should be used to encourage national economic development." See Link, *Wilson: Confusions and Crises, 1915–1916* (Princeton: Princeton University Press, 1964), 341–45. Writing in the field of business-government relations, William H. Becker saw the founding as signifying a shift by President Wilson in his attitudes toward protection and an effort on Wilson's part to attract business support. See Becker, *The Dynamics of Business-Government Relations: Industry and Exports, 1893–1921* (Chicago: University of Chicago Press, 1982), 86–89. More recently, an excellent article by business historian Karen E. Schnietz emphasized, as did Link, Wilson's partisan motivations and agreed with Kenkel that Wilson hoped the Commission "would educate the electorate on the consumer welfare costs of tariff protection, thereby undermining electoral support for the Republican party and their protectionist tariff policies." See Schnietz, "Democrats' 1916 Tariff Commission: Responding to Dumping Fears and Illustrating the Consumer Costs of Protectionism," *Business History Review* 72 (Spring 1998), 1–45. Schnietz usefully combed thoroughly the historical literature on progressivism for references to the Tariff Commission (see 2–7). In an earlier, preliminary essay, she examined the educational mission of the Commission. See "The 1916 Tariff Commission: Democrats' Use of Expert Information to Constrain Republican Tariff Protection," *Business and Economic History* 23 (Fall 1994): 176–89.

## The Civil War Tariff System

Before the Civil War, the United States government seemed to be headed toward the embrace of free trade. Beginning in 1833, Democratic Presidents and Congresses ended an experiment with tariffs that protected American manufacturers and began reducing those tariffs. In so doing the Democrats followed the actions of the British Liberals, who in the 1820s had begun a gradual shift to a free-trade regime. The repeal of the British Corn Laws in 1846 marked roughly the halfway point in Britain's 19th-century reduction of the average tariff rate. With the enactment of the Walker Tariff in the same year, the United States appeared to be following suit. But during the Civil War the United States adopted a trade policy that was rigorously protectionist, and maintained that policy for over two generations. Congress frequently revised tariff schedules but left intact the basic structure of the tariff system. High tariffs remained until the Underwood Tariff significantly reduced the Civil War rates in 1913. Until then, the ratio between duties and the value of dutiable goods rarely dropped below 40 percent and was frequently close to 50 percent. The highest tariff rates were imposed on manufactured goods – particularly metals and metal products (including iron and steel), cotton textiles, and certain woolen goods. On many manufactured items, the rate of taxation reached 100 percent. By 1872, tariff duties dominated federal tax revenues. They would continue to do so until 1911 except during the Spanish-American War and its immediate aftermath. With only slight exaggeration, economist Peter Lindert has written, “Throughout the long era from 1861 to 1933, the United States competed with Russia as the most protectionist of the major powers.”<sup>157</sup>

The structure of the American and international economies and fundamental institutional arrangements had much to do with the ability of protectionism to become established in the United States and to survive well into the 20th century. American manufacturers, who remained relatively small in scale in their operations (and largely unincorporated) until the 1870s and 1880s, worried about competition from British manufacturers, who often seemed to be ahead in the process of industrial revolution. Once the Civil War had removed Southern advocates of free trade or low tariffs from Congress, the way was open for these nervous manufacturers to work through the now-dominant Republican Party to raise tariff barriers.

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<sup>157</sup> Peter H. Lindert, “U.S. Trade and Trade Policy in the Twentieth Century,” in Stanley L. Engerman and Robert E. Gallman, *The Cambridge Economic History of the United States: Volume III, The Twentieth Century* (Cambridge: Cambridge University Press, 2000), 454. On the repeal of the Corn Laws as the “mid-point of a long period of decline in the average tariff,” see Martin Daunton, *Trusting Leviathan: The Politics of Taxation in Britain, 1799–1914* (Cambridge: Cambridge University Press, 2001), 169. The Corn Laws, enacted in 1815, had established high tariffs on “corn,” meaning any grain that required grinding. The primary goal was to protect domestic wheat farmers. For a summary of the federal tax and fiscal system from the Civil War down to 1913, see W. Elliot Brownlee, *Federal Taxation in America: A History*, Third Edition (Cambridge: Cambridge University Press, 2016), 69–92.

Once the barriers were in place, the protected manufacturers were reluctant to risk taking them down.

A provision of the U.S. Constitution lent added force to a protective tariff system. Article I, Section 8 required that direct taxes be allocated to the states according to the distribution of the population. The Constitutional provision effectively ruled out the use by the federal government of property or income taxation except under very unusual circumstances. Until the passage of the 16th amendment in 1913 allowed federal income taxation, the U.S. government had to rely almost entirely on excise taxes and tariffs for its tax revenues. So long as the scope of the federal government was reasonably modest, the level of tariffs was modest as well and involved relatively little protection. But whenever the activities of the federal government expanded significantly, its revenue requirements increased and tariffs rates had to go up.

During the 19th century, the most dramatic increase in the federal government came during and after the Civil War; tariff rates rose partly to finance new programs, such as the Civil War pension system, and partly to pay off the massive war debt. Industries or localities that sought to use tariffs for protection against foreign competition found that they had strong allies among those who reaped benefits from the spending of tariff revenues. Thus, the tariff won broad political support as both a revenue engine and an instrument of nationalistic protection.

Joining the industrialists who helped keep protection in place were workers who attributed their high wages (relative to European wages) not so much to American productivity or labor shortages as to the ability of the tariff to shield them from the competition of cheap foreign labor. Reinforcing this popular attitude was a widespread, nationalistic belief that free trade had historically benefited Great Britain more than its trading partners, including the United States.

The supporters of tariffs also included powerful groups that, under different international circumstances, would have probably sought to reduce tariff restrictions on trade. Investment bankers, for example, valued the way in which protectionism restricted the spending of Americans on imports and thus helped conserve American reserves of foreign exchange like gold and the pound sterling. This policy, in turn, facilitated the servicing of America's foreign debts, the most significant of which were held by British investors.<sup>158</sup> The policy was especially helpful during the economic crises of the 1870s and 1890s, when American reserves of foreign exchange (i.e., gold under the gold standard) became depleted. The American investment bankers also appreciated how tariff barriers encouraged British manufacturers to make direct investments in new plants within the United States and thus slip around the tariffs.

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<sup>158</sup> For a superb history of investment from abroad, see Mira Wilkins, *The History of Foreign Investment in the United States to 1914* (Cambridge: Harvard University Press, 1989).

Finally, during the 1880s and 1890s many American exporters recognized that Great Britain remained firmly committed to free trade regardless of what protectionist policies other European nations—especially Germany and the United States—adopted. So long as this remained the case, American exporters to Britain or to British-controlled markets, such as Canada and much of Latin America, could enjoy the benefits of free trade without having to sacrifice domestic protection. In other words, as political scientist David Lake has written, “As an opportunist within a structure of British hegemony, the United States had the ability to free ride.”<sup>159</sup>

The exporters who took advantage of the free ride included manufacturers who had relatively little need for protection but saw no reason to take the additional risk of opening the domestic American market to foreign competitors. That market was enormous. By 1900 the American economy had grown to become the world’s largest economy in the world. But, because of the huge domestic market, in the years just before World War I foreign trade constituted only about 11 percent of national product. In contrast, foreign trade accounted for 44 percent of national product in the U.K., 54 percent in France, and 38 percent in Germany.<sup>160</sup>

## Challenges to Protectionism, 1865–1907

After the Civil War, the Democratic Party attempted to challenge the protectionist system and made an appeal for tariff reductions an important part of their broader critique of the ambitious governmental programs that the Republican Party had established during the Civil War. During the depressions of the 1870s and 1890s, the Democrats had some success in eroding Republican control of the national government, but on the whole, until the 1930s the Republican Party commanded the political loyalty of most Americans. The popularity of the broadly nationalistic agenda of the Republican Party reinforced the sacrosanct position of protectionism. Nonetheless, after the Civil War, the two competing political parties based their economic appeals heavily on sharply conflicting ideological views of the tariff. The conflicting party identities would have a major influence on tariff politics and policy for nearly a century.<sup>161</sup>

In the late 1890s significant shifts in the structure of the economy set the stage for tariff reform that would challenge Republican protectionist orthodoxy. One shift was in international economic relations, resulting in the end of the free ride that American exporters had enjoyed as

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<sup>159</sup> David Lake, *Power, Protection, and Free Trade: International Sources of U.S. Commercial Strategy, 1887–1939* (Ithaca: Cornell University Press, 1988), 92.

<sup>160</sup> W. Elliot Brownlee, *The Dynamics of Ascent: A History of the American Economy*, Second Edition (New York: Alfred A. Knopf, 1979), 354.

<sup>161</sup> On the partisan and ideological nature of tariff debates in the late nineteenth century, see Tom E. Terrill, *The Tariff, Politics, and American Foreign Policy, 1874–1901* (Westport: Greenwood Press, 1973), especially 210–17. Also helpful on this issue is Dobson, *Two Centuries of Tariffs* (1976), 5–24, 45–71.

a consequence of British free trade. In the late 1890s, British loyalty to free trade began to wane, to a large extent because of the increasing competitive power of German and American producers. As American exporters took stock of their free rider position in the face of the British shift, many became attracted to what one historian has called tariff “revisionism.”<sup>162</sup>

The exporters did not embrace free trade; far from it. But they developed a taste for measures that would enhance the power of the American government to bargain with other nations over tariffs and other trade barriers. They became attracted to reciprocal trade agreements, to legislation that would allow the president to set tariff rates within legislated maximum and minimum rates, and to the creation of a quasi-administrative body like a tariff commission that would remove tariff agreements from the exclusive domain of Congressional policy-making. An especially attractive model was found in the work of a German imperial commission that began in the late 1890s. In 1902 the commission brought about a comprehensive revision of the German tariff system. The German government used the new schedules, which included dual maximum and minimum rates, as the basis for what became intense and effective negotiations with Germany’s trading partners.<sup>163</sup>

The leaders in promoting the tariff revisionism that began in the 1890s were relatively small manufacturers, merchants, and shippers organized in groups like the National Association of Manufacturers (NAM), the National Association of Agricultural Implement and Vehicle Manufacturers (NAAIVM), and the Merchants Association of New York (MANY). Herbert E. Miles, a president of the NAAIVM and Chair of the Tariff Committee of the NAM, later dubbed himself the “Father of the Tariff Commission.” Miles was a leading manufacturer of carriages and farm tools in Wisconsin and joined tariff reform because he had become convinced that the political power of large steel corporations had succeeded in establishing a high tariff on imported steel and generating monopoly profits.<sup>164</sup>

Not surprisingly, America’s most advanced industrial corporations and investment bankers did not lead this movement for tariff reform, and few participated in it. The reasons for their reluctance varied. Some, to be sure, just as Miles suggested, earned monopoly profits. Others had relatively little interest in reaching beyond the huge domestic market and regarded tariff reform as unnecessary risk taking. Even highly competitive manufacturers like International Harvester, Singer, and Colt, all of which successfully expanded abroad, had little enthusiasm for any form of tariff reduction. They competed successfully with European manufacturers, and

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<sup>162</sup> Wolman, *Most Favored Nation* (1992), introduced and defined on xi.

<sup>163</sup> Kenkel, *Progressives and Protection* (1983), 46; Wolman, *Most Favored Nation* (1992), 56–57; and N. I. Stone, “How the Germans Revised Their Tariff,” *American Review of Reviews*, December (1905): 719–21.

<sup>164</sup> On Herbert E. Miles, see Kenkel, *Progressives and Protection* (1983), 48, 50–51; and N.I. Stone, *One Man’s Crusade for an Honest Tariff* (Appleton: The Lawrence College Press, 1952), 1–67.

when they faced tariff barriers, they had often succeeded in expanding markets by making direct investments, thus bypassing the barriers.

Tariff revisionism, even without the backing of the largest corporations, won considerable support within Republican circles from groups that had very different economic interests. The small manufacturers and merchants supported tariff revisionism, but so did many rent-seeking protectionists who viewed it as a movement they could co-opt and thus blunt. Consequently, Congress and Republican presidents experimented with various reciprocal trade agreements between 1897 and 1909. However, because of the continuing power of protectionists reciprocity accomplished relatively little in the way of tariff reduction.

At the same time that tariff revisionism won support within the business community and the Republican Party, a broadly based movement also grew that called for more drastic reductions of tariffs. In fact, the latter movement became a swelling tide, sweeping up not only Democrats but also many Republicans. Democrats suddenly had potential Republican allies in mounting a more radical challenge to protectionism than the one that tariff revisionism had offered. Two significant economic changes drove this movement: inflation and a wave of corporate mergers. Many workers and urban consumers attributed the significant inflation that had developed in the late 1890s to protective tariffs. In addition, a broad swath of the public, particularly in the Midwest and South, worried that tariffs fostered monopoly by shielding industrial combinations from the discipline of foreign competition.

These concerns attracted widespread support among Democrats and voters who had supported the Populists during the 1890s. But many Midwestern and Western Republicans shared those concerns, and they produced a major rift within the Midwestern Republican Party. These insurgent Republicans generally supported what became known in 1902 as the “Iowa idea” when it was ensconced in the platform of the Iowa Republican Party. The plank denounced the tariff for fostering corporate monopolies and called for “modifications of the tariff schedules” that would be “required to prevent their affording shelter to monopoly.”<sup>165</sup>

## The Tariff Board, 1907–10

Efforts to heal the breach within the Republican Party over tariff policy intensified after the Panic of 1907 and as a Presidential election neared in 1908. These efforts at compromise sometimes included discussions of the possibility of creating a federal tariff commission. During this period, the public discussion of a tariff commission broadened to include the idea that a commission might do more than promote economic analysis of production and trade during negotiations of reciprocal trade agreements. That is, a commission might also measure the

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<sup>165</sup> Quoted by Edmund Morris, *Theodore Rex* (New York: The Modern Library, 2002), 144.



extent to which tariffs reflected or encouraged monopoly pricing. A group of Republican politicians, including Senators Albert J. Beveridge (R-IN) and Robert La Follette (R-WI), and small manufacturers led the way in embracing the creation of a tariff commission as a means of combating monopoly power.

No consensus emerged, however, among either the more moderate revisionists or the antimonopolists, as to how a federal tariff commission should function. Some believed it should be purely or mainly investigatory. Others believed it should just conduct economic analysis without making any recommendations. Still others wanted to give a federal tariff commission the authority to set rates. Among the advocates of a powerful commission, some thought the commission should exercise its authority independently; others in conjunction with Congress or the President.

Such divisions, coupled with the disagreements in objectives among contending Republican groups—protectionists opposed to any tariff commission, tariff revisionists, and anti-monopoly reformers—prevented the Republican Party from endorsing the tariff commission idea in the 1908 Presidential campaign. On more fundamental tariff issues, the fractured Republican Party made only a vague commitment to tariff reform, promising in its platform to adopt rate revisions that would equalize “the difference between the cost of production at home and abroad, together with a reasonable degree of profit to American industries,” and to call immediately a special session of Congress to undertake tariff reform.

The plank left a “reasonable” profit undefined. In fact, the criterion of equalization in the Republican platform plank could be used to justify setting a tariff on any product produced in America at a level that would prevent its importation.<sup>166</sup> The Republican Presidential candidate, William Howard Taft, declared that the Republican Party “must face tariff revision squarely and unhesitatingly,” but he offered no more clarity on reform principles than did his party’s platform.<sup>167</sup>

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<sup>166</sup> The free-trade economist, Frank W. Taussig, was perhaps the first to make this point, doing so in the 1910 edition of *The Tariff History of the United States*. See 363–64 of the eighth edition (cited in note 156 above) and the same pages of the fifth edition (New York: G.P. Putnam’s, 1910). By the first decade of the 20th century Taussig had become the most prominent American economist studying tariffs and international trade. He had trained in both the fields of law and political economy, taught economics at Harvard from 1886 until 1935, and published the first edition of his *Tariff History* in 1888. In 1911 his widely-read *Principles of Economics* (New York: Macmillan, 1911) appeared. Joseph Dorfman, a noted historian of economic thought, wrote that Taussig “broadened the subject matter of economics, being largely responsible for developing the study of international trade and related fields in the United States.” For a summary of Taussig’s ideas, see Dorfman, *The Economic Mind in American Civilization*, vol. 3 (New York: The Viking Press, 1949), 264–71 and vol. 4 (1959), 236–47. The quotation is from vol. 3, 270. Regarding Taussig’s influence on the creation of the Tariff Commission, see below, 89, 96, 101-102.

<sup>167</sup> Quoted by Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* (New York: Simon & Schuster, 2013), 504.

The Democratic Party was somewhat clearer on the matter of tariff reform in 1908. It pledged to focus tariff reform on reducing monopoly profits, and its platform called for eliminating tariff protection for a corporation's product if the product had more than a 50 percent market share. The platform made no mention of a tariff commission.<sup>168</sup>

The Republicans prevailed in the 1908 elections, winning the Presidency for Taft and maintaining control of Congress. Taft followed through on his promise to call a special session of Congress early in 1909, and the Republican leadership had sufficient power to safely ignore the Democrats and their free trade ideas. But the Republican leadership also ignored the insurgents within their own party, even though business support for a tariff commission had grown. A new organization, the National Tariff Commission Association (NTCA), founded by Herbert Miles and others within the NAM, organized a dramatic national convention in Indianapolis in February 1909.<sup>169</sup>

But in the special session Republican protectionists dominated the drafting of the legislation and largely ignored the tariff commission idea. The result was the Payne-Aldrich Act, named after staunch protectionists Representative Sereno E. Payne (R-NY) and Senator Nelson W. Aldrich (R-RI), the chairs of the House Ways and Means and the Senate Finance Committees. This legislation contained only minimal rate reductions and a modest reformist element—discretion for the President to lower tariff rates slightly as an inducement for nondiscrimination toward American exports. The leadership rejected proposals by Midwestern Republicans to create a tariff commission, out of reluctance to risk undermining Congressional domination of tariff policy or incurring the hostility of corporations that might have to accept commission investigation of their finances. However, as a sop to the reformists, the final language of the legislation authorized the President “to employ such persons as may be required” to assist in administering the maximum-minimum provisions of the Payne-Aldrich tariff.<sup>170</sup>

President Taft decided to administer the law in a way that would establish his position on the tariff as somewhat closer to that of the reformists. Although Congress had not authorized the creation of a tariff commission in a formal sense, Taft proceeded to establish what he called the “Tariff Board” and made Henry C. Emery, a professor of political economy at Yale, its chairman. The other two members of the Board were James B. Reynolds, Assistant Secretary of the Treasury, and Alvin B. Saunders, chair of the American Reciprocal Tariff League. With a small staff, the Board investigated charges of foreign discrimination against American exports, and

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<sup>168</sup> Goodwin, *The Bully Pulpit* (2013), 503–504, 583–584; Kenkel, *Progressives and Protection* (1983), 53.

<sup>169</sup> Stone, *One Man's Crusade for an Honest Tariff* (1952), 59–61.

<sup>170</sup> On the minimum-maximum provisions of Payne-Aldrich, see Lake, *Power, Protection, and Free Trade* (1998), 141–47; Paul Wolman, *Most Favored Nation* (1992), 164–76; and Taussig, *The Tariff History of the United States* (1964), 403–7. The best survey of Payne-Aldrich remains Taussig's, *ibid.*, 361–408. The quotation regarding the tariff board is from Becker, *The Dynamics of Business-Government Relations* (1982), 81.

was especially concerned about the failure of Canada, Germany, and France to set minimum rates on U.S. products.

Even so, the board never recommended setting U.S. tariff rates at the penalty level, and Taft never imposed any penalty rates. But the President did support expanding the work of the Board to study the economic effects of the tariff and asked Congress to fund the investigation. Reluctantly, the Republican leadership complied; in studies undertaken in 1910 and 1911 the Board, according to its leading historian, “pioneered the work of industry-wide surveys of comparative production costs.”<sup>171</sup> It completed surveys of production costs in three industries (wood-pulp and newsprint paper, wool and woolens, and cotton goods) and published preliminary findings on the chemical, oils, and paint industries.<sup>172</sup>

In conducting the work of the Tariff Board, Emery recognized three basic realities. The first was the great complexity involved in the calculations of comparative production costs. The second was the lack of either a scientific or a political consensus on the principles that should guide the setting of tariff rates. The third was the failure of either Taft or Congress to give the Tariff Board a clear mandate. As a result of the first reality, Emery and his board adopted a distinctly collaborative approach to dealing with manufacturers. As a consequence of the latter two, he remained extremely cautious in his recommendations to Taft and deferential to the political process. His recognition of these realities meant that Emery did not provide Taft with either policy recommendations or evidence that the Tariff Board was producing significant reform of any kind.<sup>173</sup>

While Taft and the Tariff Board dithered, the anti-monopoly message of the Democratic Party gathered greater political force in 1909 and 1910. In the wake of the Payne-Aldrich tariff, the Democratic case that there should be tariffs only to raise revenue became even more compelling. As a consequence, prospects for Democratic victories in the Congressional elections of 1910 rose. Among the Democrats who sought to ride the wave of anti-tariff, anti-monopoly enthusiasm was Woodrow Wilson in his campaign to become governor of New Jersey.

## Woodrow Wilson as Tariff Reformer

Wilson’s credentials on the tariff issue were impeccable. He drew fluently and naturally on the classical British liberal arguments against protective tariffs. His positions on tariffs had emerged from his extended study of the agenda that Adam Smith, Walter Bagehot, John Bright, Edmund

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<sup>171</sup> The historian is Joseph F. Kenkel. See *Progressivism and Protection* (1983), 68, and note 156, above.

<sup>172</sup> However pioneering this work may have been, Taussig concluded that it had no serious influence on the subsequent tariff reforms in 1913. Taussig, *The Tariff History of the United States* (1964), 424.

<sup>173</sup> On the early work of the Tariff Board, see Kenkel, *Progressivism and Protection* (1983), 67–73; Becker, *The Dynamics of Business-Government Relations* (1982), 82–84; and Wolman, *Most Favored Nation* (1992), 177–92.

Burke, Richard Cobden, John Stuart Mill, Robert Peel, and others had championed in the early 19th century.<sup>174</sup> Of all the British Liberals, the one who had the greatest influence on Wilson was William Gladstone, both through Gladstone's model of leadership and through his political program. At age 16 or 17, Wilson hung a picture of Gladstone above his desk, as he did later as a student at Princeton. In the White House he reread John Morley's *Life of Gladstone*.<sup>175</sup> As historian Robert Kelley has written, Wilson was a "disciple" of Gladstone.<sup>176</sup>

Based on his reading of Liberal political economy, Wilson became a believer in the benefits of free trade—in the ways it could promote not only economic efficiency, but also a broadening of economic opportunity and social vision.<sup>177</sup> One of his first public political statements, in 1882, was an attack on the protective tariff in which he called for "a tariff for revenue merely."<sup>178</sup> In private, he referred to tariffs as "taxes of the most burdensome sort withal, for their weight falls most directly and most heavily on the poor and is least felt by the rich." Wilson explained how this had happened: tariffs had "Monopoly for father."<sup>179</sup>

Subsequently, as a young professor, Wilson enthusiastically championed the tariff reduction goals of the Democratic President Grover Cleveland (terms 1885–89 and 1893–97). In so doing, Wilson lent his voice to the calls that Cleveland and other leading Democrats made for unwinding the protection tariff system that the Republican Party had crafted. In subsequent years, Wilson developed claims that resonated with traditional American hostility to concentrations of power. In 1902, not long before becoming Princeton University's president,

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<sup>174</sup> The best discussion of the intellectual influences on Wilson's economic ideas is William Diamond, *The Economic Thought of Woodrow Wilson* (Baltimore: The Johns Hopkins Press, 1943).

<sup>175</sup> John Milton Cooper, Jr., *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt* (Cambridge: Harvard University Press, 1983), 22, 397.

<sup>176</sup> Kelley described Gladstone as "the first Anglo-American political leader," and found his influence widespread in the English-speaking world, explaining that H.H. Asquith, Sir Wilfrid Laurier, and Wilson—the leaders of Britain, Canada, and the United States at the outset of World War I—"were all devoted Gladstonians." Robert E. Kelly, *The Transatlantic Persuasion: The Liberal-Democratic Mind in the Age of Gladstone* (New York: Alfred A. Knopf, 1969), 145–46.

<sup>177</sup> A Southern intellectual tradition of esteem for free trade ideas may have reinforced Wilson's attachment to the ideas of the British Liberals. Arthur Link discounted the role of "southern traditions" in shaping Wilson's views on political economy and free trade. But the antebellum Southern political economists, whom Wilson read, advocated vigorously for free trade. One of the most influential of these was George Tucker, whom Wilson recommended to readers of his five-volume textbook on American history. See Woodrow Wilson, "Research Notebook," 1884–85, in Arthur S. Link, ed., *Papers of Woodrow Wilson (PWW)*, vol. 3 (Princeton: Princeton University Press, 1968), 449–50; Wilson, "Section for a 'History of Political Economy in the United States,'" 1885, in Link, *PWW*, vol. 4 (1968), 634; and Wilson, "Suggestions for Readers and Teachers," ca. 1892, in Link, *PWW*, vol. 8 (1970), 151–53. On the commitment of the Southern political economists to the principles of Adam Smith, see Jay Carlander and W. Elliot Brownlee, "Antebellum Southern Political Economists and the Problem of Slavery," *American Nineteenth Century History* 7 (September 2006), 389–416.

<sup>178</sup> Woodrow Wilson, "Testimony before the Tariff Commission, September 22, 1882," in Link, *PWW*, vol. 2 (1967), 140–43.

<sup>179</sup> Woodrow Wilson, "Government by Debate," unpublished essay, ca. December 4, 1882, in Link, *PWW*, vol. 2 (1967), 187, 197.

he wrote that “protective tariffs deliberately extended the favors of the government to particular undertakings; only those who had the capital to take advantage of those favors got rich by them; the rest of the country was obliged to pay the costs in high prices and restricted competition.”<sup>180</sup>

In 1910, during Wilson’s campaign to become governor of New Jersey, he shifted his anti-tariff message somewhat. He began to place more emphasis on tariff reform as the means to increased efficiency and increased exports. Protection for industry was now being used, Wilson argued in 1910 before a group of bankers, not to protect against cheap foreign labor but instead against “the greater economy, the greater studiousness, the greater mechanical skill, the greater scientific knowledge of the German manufacturer and miner.” He told the bankers: “We conquered the world once by our visions.” Now, he said, “We shall have to make the conquest of men . . . by a new ideal of endeavor, by new willingness to submit our brains and our ingenuity to the universal pressure of the eager action of a world drawn together by all the instrumentalities of trade.”<sup>181</sup> Wilson lamented: “By protecting ourselves from foreign competition—from the skill and energy and resourcefulness of other nations—we have felt ourselves at liberty to be wasteful in our own processes.”<sup>182</sup>

Wilson still pounded away at the connections between the tariff and monopoly power in industry, suggesting that tariffs not only resulted from monopoly power but also encouraged its growth. And, he warned in 1909, this power threatened to undermine republican political institutions. Through the process of developing “entrenchments of Special Privilege,” business organizations that were “national in their scope and control . . . have as powerful a machinery ready to their hand as the Government itself.”<sup>183</sup>

In 1910 Taft hoped that his support for a tariff commission might be a way to keep some protectionists, the tariff revisionists, and even anti-monopoly Republicans united in support of Republican candidates for Congress. But his plan would work only so long as he and his party succeeded in papering over the conflicting objectives of those who supported the idea of a tariff commission. Therefore Taft asked Emery and his fellow members of the Board to avoid public pronouncements during the 1910 campaigns. A number of Republican state platforms, particularly in Midwestern and Western states, endorsed proposals for a permanent tariff commission. However, in the elections the Democrats rode the popularity of anti-trust, anti-

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<sup>180</sup> Woodrow Wilson, *A History of the American People: Reunion and Nationalization*, vol. 5 (New York: Harper & Brothers, 1902), 189.

<sup>181</sup> Woodrow Wilson, “An Address in Atlantic City to the New Jersey Bankers’ Association, May 6, 1910,” in Link, ed., *PWW*, vol. 20 (1976), 420.

<sup>182</sup> Woodrow Wilson, “An After-Dinner Address to the Real Estate Men of Boston, January 27, 1912,” in Link, ed., *PWW*, vol. 24 (1978), 84.

<sup>183</sup> Woodrow Wilson, “The Tariff Make-Believe,” *The North American Review*, 190 (October 1909), reprinted in Link, ed., *PWW*, vol. 19 (1975), 374.

tariff ideas and took advantage of the divided Republican Party. As a result, they won control of the House in 1910, the first time they had done so since 1892. Meanwhile, Wilson won his race for governor of New Jersey, positioning himself well to attain national office in the 1912 elections.<sup>184</sup>

## Taft, the Tariff Board, and a Presidential Election, 1910–12

After the elections, Taft understood the need for the Republican Party to distance itself from the Payne-Aldrich tariff by moving toward a position that promised tariff reductions while retaining the support of the powerful protectionists. Creating a permanent tariff commission still seemed to him to offer the most promising route for that transition, although he had very little concept of what substantive tariff reduction policies might emerge outside of reciprocal trade agreements. In December 1910, in a lame-duck session of Congress, Taft tried to persuade protectionists to create a permanent tariff commission before the new Democratic-controlled House took power. Taft enjoyed vigorous support from the NAM, which had 3,000 member firms, and the NTCA, which represented over 100 business organizations. In January 1911, the NTCA organized a convention in Washington that drew 500 delegates from 39 states. Taft addressed the convention, and the delegates lobbied their representatives in Congress. Nonetheless, these efforts and Taft's leadership failed to persuade the protectionists to create a permanent commission. However, Congress did appropriate \$400,000 to fund the Tariff Board through June 30, 1912. In an effort to win bipartisan support for a permanent commission, he added two Democrats, including another economist, Thomas Walker Page of the University of Virginia.<sup>185</sup>

In January 1911, Taft signed a reciprocal trade agreement he had negotiated the previous summer with Canada. He had had high hopes that the agreement would demonstrate that he was a “low tariff and downward revision man” while enabling him to hold on to the support of protectionists.<sup>186</sup> The essence of the agreement was free trade in farm goods and lower tariffs in both countries on manufactured goods. Immediately after the lame-duck session had ended, Taft called for a special session of the new Congress (in which the Democrats would control the

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<sup>184</sup> For further discussion of Woodrow Wilson's career before 1913, see W. Elliot Brownlee, “Wilson's Reform of Economic Structure: Progressive Liberalism and the Corporation,” in John Milton Cooper Jr., ed., *Reconsidering Woodrow Wilson: Progressivism, Internationalism, War, and Peace* (Washington, DC and Baltimore: Woodrow Wilson Center Press and The Johns Hopkins University Press, 2008), 57–75; and W. Elliot Brownlee, “The New Freedom and Its Evolution,” in Ross A. Kennedy, ed., *A Companion to Woodrow Wilson* (Chichester: Wiley-Blackwell, 2013), 106–21.

<sup>185</sup> Kenkel, *Progressives and Protection* (1983), 73–75; Stone, *One Man's Crusade for an Honest Tariff* (1952), 66–67; Becker, *The Dynamics of Business-Government Relations* (1982), 84–85.

<sup>186</sup> Taft quoted by Goodwin, *The Bully Pulpit* (2013), 658.

House). Taft asked Congress to join the Canadian Parliament in a concurrent resolution approving the agreement. He lobbied vigorously for bipartisan support and lined up ex-President Roosevelt behind the resolution.

But many Republican insurgents, who often represented Midwestern and Western wheat growers, fishermen, loggers, and other producers who feared Canadian competition, opposed free trading in primary products and criticized the agreement for not further lowering the tariffs on manufactured goods. However, in April the House Democrats provided enough support to pass the legislation. They did so in part to embarrass Taft with both Republican insurgents and the protectionists. It was a victory for reciprocity, but it was one that further alienated the Republican insurgents from Taft, and it turned out to be hollow. In September Canadian voters rejected the agreement in a referendum called by their prime minister, Wilfred Laurier, a Liberal free trader aligned intellectually with Woodrow Wilson, after Laurier dissolved a Parliament that seemed certain to reject his recommendation for approval.<sup>187</sup>

The debate over the Canadian agreement continued through 1911, from the remainder of the special session into the new session that convened in December 1911. The contending sides in Congress turned the tariff commission issue into a political football. In the process, Taft aroused doubt about his commitment to the tariff commission idea and, at the same time, undermined the reputation of his Tariff Board. The negotiations over the Canadian trade agreement had discussed more than 300 duties, but the sole cost-investigation that the Board had undertaken studied just one industry, the production of paper and pulp. Critics of the Canadian agreement, who were usually supporters of a permanent tariff commission, declared that Taft should table his proposed agreement until the Tariff Board could demonstrate that the agreement would not endanger American producers. The Board failed to produce its one and only report in a timely fashion, and the results of its study of average production costs pointed to higher costs in the United States. This led some Republicans to conclude that the Board had demonstrated the risks of the Canadian agreement and therefore the need for protection.

Taft nonetheless won approval of the Canadian agreement in the special session—but only with the votes of Democrats. In addition, the Democrats were able to pass, with the support of some insurgent Republicans, three bills designed to reduce the Payne-Aldrich rates and, at the same time, to smoke out and further embarrass the President regarding his commitment to tariff reform. The bills lowered tariffs on wool and woolens, the manufacture of cotton, and various manufactured goods. In the session that convened in December 1911, Congress re-examined the woolen rates after the Tariff Board had submitted its report on that industry. Once again, bipartisan support produced another bill lowering rates. In debating these bills, the contending groups in Congress favorably cited the reports of the Tariff Board when it suited them, and

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<sup>187</sup> On Wilson and Laurier as disciples of Gladstone, see note 176 above.

when it did not, chastised the Board for sloppy analysis or for relying uncritically on business data. Ultimately Taft vetoed all of the bills, citing procedural reasons in his veto messages. A central reason he mentioned in all but the second woolen veto was that the Tariff Board had not sufficiently investigated the relevant production costs. Yet Taft had just led the fight for Canadian reciprocity even though the Board had not delivered a report on it. And, there were even more inconsistencies. The result was a widespread consensus that Taft had used the Tariff Board's work only when it was politically convenient.

As historian William H. Becker has written, by the end of the sessions the Board had "become a hated symbol to both protectionists and reductionists." Protectionists believed the Board was a Trojan horse for free trade. Both tariff revisionists (those who wished to foster reciprocal trade agreements) and free trade Democrats regarded the Tariff Board either as a shield for protection of the Payne-Aldrich tariffs or as inherently ineffective. In early 1912, while framing appropriation legislation for the next fiscal year, Congress ended funding for the Tariff Board, giving it a quiet burial. However, the Democratic leadership of the House agreed to the possibility of continuing some of the work of the Board. The appropriation act established the Bureau of Foreign and Domestic Commerce (BFDC) within the Department of Commerce and authorized it to conduct studies of the comparative production costs of dutiable goods.<sup>188</sup>

By then, the dramatic Presidential election of 1912 was gathering momentum. Despite the bipartisan embarrassment the Tariff Board had suffered in 1911, the idea of creating a permanent tariff commission turned out to be still alive. The burial of the Tariff Board had been premature. What revived the idea was a stunning turn of events—the schism in the Republican Party. The inability of the Taft administration and Republican leaders in Congress to heal the breach over tariff policy set the stage for a third-party campaign for the Presidency by Theodore Roosevelt.

In his effort to demonstrate that he was the most popular politician in America, Roosevelt associated himself with the tariff-reforming wing of the Republican Party and adopted their proposal for the tariff commission. It became a staple of what he called the "New Nationalism," the program that formed the platform of his Progressive Party challenge to the Republican and Democratic establishments. The Republican Party, which nominated Taft for reelection, also

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<sup>188</sup> Goodwin, *The Bully Pulpit* (2013), 658–60; Kenkel, *Progressives and Protection* (1983), 75–90 and 98; and Becker, *The Dynamics of Business-Government Relations* (1982), 84–85. The quotation from Becker is on 85. In August 1912, the appropriations legislation created the Bureau of Foreign and Domestic Commerce by consolidating the Bureau of Statistics and the Bureau of Manufactures already in the Department of Commerce and Labor. Its ability to study domestic conditions was limited. The legislation appropriated no money for the Bureau of Trade Relations in the State Department, thus discontinuing it de facto. And the legislation made no appropriation for compiling statistics on domestic commerce. Laurence F. Schmeckebier and Gustavus A. Weber, *The Bureau of Foreign and Domestic Commerce: Its History, Activities, and Organization* (Baltimore: The Johns Hopkins Press, 1924), 28–30 and 138–139.



endorsed the idea of a permanent tariff commission. But the Republicans were vague on what the role of the commission would be and the extent to which they were willing to revise the Payne-Aldrich tariff. Roosevelt's Progressives were less vague, calling for large cuts in rates and talking about using a permanent tariff commission to reduce the partisanship in tariff debates and to increase the role of economic knowledge in rate-making.<sup>189</sup>

As part of the New Nationalism, Roosevelt touted a permanent tariff commission as a nonpartisan body with plenary power over information gathering and with the responsibility for making recommendations for a "scientific" tariff. The Republican Party's platform had a plank that its architect later described as calling for "a competitive tariff," a "presumption in favor of the consumer," and "a real tariff commission."<sup>190</sup> Roosevelt's call gained credibility as leaders of the commission movement, such as Herbert Miles, and prominent Midwestern progressives like Albert Beveridge with anti-protectionist credentials, enthusiastically supported Roosevelt in his presidential campaign.

With the Republicans severely divided between the depleted Republican Party and the new Progressive Party, and the Congressional leaders of the Democratic Party skeptical at best of a tariff commission, the Democratic candidate, Woodrow Wilson, had no need to take account of the poorly defined tariff commission idea. He opted for a clear and extreme point of view as he placed tariff reform at the very top of his policy agenda. In 1911, he declared: "The tariff question is at the heart of every other economic question we have to deal with, and until we have dealt with that properly we can deal with nothing in a way that will be satisfactory and lasting."<sup>191</sup>

Wilson's tariff positions first united the Democratic Party and then gave him a clear advantage over Taft and Roosevelt. While Wilson stressed the connections between the tariff and the rise of monopoly power in industry, Taft became identified with the conventional protectionist approach, while Roosevelt failed to generate significant traction among Democratic voters with

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<sup>189</sup> On the debates over tariffs in the 1912 campaign, see Kenkel, *Progressives and Protection* (1983), 90; and Goodwin, *The Bully Pulpit* (2013), 648–49.

<sup>190</sup> The architect was William Culbertson, a young staff member for the Tariff Board. He was the protégé of William Allen White, the Progressive editor, from Emporia, Kansas. White discovered Culbertson at Emporia College and mentored him through Emporia College to two degrees at Yale. In the Ph.D. program at Yale Culbertson studied with Henry C. Emery, writing a biography of Alexander Hamilton, which concluded with a chapter on Hamilton's tariff policies. Culbertson immediately began working for Emery on the Tariff Board and single-handedly wrote the Board's "Glossary on Schedule K" (pertaining to wool and woolens) and the policy statement that White, who served on the Progressive Party platform committee, was able to include, with only minor changes, in the platform. See William S. Culbertson, "Ventures in Time and Space," unpublished autobiography, William S. Culbertson Papers, Library of Congress, and his early publications: *Alexander Hamilton: An Essay* (New Haven: Yale University Press, 1911) and "The Tariff Board and Wool Legislation," *The American Economic Review* 3 (March 1913), 59–84.

<sup>191</sup> Woodrow Wilson, "Interview," *New York Times*, December 24, 1911, in Link, ed., *PWW*, vol. 23 (1977), 611.

his complicated “reformist” message. Wilson won the White House with a mandate for an across-the-board, significant rollback in tariff rates.<sup>192</sup>

## The Underwood Tariff of 1913

Tariff reform was the first issue the new administration pushed in Congress, and passage of the Underwood bill was the swift consequence. The Underwood Tariff represented major reform. It slashed rates on dutiable goods, on the average, by about one-third and expanded the list of duty-free goods to include food products, leather, wool, and sugar (the last phased in over four years). Wilson was generally true to a principle that he had espoused in 1909: customs duties ought to be levied only on “the things which are not of primary necessity to the people in their lives or their industry, things, for the most part, which they can do without suffering or actual privation.”<sup>193</sup>

Wilson’s proposed expansion of the free list had threatened to cause defections of Congressional Democrats, but he insisted on party discipline behind the expansion of the free list over a broad range of products. The President understood that if he allowed any defections, more were certain to follow. He turned back efforts by Democrats in Congress to provide protection on leather, wool, cotton textiles, tobacco, and lumber. The only compromise Wilson allowed was on the phased-out tariff on sugar. He agreed to that in order to protect revenues, while the income tax—included in the Underwood legislation, in large part to replace tariff revenues—proved itself.<sup>194</sup> As a consequence of the Underwood tariff, rates became lower than at any time since the Civil War.<sup>195</sup>

The process that the Wilson administration and Congress used to establish tariff rates in the Underwood legislation was, however, far from scientific; it lacked the application of economic principles or systematic investigation. Democratic leaders argued that they sought to establish, in principle, a “competitive tariff.” But, as economist Frank W. Taussig pointed out, this principle could be construed as meaning essentially the same thing as the Republican principle of a tariff “equalizing cost of production,” and both principles were equally inconsistent with the principle of free trade. As Taussig also noted, what was more important was what the “implications” of the two principles were “to the average voter.” The implications “were by no means the same.” Taussig went on to explain that the Republicans “made it clear that they

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<sup>192</sup> On the importance of the tariff issue in the campaigns of 1912, see Lewis J. Gould, *Four Hats in the Ring: The 1912 Election and the Birth of Modern American Politics* (Lawrence: University Press of Kansas, 2008), especially 144–49.

<sup>193</sup> Woodrow Wilson, “The Tariff Make-Believe” (1909), 145.

<sup>194</sup> On the compromise over sugar, see Taussig, *The Tariff History of the United States* (1964), 425–26.

<sup>195</sup> The best history of the crafting of the Underwood Tariff, especially Wilson’s role, is Arthur S. Link, *Woodrow Wilson: The New Freedom* (Princeton: Princeton University Press, 1956), 177–97.

meant duties to be kept amply high enough to leave the domestic producer in command of the situation,” while the Democrats “meant that duties should be kept below the point of prohibition.” In other words, “The Republicans wished to make sure of keeping imports out; the Democrats wished to make sure of letting some in.”<sup>196</sup>

Given the lack of clear principle, it was not surprising that the Ways and Means Committee settled duties, to quote Taussig once again, “in more or less rough and ready fashion of compromise, not of any close calculation or accurate information.” Taussig found “not a little truth” in the Republican charge that the committee “had proceeded roughshod,” arriving at duties “by guesswork.” But, Taussig implied, this was in large part because of the desire of Wilson and Congressional Democrats to move decisively toward free trade.<sup>197</sup>

Wilson had, in fact, made his strategy crystal clear in 1911, using some of the same words as Taussig: “In the somewhat rough and ready experimental estimates that it will be necessary to make, the judgment of an experienced committee of Congress is as good a guide as the judgment of a professional board. The question is then one of statesmanship.”<sup>198</sup> For Wilson, the call for scientific tariff-making by a commission of experts was merely an excuse to delay substantive reform and maintain the status quo until the Republicans could return to dominance in Congress and re-establish control of the taxing process.

Wilson’s intent, instead, was to create a precedent for a process that would produce sustained across-the-board cuts in tariffs and ultimately bring about something approaching a free-trade posture on the part of the United States. In 1913, he rejected the incremental program of Republican reformists and adopted a strategy that he intended to be far more challenging to protectionism. His assumption was that the President and Congress could be relied on to challenge protectionism if the public could be led to expect continued, regular, and dramatic cuts in tariff rates.<sup>199</sup>

In leading the adoption of the Underwood Tariff, Wilson had given the revisionists more reform than they had bargained for. In so doing, he invoked republican, anti-monopoly principles, and made the application of those principles a test of party loyalty. He thereby revived a reform movement within the United States that had its origins in classical liberalism and the

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<sup>196</sup> Taussig, *The Tariff History of the United States* (1964), 418–21.

<sup>197</sup> *Ibid.*, 423.

<sup>198</sup> Wilson, “Progressive Democracy Is Remedy for Evils of Tariff and Trusts, Says Woodrow Wilson,” *New York Times*, December 24, 1911, in *PWW*, vol. 12 (1972), 611. Taussig and Wilson were friends, having been at about the same time both students and beginning professors with closely related intellectual interests. In writing the last volume of his history of the United States, Wilson cited Taussig as one of his “chief authorities on matters fiscal, financial, and economic.” (Wilson’s other “chief” authorities on these topics were A.S. Bolles, Carroll D. Wright, and David Ames Wells.) Wilson, *A History of the American People: Reunion and Nationalization* (1902), 197.

<sup>199</sup> Wilson almost certainly had in mind the incremental program of the British Liberals during the 19th century.

representation of southern trading interests. This movement had become attractive as an international strategy for small producers in the late 19th century, and then acquired a powerful republican, anti-corporate dimension during the progressive era. Wilson embraced all of those sources: the republican heritage of the American Revolution, the classical economics arguments, the interest in advancing small business, and the search for an international mechanism for disciplining corporate monopolies.

Wilson's rejection of the tariff commission idea during the campaign of 1912 and his New Freedom legislative victories in 1913 reflected something more than a pragmatic adaptation to the realities of partisan politics, a desire to press ahead rapidly with dramatic tariff reform, and a savvy sense that he should avoid the delays and bickering that had ensnared Taft. Wilson distrusted commission government. One reason was that he had great admiration for the British parliamentary system in which political parties, whether in power or out of power, had substantial technical capacity for drafting legislation. The American counterpart, in his view, should be the development of the technical capacity of Congressional committees and administrative departments such as the Treasury. Indeed, Wilson vigorously supported the mobilization of economic knowledge and data in the analysis of social problems and the formulation of legislation. Partly for that reason, in 1913 he did not stand in the way of providing \$50,000 for the analysis of comparative production costs by the BFDC during the remainder of the 1914 fiscal year. Also in 1913, he did not object when Congress organized a Cost of Production Division within the Bureau to conduct the work.<sup>200</sup>

In addition to his partiality to Parliamentary-style government, Wilson had a preference, expressed most clearly in his thinking about trade regulation, for "legal regulation" over "executive regulation" as more consistent with democratic values. Executive regulation, he feared, could lead to abuses of power and capture by the regulated or taxed interests.<sup>201</sup> "Must we fall back on discretionary executive power?" he had asked in 1908. "The Government of the United States was established to get rid of arbitrary, that is, discretionary executive power." He went on, "If we return to it, we abandon the very principles of our foundation, give up the English and American experiment and turn back to discredited models of government." Two years later, in a similar vein, he stressed the risk of the capture of commissions by the interests whom the commissions regulated or taxed. "Having created trusts," he wrote, "the dominant part has tried to 'regulate' them, but its regulation . . . may in the long run only cement the partnership and corrupt."<sup>202</sup>

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<sup>200</sup> Schmeckebier and Weber, *The Bureau of Foreign and Domestic Commerce* (1924), 30, 139–40. Also, see note 188, above.

<sup>201</sup> Brownlee, "The New Freedom and Its Evolution" (2013), 73–75.

<sup>202</sup> Wilson, "Law or Personal Power," Remarks at the National Democratic Club, New York, April 13, 1908, in Link *et al.*, *PWW*, vol. 18 (1975), 264; and Wilson, "To First Voters," June 26, 1910 in Link *et al.*, *PWW*, vol. 20 (1976), 504.

Wilson's reservations about relying on independent commissions to regulate trade extended as well to the process of determining tariffs. He feared that a tariff commission would be subject to capture by protectionists working through Congress or the Presidency, especially during a return of the Republicans to power. If that happened, he believed, the commission might win public support and be able to sustain protectionist policies. Wilson held principled and political institutional objections to the commission, was proud of his party's record on tariff reform, and did not want to take any risks in alienating staunch Democratic supporters of the Underwood Tariff.

## Wartime Disruption, 1914–15

In less than two years as President, Woodrow Wilson had led in the creation of structural economic reform, including tariff reform, more ambitious than any since the sweeping program of the Republicans during the Civil War. But World War I intervened to prevent any comprehensive testing of the long-run potential of some of Wilson's New Freedom reforms, including the launching of what Wilson had hoped would be a sustained movement toward free trade. The wartime situation forced Wilson to modify the assumptions that had led him to champion the Underwood Tariff as a model of tariff reform that was politically viable.

The economic stress caused by the war during 1914 and 1915 was crucial in weakening Wilson's political attachment to the Underwood Tariff's strategic and institutional formula. The outbreak of war in August 1914 immediately disrupted established trading and financial relationships, threatened economic contraction, and imposed powerful new fiscal pressures on the federal government. These factors gave second wind to the tariff commission movement that had gone down to apparent defeat in 1913.

One source of revival was widespread concern among former small-business advocates of tariff revisionism that the postwar world would be chaotic, providing greater justification for a systematic understanding of the political economy of commerce and for expanding the role of administrative discretion in setting tariff rates. Very quickly in this newly unstable environment, the traditional leaders of the tariff commission movement won new recruits to their cause among large corporations, the labor movement, and a variety of civic leaders. In 1915, the Chamber of Commerce and the MANY took the leadership in forming a broader set of alliances. The Chamber and its organizational allies formed a new tariff commission lobby, the Tariff Commission League (TCL), which replaced the NTCA and broadened its base to include leaders from large firms engaged in investment banking, railroading, merchandising, and manufacturing. Support for the MANY was weighted even more heavily toward the largest financial and manufacturing enterprises, including National City Bank; Kuhn, Loeb (some of whose partners were major supporters of Woodrow Wilson), U.S. Steel; International

Harvester; Western Electric; and General Electric. For the sake of peace and order in the postwar world, international commerce, they believed, would require stronger management by the world's largest economies, and the United States would need the instrument of a professional tariff commission to play its part effectively.

The need for planning for that postwar world was immediate. During 1915 and 1916, the tariff revisionists, along with Wilson and the leaders of his administration, were at times optimistic that negotiations or breakthroughs on the battlefield would bring about an early peace. This led the revisionists to worry that a swift end to the war might result in belligerents, organized in state-sponsored cartels, dumping their accumulated stockpiles on the American market while raising barriers to American exports. In the view of people with this worry, a tariff commission would be an instrument to support the introduction of the retaliatory provisions absent in the Underwood Tariff. A more widely held position was that, even if dumping proved not to be a problem, the inflamed nationalism among the former belligerents and the unsettled nature of international relations might require a more vigorous representation of American exporting interests by the government. At the same time, however, the rising concern about these issues provided convenient political cover for business interests that wished to use the tariff commission issue, either directly or indirectly, to roll back the Underwood reforms.<sup>203</sup>

This revival of the tariff commission movement and tariff revisionism did not immediately arouse the American public over tariff issues. But what did over the 18 months following August 1914 were the economic and political difficulties that the war created. Weakening trade and financial disruption in the initial months of the war, including the closing of the New York stock exchange from the end of July 1914 through mid-December, made more severe an economic recession that had begun in 1913. The new Federal Reserve did not become effective until early 1915, and its role in international finance was especially slow to adapt to wartime conditions. In turn, the flow of customs revenues declined and a major federal budget deficit loomed in 1915.<sup>204</sup> Fearing that the deficit would produce a banking crisis and a worsening recession, in October 1914 the Wilson administration led in the passage of the Emergency Revenue Act. This measure imposed about \$100 million in new taxes, mainly in the form of taxes on domestic consumption.

The combination of the recession, financial trouble, and the tax increases that were unpopular almost everywhere except the Southern states meant that the Democrats suffered significant losses in the 1914 Congressional elections. The Republicans successfully blamed Wilson's

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<sup>203</sup> On the antidumping panic of the dyestuffs industry, see Schnietz, "Democrats' 1916 Tariff Commission" (1998), 16–17.

<sup>204</sup> As it turned out, in fiscal 1915 customs revenues fell about \$80 million, to about three-fourths of the previous year's level. U.S. Government, Secretary of the Treasury, *Annual Report, 1915* (Washington, DC: Government Printing Office, 1915), 243.

reforms, particularly the Underwood Tariff, for creating the recession, and the tax increases for adding to the pain.<sup>205</sup> In November the Democrats barely held onto control of Congress, losing some 48 seats in the House, including many in the vote-rich states of New York, Ohio, and Illinois, which Wilson had carried in his 1912 election and might need to hold in order to win reelection in 1916.<sup>206</sup>

The electoral setback caused Democrats from the grassroots of the party, Congressional leaders, and Wilson cabinet members to begin to doubt their party's prospects in 1916. They realized that, even without the wartime economic problems, they faced a major problem of building a winning coalition in the face of a Republican Party reunified by Theodore Roosevelt's return to the fold. The only way to win, Democrats were certain, was to hold at least some of Northeastern states and to develop a successful appeal to the Midwesterners and Westerners who had bolted from the Republican Party in 1912 and formed the core of the Progressive Party.

Beginning shortly after the 1914 elections Democrats throughout the nation, except the South, urged the Wilson administration to appeal to the former Progressive voters by embracing a proposal for a permanent tariff commission. Getting behind the tariff commission idea, they argued, could move the Democratic Party from a defensive to an offensive posture on tariff issues, hold some support in the northeast, and attract support from former Progressives who had favored the tariff-commission approach and were still suspicious of the protectionism of the Taft Republicans.<sup>207</sup>

Wilson had no objections in principle to making tactical adjustments in his economic program to attract former Progressives to the Democratic Party. In fact, he had already done so during the 1914 election campaigns by shifting his position on the regulation of trade. In the Congressional debates that preceded the creation of the Federal Trade Commission (FTC) in August 1914 he led a coalition of Democrats and progressive Republicans in pressing for a regulatory commission rather than an antitrust covenant enshrined in law, which had been his preference.<sup>208</sup>

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<sup>205</sup> For an excellent survey of the Republican attacks on the Underwood Tariff, see Schnietz, "Democrats' 1916 Tariff Commission" (1998), 12–16.

<sup>206</sup> On the 1914 elections, see John Milton Cooper Jr., *Woodrow Wilson: A Biography* (New York: Random House, 2009), 273–74.

<sup>207</sup> On the lobbying of Wilson by Democrats, see Schnietz, "Democrats' 1916 Tariff Commission" (1998), 19–20, especially n. 41 and 42; Kenkel, *Progressives and Protection* (1983), 101, 262, n. 15; Link, *Wilson: Confusions and Crises* (1964), 342; and Becker, *The Dynamics of Business-Government Relations* (1982), 87, 207, n. 54.

<sup>208</sup> On the political calculations involved in Wilson's support for the creation of the FTC, see Cooper, *Woodrow Wilson* (2009), 231–34, and Brownlee, "Wilson's Reform of Economic Structure" (2008), 75.

There were three interrelated reasons why Wilson was willing to make that policy move in the area of trade regulation but not in tariff-making. First, tariff reform was a much higher priority for Wilson than antitrust regulation. Second, Congressional Democrats like Representative Claude Kitchin and Senator Oscar Underwood, who had been elected to the Senate from Alabama in 1914, shared his priorities and wanted him to stand firm in opposition to a tariff commission. Third, after August 1914, Wilson had the shield of the FTC to fend off proposals to create a tariff commission.

In late 1914 Wilson began to try to divert attention away from the tariff commission idea by suggesting that the FTC as well as the BFDC might take on the analysis of tariff issues. At a press conference in December 1914 a reporter asked Wilson if he had “given any further consideration to the proposal to have an expert tariff commission.” After commenting, “Well, it is called to my attention about once every twenty-four hours, so it's a continuing performance,” Wilson pointed out that “the trade commission is authorized to report and advise Congress upon these, as upon all such matters.”<sup>209</sup> At another press conference in January 1915 Wilson had an exchange with a reporter who asked Wilson to say more about how the FTC would “take up the work of a tariff commission.” Wilson replied that the work “has to be developed by the [trade] commission itself.” The reporter followed up by asking: “Isn't there a bureau of the Commerce Department that has that power?” Wilson said that the BFDC did have “inferentially, those powers.” Wilson then agreed with the reporter's next comment, which was that “Mr. Underwood, when the tariff was in process, had laid some stress upon the powers which had been granted to these bureaus.” Wilson added: “I don't think there is any lack of power now. It merely is a question of development.”

In reply to yet another follow-up question, Wilson explained that the BFDC and the FTC would probably make independent reports on tariff issues. Wilson noted that, on the one hand, the BFDC was engaged in “an active sort of business of promotion,” sending “agents to foreign countries” and studying the opportunities there for American merchants,” and then getting “American merchants in touch with those opportunities.” On the other hand, the FTC would be “making a more scientific study” of commercial “opportunities.”<sup>210</sup>

Through the summer of 1915 Wilson stuck by his position. In August he told Representative James M. Cox of Ohio, a Democrat who had advised him to embrace a tariff commission, that

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<sup>209</sup> Press Conference, December 29, 1914, in Robert C. Hildebrand, *The Papers of Woodrow Wilson, The Complete Press Conferences, 1913–1919*, vol. 50 (Princeton: Princeton University Press, 1985), 661.

<sup>210</sup> Press Conference, January 12, 1915, in *ibid.*, 676. A week later Wilson made the same distinction between the work of the BFDC and the FTC. Press Conference, January 19, 1915, in *ibid.*, 681.



well before the election he would deliver a public explanation that “full powers of a tariff commission are already lodged in existing organs of the Government.”<sup>211</sup>

## Wilson’s Conversion

As 1915 wore on, however, fiscal problems became more difficult and began to encourage a shift in the attitudes of Wilson’s advisors, and ultimately Wilson himself. Federal revenues remained weak in the first half of 1915, falling short of estimates. The Emergency Revenue Act was scheduled to expire on December 31, 1915. Moreover, the Underwood Tariff had scheduled the sugar tariff’s demise for May 1, 1916, thus threatening an even larger revenue shortfall. On May 7, 1915, as the administration contemplated what already promised to be a budget deficit of unprecedented scope, a German U-boat sank the British ocean liner, the *Lusitania*, killing 1,198, including 128 Americans. Calls for American entry into the war mounted and the crisis in German-American relations continued until September, energizing the movement for American military preparedness. On July 21, Wilson wrote to the Secretaries of War and the Navy to develop plans for an “adequate national defense” in preparation for recommendations to Congress in December. In response, Secretary of the Treasury William Gibbs McAdoo asked his staff for recommendations to raise additional revenues. After they proposed retaining the sugar duty, McAdoo asked them to go further and make “every possible suggestion as to new sources of internal taxation which you think are worthy of consideration.”<sup>212</sup> In August, a German U-boat torpedoed another British passenger liner, the *Arabic*, killing 44 people (including two Americans). Wilson stiffened his resolve to seek tax increases. He gradually embraced most of the elements of a preparedness program that McAdoo and his staff recommended after consulting with Kitchin, the powerful member of Congress who was both the majority leader of the House and the new chair of the House Ways and Means Committee.

During December 1915 and January 1916 it became clear to Wilson and the Democratic leadership in the House that this preparedness program would certainly entail massive increases in the income tax that had been introduced as part of the Underwood Tariff. It would almost certainly include very significant increases in the taxation of corporations, probably through regular income taxation and, even more important, some form of excess-profits taxation. Wilson and Secretary McAdoo favored this approach but worried about the potential backlash—both from business, including the Democratic Party’s own significant supporters

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<sup>211</sup> “Wilson’s Stand on Tariff: Opposed to Special Commission for Scientific Legislation,” *New York Times*, September 26, 1915.

<sup>212</sup> A. J. Peters to William G. McAdoo, August 14, 1915; McAdoo to William H. Osborn, August 18, 1915, Papers of William G. McAdoo, Library of Congress (referred to below as the McAdoo Papers). Peters was McAdoo’s Assistant Secretary for Tax Policy.

within the New York investment banking and mercantile communities, and from voters, particularly in the Northeast, who might punish the President for tax increases during an election year. Within the Wilson administration, a tactical idea took hold. Administration support for the tariff commission idea could help moderate business hostility to the tax plan and defuse the charge that Wilson was antibusiness.

At least two of Wilson's cabinet members, Secretary of Agriculture David Houston and Secretary of the Interior Franklin Lane, were "Roosevelt Democrats" who had admired the ex-President. They had long been friendly to the idea of establishing a tariff commission as a way of generating information that would enhance the drafting of tariff reform legislation and reduce the influence of protectionists on tariff policy. Houston held particularly strong pro-commission views. A kind of protégé of key Wilson advisor Colonel Edward M. House, Houston was a political scientist and university administrator who had been president of Texas A&M, president of the University of Texas, and, most recently, chancellor of Washington University in St. Louis.<sup>213</sup> As a graduate student in political science at Harvard University, where he had earned an M.A. in 1892, Houston had studied with the distinguished tariff expert, Frank Taussig. Like Wilson, Houston remained a friend of Taussig's.

Houston recalled that he had brought up the tariff commission idea early in Wilson's administration, urging its adoption, and then had done so twice more. On these occasions, Houston had told the President that "he was not foolish enough to think that the tariff or any form of taxation could be taken out of politics, that I recognized clearly that taxation was the sort of thing that constituted the essence of political difference" and "that I was not so innocent as to believe that any Congress would ever fully accept the conclusions of any administrative or investigating commission on any matter of taxation." But he "was convinced that such a body could be of great service by gathering reliable data for the information of the President, of Congress, and, above all, of the public," which "was ignorant both of the principles and facts"—to the benefit of "special groups" that shaped legislation "in the dark and secret chamber of conference committees."<sup>214</sup>

Houston won no early recruits to his campaign to persuade the President. He was a person of "intellectual force and solid information," as McAdoo later wrote, but Houston was a relatively marginal figure in the political deliberations of the cabinet because he was "somewhat at odds

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<sup>213</sup> On Houston's relationship with Colonel House, see Charles E. Neu, *Colonel House: A Biography of Woodrow Wilson's Silent Partner* (Oxford: Oxford University Press, 2015), especially 50 and 82. Much earlier House had apparently recruited Houston from the University of Texas, where he had been a dean, to become President of Texas A&M.

<sup>214</sup> David Houston, *Eight Years with Wilson's Cabinet, 1913–1920*, vol. 1 (Garden City: Doubleday, 1926), 196–97.

with the liberal Democrats” in the administration.<sup>215</sup> However, another cabinet member soon joined Houston and Lane in their campaign. As the best-connected New York politician in the cabinet, and close to the traditionally free-trade mercantile community of New York City, McAdoo agreed that championing the tariff commission would improve Wilson’s chances in the 1916 elections.<sup>216</sup> In addition, in the process of managing his department during the turbulence of the war, McAdoo began to see some administrative promise in establishing a tariff commission. In 1914 and 1915 McAdoo had sought to use the Treasury and the nascent Federal Reserve Board to promote American international trade, and now he concluded that a tariff commission might be a useful tool to bargain for more favorable treatment of American exports and might expand the scope of power of McAdoo’s own initiatives in promoting international trade.<sup>217</sup>

At the same time, McAdoo saw the political advantage for Wilson in championing the creation of a tariff commission. In October McAdoo hinted in public that the administration might embrace the tariff commission. In a well-publicized speech in Helena, Montana, McAdoo declared that the Wilson administration was seeking to end “agitation of the tariff” and “do business upon the basis of an established tariff.”<sup>218</sup> Guy Emerson, a New York publicist who was the eastern representative of the Tariff Commission League (based in Chicago) immediately wrote to congratulate McAdoo for the speech. Emerson appreciated the plea for “taking the tariff out of politics” and urged McAdoo to pursue this by getting behind “a nonpartisan Tariff Commission of the highest personnel.” Emerson observed that the notables who led the League, including James J. Hill, Thomas A. Edison, and Jane Addams, had joined with the U.S. Chamber of Commerce in drafting proposed legislation. Emerson added that Samuel Gompers of the American Federation of Labor “has given us his unqualified endorsement and support.”<sup>219</sup>

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<sup>215</sup> William Gibbs McAdoo, *Crowded Years: The Reminiscences of William G. McAdoo* (Boston: Houghton Mifflin, 1931), 181.

<sup>216</sup> For an example of the business concerns, see the correspondence of Albert Strauss, a member of the New York mercantile investment firm of J.W. Seligman and Co., with McAdoo’s close associate, John Skelton Williams, the Comptroller of the Currency. Strauss to Williams, March 1, 2, and 3, 1915, McAdoo Papers.

<sup>217</sup> On McAdoo’s ambitious leadership at the Treasury, see W. Elliot Brownlee, “Social Investigation and Political Leadership in the Financing of World War I,” in Michael J. Lacey and Mary O. Furner, *The State and Social Investigation in Britain and the United States* (Washington, DC, and Cambridge, UK: Wilson Center Press and Cambridge University Press, 1993), 323–64; and Brownlee, “Wilson and Financing the Modern State: The Revenue Act of 1916,” *Proceedings of the American Philosophical Society*, 129 (1985), 173–210. I agree generally with Karen Schnietz’s assessment of the importance of McAdoo’s role in persuading Wilson to embrace the tariff commission idea, but I think she has overly downplayed the importance of Houston. See Schnietz, “Democrats’ 1916 Tariff Commission” (1998), 23, n. 52.

<sup>218</sup> Address of W.G. McAdoo, Secretary of the Treasury, at Helena, Montana, October 28, 1915,” transcript with McAdoo’s penciled editing, McAdoo Papers.

<sup>219</sup> Guy Emerson to McAdoo, November 8, 1915. McAdoo Papers. During the Liberty Loan campaigns of wartime borrowing in 1917 and 1918 McAdoo would draft Emerson as the chief public relations coordinator for the loans.

A potential obstacle within the cabinet, however, was Secretary of Commerce William C. Redfield. He was engaged in his own efforts to promote trade and, like McAdoo, sought to react positively to the same business concerns about the post-war world that motivated many of those who sought to revive the tariff commission idea. Redfield, however, often came into conflict with McAdoo, particularly with regard to the organization and financing of Latin American trade.<sup>220</sup> Like McAdoo, he appreciated the need for improved information in understanding the new financial and trading environment. In particular, he believed that the most important work a new tariff commission might do was to conduct cost of production studies. However, the very same work was already being performed by the BDFC—superbly so, in his view—within his cabinet department. Redfield saw no need for the FTC to take over this work, and saw no need either for a new agency, especially one that might not have as much expertise in understanding manufacturing as the Commerce Department. The most efficient solution, he suggested, was to provide more support for the excellent but underfunded BDFC.<sup>221</sup>

What had emerged, in part, was a turf fight between the Treasury and Commerce for control of tariff policy. Wilson hated resolving disputes among his cabinet members, and the skirmish undoubtedly contributed to his sluggish movement toward support of a tariff commission.<sup>222</sup> By October of 1915 McAdoo had decided to join Houston and Lane in attempting to change the President's mind, and in the process ease the enactment of the new revenue program and the expansion of the scope of the Treasury in managing international commerce. Yet he proceeded cautiously. Momentous financial issues, national and international, dominated McAdoo's discussions with Wilson, and McAdoo's efforts to expand his influence over the nation's economic affairs had often irritated the President, particularly when McAdoo was too brazen in his efforts to dominate the cabinet or manipulate the President. McAdoo's caution in pressing for the tariff commission may well have delayed Wilson's conversion.<sup>223</sup>

As McAdoo often did when he found himself in this kind of situation, he recruited Colonel House to his cause. Partly because of his friendship with Houston, House was already

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<sup>220</sup> See the discussion by Dale Norman Shook, *William G. McAdoo and the Development of National Economic Policy, 1913–1918* (New York: Garland Publishing, 1987), 120.

<sup>221</sup> For Redfield's own survey of the international work of the Bureau of Foreign and Domestic Commerce, see William C. Redfield, *With Congress and Cabinet* (Garden City: Doubleday, 1924), 117–124. See also Schmeckebier and Weber, *The Bureau of Foreign and Domestic Commerce* (1924), 30–37, on the work of the Department of Commerce during World War I. For Redfield's case to Wilson, see Redfield to Wilson, December 22, 1915, in Link *et al.*, *PWW*, vol. 35 (Princeton: Princeton University Press, 1980), 384.

<sup>222</sup> The FTC was slow to start up in 1915 and faced serious organizational problems into 1916. Otherwise, it too might have become a contender in the competition.

<sup>223</sup> Wilson's occasional irritation over McAdoo's aggressiveness may have been augmented by McAdoo's marriage to Wilson's daughter Eleanor in May 1914. However, subsequently McAdoo had far greater access to Wilson than any other cabinet member, and Wilson always had high regard for McAdoo's competence.

sympathetic to the tariff commission idea. On November 5, he broached the subject in an introductory way with Wilson in the context of a discussion of the 1916 elections. When Wilson “seemed to look with equanimity upon losing Massachusetts, Connecticut, New York, and perhaps, New Jersey,” House “asked how far he was willing to go toward creating a tariff commission.” Wilson replied, according to House, “Only so far as one might be assembled from existing boards like the Trade Commission and the Bureau of Commerce.” And, Wilson added, “the tariff was a political question which one could not relegate out of active politics, and what ever party was in should express its views as to tariff.” House recalled that he “disagreed wholly,” arguing that as a result of partisan politics “our whole industrial system lacks stability.” House went on: “No American manufacturer feels secure and he never knows whether to increase or curtail his plant.” In contrast, “his European competitor has no such handicap as a constantly rising and falling tariff.” The tariff commission, House told Wilson, offered an opportunity to reduce the economically disruptive and destabilizing partisanship of the tariff issue.<sup>224</sup>

The conversation with House prompted Wilson to contemplate discussing the tariff commission in his State of the Union message scheduled for December 7, 1915. On November 28, the President asked House for his advice. House, apparently worried that Wilson might speak out against the idea of a tariff commission, urged Wilson not to but “go into the matter fully in another message.” House recalled that they subsequently “discussed the idea of a tariff commission in some detail, I urging it and he arguing against it.” Wilson reiterated his belief that “the Government now had the necessary machinery for doing it”—the position which he had maintained for more than a year. But in this conversation he added his fear that “a tariff commission such as the republicans suggested” would “finally come to be a legislative body upon that subject which would not be good for the country.” Wilson cited the Interstate Commerce Commission (ICC) as an example of “what he had in mind.” Wilson opined that the ICC “had been in force so long and the people had accepted it so thoroughly, that he did not believe Congress now dared to radically change any decisions they laid down.” Perhaps Wilson’s additional implication was that with a return of Republican power to Washington, protectionist interests would capture the tariff commission.<sup>225</sup>

In writing his State of the Union message Wilson decided to follow House’s advice. In the message Wilson laid out at length his preparedness program, called for measures that would strengthen American commerce and military capability, and embraced the challenge of the revenue program that he and McAdoo had crafted. He did not mention a tariff commission. However, near the end of his message, he declared that “many conditions about which we have repeatedly legislated . . . are likely to change even more rapidly and radically in the days

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<sup>224</sup> “From the Diary of Colonel House, November 5, 1915,” in Link *et al.*, *PWW*, vol. 35 (1980), 176–77.

<sup>225</sup> “From the Diary of Colonel House, November 28, 1915,” in Link *et al.*, *PWW*, vol. 35 (1980), 261.

immediately ahead of us, when peace has returned to the world and the nations of Europe once more take up their tasks of commerce and industry with the energy of those who must bestir themselves to build anew.” But “just what these changes will be no one can certainly foresee or confidently predict. . . . The most we can do is to make certain that we have the necessary instrumentalities of information constantly at our service so that we may be sure that we know exactly what we are dealing with when we come to act, if it should be necessary to act at all.”

Wilson concluded these remarks by indicating that he might “ask the privilege of addressing you more at length on this important matter a little later in your session.” The President had not yet made up his mind on the question House had asked, but Wilson had followed House’s advice and had not closed the door on the creation of a tariff commission. Moreover, he ended his message with a tone that resembled Roosevelt’s New Nationalism more than the New Freedom: “For what we are seeking now, what in my mind is the single thought of this message, is national efficiency and security. We serve a great nation . . . We should see to it that it lacks no instrument, for facility or vigor of law, to make it sufficient to play its part with energy, safety, and assured success. In this we are no partisans but heralds and prophets of a new age.”<sup>226</sup>

In January 1916, as the discussions within the administration regarding an imminent fiscal crisis intensified, McAdoo pressed Wilson to embrace a proposal for a tariff commission. The chore of persuading Wilson had exhausted the cabinet. More than a year later, in February 1917, when various cabinet members were becoming deeply frustrated in their efforts to persuade Wilson to harden his line against Germany (Houston and McAdoo threatened resignation), Lane thought back to the previous winter, when he had written to a family member: “I tried to smooth [Houston and McAdoo] down by recalling our past experiences with the President. We have had to push, and push, and push, to get him to take any forward step—the Trade Commission, the Tariff Commission. He comes out right but he is slower than a glacier—and things are mighty disagreeable, whenever anything has to be done.”<sup>227</sup> Lane had identified a crucial dimension of Wilson’s political persona—a great reluctance to compromise his principles in order to gain a tactical advantage.

In January 1916 McAdoo persevered. Early in the month he asked A. J. Peters to submit a memorandum detailing the history of tariff commissions and outlining a proposal, including a draft of legislation. Peters provided the draft and a nine-page document in which he traced the history of tariff analysis by Secretaries of the Treasury, the tariff commission in 1882, and Taft’s tariff board. Peters prefaced his remarks by noting that “our lack of information at hand in

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<sup>226</sup> “An Annual Message on the State of the Union, December 7, 1915,” in Link *et al.*, *PWW*, vol. 35 (1980), 309–10.

<sup>227</sup> Franklin Knight Lane to George Whitfield Lane, February 25, 1917 in Link *et al.*, *PWW*, vol. 41 (1983), 282.

preparing the last tariff bill was a source of anxiety to many of us.” He went on: “The public at large recognizes the need for a careful consideration of tariff matters, and the proposition for the establishment of a tariff board is receiving the support of commercial and business bodies and fair-minded men all over the country.” He recommended against a commission appointed by the Secretary of the Treasury, and McAdoo concurred in a marginal note. Peters recommended instead “an independent commission” with broad investigatory responsibilities and “full power to summon witnesses and to acquire information.” In relating the history of Taft’s board, Peters wrote that “it made contributions of great value” and observed that when Congress cut off funding for the board, “the Speaker, Mr. Clark, Mr. Underwood, and sixty-two Democrats, including a majority of those Democrats serving on the Ways and Means Committee of the next Congress,” voted in favor of the appropriation.”<sup>228</sup>

With a clear and detailed proposal in hand, McAdoo wrote a confidential political memorandum to Wilson. McAdoo warned that Republicans planned to focus on the tariff in the upcoming 1916 elections. McAdoo reported on his extensive speaking trip to the Midwest and Far West on which “in almost every one of the large cities I visited I found that there had been a carefully cultivated sentiment, amounting to a genuine fear, on the part of manufacturers and many business men, that this country is in jeopardy from a possible invasion of its markets by manufacturers and merchants of Europe after peace is restored.” His main point: “It is by this skillful appeal to the fears of the manufacturer and business men of America that the Republicans hope to make the tariff an issue.” McAdoo dismissed these fears, declaring that after the war “we shall be better prepared to meet world competition in the future than ever before in our history.” He urged Wilson not to consider any “anti-dumping” legislation, which would only strengthen “the fears and apprehensions of the business interests of the country,” but, “if the matter is to be considered at all, it should be considered as part of a tariff commission program and not as a separate matter, and that it would be better, even in that case, to confine action to an investigation by such a commission of the ‘dumping’ problem and not go beyond that.”<sup>229</sup>

This memorandum, along with the continued pressure from Lane and Houston, reinforced by a paper by Taussig that both Houston and Redfield had circulated, finally convinced Wilson. Taussig’s moderate views, especially his deference to legislative and executive authority, may well have been important in persuading Wilson. Taussig saw the role of a tariff commission as rather circumscribed—a narrowly technocratic role, leaving fundamental policy decisions to Congress and the President. Taussig was sympathetic to a case for “permanent officials

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<sup>228</sup> A. J. Peters, Memoranda for the Secretary from Mr. Peters: “A Tariff Commission and the History of Previous Commissions,” January 10, 1916, and “The Essentials of a Draft for a Tariff Commission,” January 10, 1916, McAdoo Papers.

<sup>229</sup> William G. McAdoo to Woodrow Wilson, January 14/16, 1916, in Link *et al.*, *PWW*, vol. 35 (1980), 475–77.

regularly serving in executive departments,” just as Redfield had proposed, but worried that the sub-department board would not attract a “permanent, dignified, able, non-partisan” group of experts. While Taussig certainly favored free trade, he did not recommend rapid movement toward it, and did not believe that the tariff commission should have a mandate to promote it. In February 1916 he published his views, writing that “if we are really to have a useful, permanent, non-partisan board, it must be appointed in such a way, and its duties must be defined in such a way, as to make clear its purely advisory and non-political functions.” He added that “if its establishment is simply a political move by one party or another, it is almost certainly doomed to failure.”<sup>230</sup>

The President immediately discussed with McAdoo the delicate next step—the negotiations with Claude Kitchin. He was certain to dislike the idea of any compromise on the tariff issue, particularly one that might diminish the role of Congress in the drafting of tariff legislation and might encourage future increases in tariffs. With the assistance of McAdoo and probably Houston, Wilson wrote to Kitchin expressing the “hope” that his committee would take up “this question . . . immediately with a view of formulating some policy and action concerning it.” Wilson said he felt “confident that you will agree with me that the situation of the whole world in the matter of economic development is so unusual and our own interest in the changes probably impending so vital that I am justified in pressing this great topic upon the consideration of the Committee at this time.”

Wilson proposed an “unpartisan” (“nonpartisan” in Wilson’s dictated version) tariff “board.” Wilson’s proposal drew heavily on Peters’ draft of January 10 and outlined responsibilities that included: (1) examining the “whole economic situation of the country with a dispassionate and disinterested scrutiny”; (2) providing the government and the public with “useful facts” regarding “treaty and tariff relations between the United States and foreign countries”; (3) investigating the “industrial effects of proposed or existing duties on products which compete with products of American industry” and “the possibility of establishing new industries or of expanding industries already in existence through scientific and practical processes in such a manner as substantially to promote the prosperity of the United States”; (4) cooperating “with all appropriate agencies already in existence in the several departments of the Government”;

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<sup>230</sup> Frank W. Taussig, “The Proposal for a Tariff Commission,” *The North American Review*, 203 (February 1916), 194–204. The quotations are on 202 and 204. Taussig did not connect the proposal for a tax commission to wartime conditions but George Harvey, the publisher of *The North American Review* (a high-brow forum for policy discussions), provided that context in a long editorial that appeared in the same issue. “Wilson and a Second Term,” *The North American Review* 203 (February 1916), 161–84, especially 172–76.



and (5) helping lawmakers understand unfair business methods and the damage potentially associated with the “dumping” of foreign goods.<sup>231</sup>

## The Revenue Act of 1916

Wilson must have known that his turn toward a crusade for tariff reform that was “unpartisan” or “nonpartisan” would shock Claude Kitchin and many other Congressional Democrats who in 1913 had championed and enacted distinctly partisan tariff reform. Kitchin and Wilson had been in agreement that what the nation needed by way of tariff reform in the future was more of the same Democratic leadership. Wilson could not have been surprised when, the very next day, his private secretary Joseph Tumulty let the President know that he had spoken with Kitchin, who would be arriving at the White House that day “to oppose the idea of a Tariff Commission.” Tumulty also told Wilson that Kitchin had reminded him that Kitchin himself had “made two speeches against it.” While Tumulty understood and supported Wilson’s change of heart, he warned the President “that you will again be charged with inconsistency.” Tumulty suggested that Wilson “explain in the frankest possible way” why he had changed his mind, calling out in particular the “economic changes that are bound to spring out of the war.” He provided Wilson with a draft of a letter and also suggested that he tell Kitchin “that Congress has so much to do at the present time that it is impossible to collect all the data necessary upon which to base honest and accurate re-adjustments of the tariff law.”<sup>232</sup>

Two days after meeting with Kitchin, Wilson wrote the letter along the lines suggested by Tumulty. “I have changed my mind,” Wilson said, “because all the circumstances of the world have changed and it seems to me that in view of the extraordinary and far-reaching changes which the European war has brought about it is absolutely necessary that we should have a competent instrument of inquiry along the whole line of the many questions which affect our foreign commerce.” Wilson emphasized that the commission would focus on fact-gathering rather than policy-making, and its main assignment would be assisting legislators to write fair-trade laws after the war. Wilson concluded his letter with a long quotation from his State of the Union message. “You will remember that in my last message to Congress,” he told Kitchin, “I foreshadowed just the considerations which were operating in my mind in this matter.”<sup>233</sup>

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<sup>231</sup> Woodrow Wilson to Claude Kitchin, January 24, 1916, in Link *et al.*, *PWW*, vol. 35 (1980), 510–12. On the drafting of the letter to Kitchin, see Link, *Wilson: Confusions and Crises* (1964), 342–43, and Link *et al.*, *PWW*, vol. 35 (1980), 512, n. 2. Link suggests that Houston drafted the letter (except for the first and last paragraphs), but the undated and unsigned memorandum Link mentions was more likely a draft by McAdoo and his leading tax and tariff expert in the Treasury, A. J. Peters.

<sup>232</sup> From Joseph Patrick Tumulty to Woodrow Wilson, January 25, 1916, in Link *et al.*, *PWW*, vol. 35 (1980), 524.

<sup>233</sup> From Woodrow Wilson to Claude Kitchin, January 26, 1916, Link *et al.*, *PWW*, vol. 35 (1980), 526–27.

The Wilson administration immediately launched a public relations campaign. Someone arranged for the *New York Times* to publish Wilson's letter the following day. Meanwhile, McAdoo encouraged Wilson. McAdoo told him that two of Wilson's most important financial backers among his close Princeton friends had just met with McAdoo in New York and "are very earnestly in favor of a tariff commission." McAdoo added: "I suppose you know that the American Federation of Labor endorsed the idea at its National Convention in San Francisco in November, last, and that the National Grange did the same thing." McAdoo enclosed the resolutions that the two organizations had passed.<sup>234</sup>

The next evening, at the annual dinner of the Railway Business Association at the Waldorf-Astoria in New York, Wilson told the members that he had changed his mind and now favored a "tariff board." He declared that "there is going on in the world, under our eyes, an economic revolution. No man understands that revolution; no man has the elements of it clearly in his mind. No part of the business of legislation with regard to international trade can be undertaken until we do understand it; and members of Congress are too busy, their duties are too multifarious and distracting, to make it possible, within a sufficiently short space of time, for them to master the change that is coming."<sup>235</sup>

Early the next month, Wilson said much the same thing to a breakfast meeting of the 560 members of the Business Men's League of St. Louis. "Before this war began and the universal sweep of economic change set in," he admitted, "I believed . . . that a tariff board was meant merely to keep alive the question of protection. Now, the sweep of this change has been so universal that an unprejudiced, nonpartisan board is absolutely necessary in order to find how far and in what way the facts have been changed." He added, however, that he had "some misgivings" because he would "have to choose the men that make it up. And I tell you that men without prepossessions are hard to find, and, when you find them, they are generally empty of everything else. . . . Yet I shall have to choose suitable members for a tariff board, for I feel great confidence that we shall have one, and I want the best counsel I can get."<sup>236</sup>

A week later, Wilson provided even more details of his thinking to the annual convention, 800 strong, of the U.S. Chamber of Commerce at the New Willard Hotel, just around the corner from the White House and the Treasury. For this audience, which contained many ardent supporters of a tariff commission, he expanded on the context for the introduction of a tariff

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<sup>234</sup> McAdoo to Wilson, January 26, 1916, McAdoo Papers. Wilson's two Princeton friends were fellow alumni Cleveland H. Dodge and David B. Jones, magnates in copper and zinc, respectively. McAdoo was probably meeting with them regarding the financing of Wilson's 1916 campaign.

<sup>235</sup> *New York Times*, January 27, 1916; Woodrow Wilson, "An Address in New York on Preparedness," January 27, 1916, in Link *et al.*, *PWW*, vol. 36 (1981), 11–12.

<sup>236</sup> Woodrow Wilson, "An Address to the Business Men's League of St. Louis," February 3, 1916, in Link *et al.*, *PWW*, vol. 36 (1981), 113.

commission. “America is going to be thrust out into the economic leadership of the world,” he predicted. “It is a matter of congratulation that we have gained the instrumentalities which are necessary for this great part.” He cited as an example the Federal Reserve System, but noted: “There are some instrumentalities which we still lack and which I believe I can confidently predict we shall get. For example, we do need an instrument which will have a wider scope of power of inquiry in the field which, for lack of a better term, we call the field of foreign exchange, and, therefore, the field which is touched by all matters affecting tariffs. We ought to have a really scientific tariff board, and I think we are going to have one.”

In this Chamber of Commerce speech Wilson took a new and very different tack. For the first time he talked about previous debates as debates between doctrines—the “doctrine of protection” vs. the “doctrine of free trade,”—and the role of the previous tariff board in keeping alive “an unprofitable controversy.” In what was a stunning declaration for a disciple of Gladstone, Wilson said that he was not interested in either doctrine. Moreover, he seemed to imply that more than wartime conditions were moving him to abandon doctrine. “I have been a college professor,” he explained, “and know why I am not interested—because there is nothing in either doctrine. The only thing that is interesting are the facts of commerce and industry, and that the only thing that is right to deduce from the facts is something that has nothing properly to do with party politics at all.” He had begun to see a virtue in taking the partisan and ideological sting out of tariff debates.<sup>237</sup>

The next part of the plan was for McAdoo and his Treasury staff to draft a bill, which Representative Henry T. Rainey of Illinois, the second-ranking Democrat on Ways and Means, would introduce on February 1. The administration recognized that introducing the bill himself would have been embarrassing for Kitchin, who had a record of strong opposition to the tariff commission idea. And by introducing the bill, Kitchin might have compromised his leadership of the more important revenue legislation that his committee had begun reviewing in January. As for Rainey, he was happy to carry the bill. He was personally concerned about German competition after that nation’s tariff legislation expired later in 1916 and, although he had voted against funding Taft’s tariff board in 1911, he “realized the value of [its] Reports” as “the most reliable sources of information we had.” Rainey told McAdoo that while “Kitchin does not believe in the Tariff Board proposition . . . he does not expect to oppose it and as the ranking Democrat on the Ways and Means Committee.” Rainey added: I desire to assure you that I will be very glad indeed to make the fight in the Committee and on the Floor for the Bill.”<sup>238</sup>

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<sup>237</sup> Woodrow Wilson, “An Address to the Chamber of Commerce of the United States,” February 10, 1916, in Link *et al.*, *PWW*, vol. 36 (1981), 155–56.

<sup>238</sup> Rainey to McAdoo, January 27, 1916, McAdoo Papers.

The revenue legislation preoccupied Kitchin through June. He worked tirelessly to advance the funding for Wilson's preparedness plan, which was the President's top priority during these months. To hold together the now slim majority of Democrats in the House and on the Ways and Means Committee meant that Kitchin had to satisfy a group of insurgent Democrats who held the balance of power. Members of this group, like himself, opposed entry into the war. However, they were willing to fund the preparedness program so long as it was funded without deficit spending, avoided consumption taxation, and imposed steeply progressive taxes on individuals and corporations. Furthermore, this group also had strong anti-protectionist views, and its members were reluctant to vote for any stand-alone bills that might seem to favor tariff increases. This meant that Kitchin could not allow the Rainey bill to advance in the House.

In June, however, as the Ways and Means Committee hammered out its version of the revenue legislation, Kitchin decided that the contents of the Rainey bill were useful as a vehicle to dampen what was becoming vigorous business opposition to the revenue legislation. That opposition was intense because the revenue measures now included a greatly expanded, more progressive income tax, the introduction of a progressive estate tax, and a graduated gross receipts tax on the munitions industry. Kitchin, in private collaboration with McAdoo, included the tariff commission proposal as one section of the revenue bill that the committee reported out on July 1, 1916 (H.R. 16763). The bill included another measure that the Wilson administration had proposed to appease business: the imposition of a new tariff, including duties of 30 percent on the importation of dyestuffs, medicines, and synthetics. The goal was to protect the American chemical industry from German competition, specifically the German Farben Trust, both during and after the war, when the American industry anticipated price-cutting and dumping.<sup>239</sup>

Meanwhile, the Democratic Party embraced the tariff commission in its national platform. The platform, to which Wilson had contributed, declared, "Two years of a war which has directly involved six of the chief industrial nations of the world, and which has indirectly affected the life and industry of all nations, are bringing about economic changes more varied and far-reaching than the world has before experienced." The platform went on: "In order to ascertain just what those changes may disclose themselves to be," the Democratic majorities were "providing for a non-partisan tariff commission to make dispassionate and thorough study of every economic fact that might throw light either upon our past or upon our future fiscal policy with regard to the general conditions under which our trade is carried on." The platform endorsed the legislation and its goal of shaping future policy "in accordance with clearly

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<sup>239</sup> McAdoo to D.F. Houston, February 2, 1916; A. J. Peters to McAdoo, March 7, 1916; and A. J. Peters to McAdoo, June 3, 1916, McAdoo Papers. Peters vigorously opposed the duties on dyestuffs.

established facts rather than by preconceived theory or the arbitrary demands of selfish interest.”<sup>240</sup>

On the floor of the House, Kitchin openly sought Republican support for the bill, pointing to its creation of a tariff commission and the imposition of the tariff on dyestuffs. Kitchin declared that “If I were as good a Democrat as I used to be, I would be fighting the dye-stuffs provision, but I am going to take this bill with that dye-stuffs provision and tariff commission in it like I used to take a bad pill when I was a boy. I would take it down all at once.”<sup>241</sup>

The consensus that the Kitchin committee and the Wilson administration had established swept the revenue package through the House with little difficulty. Because of Kitchin’s effective floor leadership, the administration was able to refrain from taking a public position on the bill. And, as it turned out, many House Republicans responded favorably to Kitchin’s initiatives. Ohio Representative Nicholas Longworth, a protectionist stalwart and Taft loyalist, reflected the views of these Republicans when, on July 6, he declared that he would vote for the bill if he had “to choose between voting it all up or voting it all down.” He lauded, in particular, support for preparedness, the creation of a tariff commission, and the protective duties on dyes and dyestuffs.<sup>242</sup> While the bill was under discussion in the House, the anti-tariff Democratic Senator William Jennings Bryan wrote in support of the revenue measure while assuring his low-tariff colleagues that the tariff commission provision “does no harm.”<sup>243</sup> The Democratic leadership allowed virtually no tampering with the Kitchin committee’s report. The committee had held no formal hearings. Business groups first learned about its provisions in the press. They had precious little time in which to respond, since Democrats introduced the legislation as a “privileged bill” to make amendments difficult. On July 10, 1916, only four days after consideration of the bill began, the House passed the Kitchin package. Joined by 39 Republicans, the Democrats established a 240–140 margin of victory.<sup>244</sup>

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<sup>240</sup> “A Draft of the National Democratic Platform of 1916,” June 10, 1916, in Link *et al.*, *PWW*, vol. 37 (1981), 193.

<sup>241</sup> *Congressional Record*, 64th Congress, 1st sess., *Appendix* (Washington, DC: GPO, 1948).

<sup>242</sup> “Speech of Nicholas Longworth in House of Representatives, July 6, 1916, copy in the Papers of Nicholas Longworth Papers, the Library of Congress. For the supporting positions of other Republicans, see *Congressional Record*, 64th Congress, 1st sess., 10662, and *Appendix*, 1402–3.

<sup>243</sup> William Jennings Bryan, “The New Revenue Measure,” *The Commoner* 16 (July 1916), 1.

<sup>244</sup> The House had made some changes in the original tariff commission proposal in the Rainey bill. The only changes that concerned the Wilson administration were the reduction of the salaries of the members from \$10,000 to \$7,500 per year and the elimination of a clause guaranteeing a permanent annual appropriation for the commission. See Joseph P. Tumulty to Woodrow Wilson, August 10, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 20–21. Karen Schnietz has pointed out two other important changes that Congress made in Wilson’s original proposal. These were expansion of the investigatory scope of the Commission to include “the industrial effects” of tariffs and an increase in the membership of the Commission from five to six. See Schnietz, “Democrats 1916 Tariff Commission” (1998), 34–36.

On the same day, Wilson was in Detroit, continuing to try to drum up support for the tariff commission. He began to emphasize even more the virtue he now saw in taking the partisanship out of tariff debates. At a luncheon meeting of the World's Salesmanship Congress Wilson declared: "It has been a very great grief to some of us, year after year, year after year, to see a fundamental thing like the fiscal policy of the Government with regard to duties on imports made a football of politics." Party politics, he said, "ought to have nothing to do with the question of what is for the benefit of the business of the United States, and that is the reason we ought to have a tariff commission." The focus of the commission would be to determine the facts. "Do not let a fact catch you napping, because you will get the worst of it if you do. And the object of the tariff commission is that we should see the facts coming first, so that they could not get us."<sup>245</sup>

The Senate Finance Committee, in order to soften the impact of new preparedness taxes on business, agreed to add the provisions creating a tariff commission and raising the level of tariff protection for the chemical industry. Finance Committee Democrats justified the latter as necessary for mobilization, and certainly knew that it would lessen the sting of the munitions tax to E.I. du Pont de Nemours and Co. But in the Senate at large, divisions within the Democratic Party were more severe than in the House. Free-trade Democrats, led by Senator Underwood, threatened to break ranks and oppose the entire revenue package. Even more troublesome was the opposition of various portions of the business community. On July 17, in discussing Wilson's reelection prospects, McAdoo reported to Colonel House that "the new revenue bill is getting me much concerned."<sup>246</sup> In response, McAdoo and his Treasury Department stepped up their lobbying and mediation. By making a few minor concessions to the munitions industry and mining interests, the Finance Committee and the Democratic caucus protected and even toughened the provisions of the Ways and Means bill.

In the final debate in the Senate, McAdoo and Wilson faced another problem. In his effort to defeat the tariff commission proposal, Underwood tried to encumber the revenue act with a kind of poison pill—a severe reduction of the personal exemption in the income tax. Most Democrats interested in low tariffs refused to support him. Bryan, for example, on August 22, wrote that lowering the exemptions could "jeopardize the entire income tax" because Republicans "would want to transfer it to tariff rates."<sup>247</sup> In response to this problem, on August 24 Wilson passed word to the press that "President Wilson was showing a deep interest in saving the provisions of the pending General Revenue bill for the creation of a permanent non-

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<sup>245</sup> Woodrow Wilson, "A Luncheon Address in Detroit," July 10, 1916, in Link *et al.*, *PWW*, vol. 37 (1981), 392–93.

<sup>246</sup> McAdoo to Colonel House, July 17, 1916, McAdoo Papers.

<sup>247</sup> Bryan to Kitchin, August 22, 1916, Papers of Claude Kitchin, University of North Carolina Library.

partisan tariff commission and was doing everything he could to prevent this important legislation from becoming futile.”<sup>248</sup>

During the time the bill was in the Senate, Wilson accepted the nomination of his party for President. In detailing the accomplishments of his administration he anticipated the success of the revenue measure. His headline was: “Alike in the domestic field and in the wide field of the commerce of the world, American business and life and industry have been set free to move as they never moved before.” Wilson emphasized that “the tariff has been revised, not on the principle of repelling foreign trade, but upon the principle of encouraging it” and that “a Tariff Board has been created whose function it will be to keep the relations of American and foreign business alike under constant observation, for the guidance alike of our business men and of our Congress.” Later in the speech he explained that the tariff commission was part of what he described as “the instrumentalities of prompt adjustment” to changing world economic conditions. He singled out the FTC, the Bureau of Foreign and Domestic Commerce, and, finally, the new tariff commission, which “completes the machinery by which we shall be enabled to open up our legislative policy to the facts as they develop.”<sup>249</sup>

Wilson had declared the victory of the tariff commission before the outcome in the Senate was entirely settled but in the next week Underwood’s poison-pill ploy failed. On September 6, the Senate passed the revenue bill, including the tariff commission provision, by a margin of 42 to 16. Democrats with major reservations about the commission chose not to vote. The next day Congress accepted a conference committee’s reconciliation of the House and Senate bills, and on September 8 Wilson signed the measure into law.<sup>250</sup>

The final legislation—the Revenue Act of 1916—created the United States Tariff Commission. The new body would be independent in its work from any agency of the federal government. The Commission would consist of six members serving 12-year terms on an overlapping basis and appointed by the President subject to confirmation by the Senate. No more than three of the six could be members of the same political party. The Commission was obliged to study the operation, administration, and fiscal and industrial effects of the laws regarding customs. It had the power “to investigate the tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, and economic alliances, and the conditions and causes relating to the competition for foreign industries with those of the United States.” It also was responsible for reporting, “whenever requested, all information at its command” to the President and the tax-writing committees of Congress.

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<sup>248</sup> *New York Times*, “President to Push Tariff Board Fight,” August 25, 1916.

<sup>249</sup> Woodrow Wilson, “A Speech in Long Branch, New Jersey, Accepting the Presidential Nomination,” September 2, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 129 and 136–37.

<sup>250</sup> *Congressional Record*, 64th Congress, 1st sess., 13873.

The legislation created the core of an administrative and clerical staff by transferring to the Tariff Commission the Cost of Production Division of the BFDC within the Department of Commerce, along with all of its records and those of the former Tariff Board.<sup>251</sup> The Act contained critical provisions to enable the Commission to enforce its right of access to records of business organizations that produced, imported, or distributed any good under investigation, and to summon witnesses under oath. Finally, the legislation authorized an appropriation of \$300,000 for the 1916–17 fiscal year.<sup>252</sup>

## The Election of 1916

The tariff commission proposal had eased Republican objections within Congress to the highly progressive revenue measure, just as the Wilson administration had hoped. It is more difficult to discern the effect of the enactment of the legislation on the outcome of the election in 1916. But a clear difference on tariffs between the two parties did emerge during the campaigns, and Wilson enthusiastically championed his leadership in creating the Tariff Commission.

During his campaign Wilson reaffirmed his declaration that the Commission's studies would help guide the tariff policies of his administration. On September 25, to the Grain Dealers' National Association, he said that his government had "admitted that, on the one side and on the other, we were talking theories and managing policies without a sufficient knowledge of the facts upon which we were acting. And, therefore, we have established what is intended to be a nonpartisan tariff commission." The Commission, Wilson said, will be "Another eye created to see the facts!" It would "look for the facts no matter who is hurt."<sup>253</sup> Later that month, in speaking to more than 3,000 people, including a thousand members of the Young Men's League of Democratic Clubs, Wilson contrasted the structure of Taft's tariff board with his. The Republicans "are perfectly willing to have a tariff board, at least they were willing to have it before we created it, provided they can determine beforehand what its conclusions are going to be by determining the quality and antecedents of the men who compose it. You can very easily determine beforehand what is going to happen."<sup>254</sup>

Early the following month, closer to the election, Wilson had an opportunity to bring his message on the tariff commission to a larger audience. The renowned investigative journalist Ida Tarbell interviewed him for an extensive profile she was writing for *Collier's*, a magazine

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<sup>251</sup> Schmeckebier and Weber, *The Bureau of Foreign and Domestic Commerce* (1924), 140–41.

<sup>252</sup> For a good summary of the provisions, see Joshua Bernhardt, *The Tariff Commission: Its History, Activities and Organization* (New York: Appleton, 1922), 17–18.

<sup>253</sup> Woodrow Wilson, "An Address in Baltimore to the Grain Dealers' National Association," in Link *et al.*, *PWW*, vol. 38 (1982), 265–66.

<sup>254</sup> Woodrow Wilson, "A Campaign Speech to Young Democrats at Shadow Lawn," in Link *et al.*, *PWW*, vol. 38 (1982), 308.



that reached millions of readers. Tarbell was most famous for her exposés of the monopolistic practices of John D. Rockefeller and Standard Oil, but she also had played a major role in dramatizing the tariff issue for a national audience. She had begun to publish on the tariff in 1907 and in 1909, when the Payne-Aldrich tariff was under debate, writing essays in *The American Magazine* that powerfully connected protectionist profits with economic hardships of average Americans. In one of the articles, “Juggling with the Tariff,” she called out the need for “evidence of the cost of production here and abroad, gathered not by the interested, but by the disinterested, not by clerks, but by experts.”<sup>255</sup> In 1911, she collected the essays in a book, *The Tariff in Our Times*.<sup>256</sup>

In her October 1916 piece for *Collier's*, “A Talk with the President of the United States,” Tarbell reported that Wilson stressed the importance of the fact-finding role of the Tariff Commission. It would assist, Wilson said, in the “almost impossible” task of getting “old notions out of men’s heads.” He offered the example of a “Republican congressman” who “came to me not long ago to offer a suggestion about what the commission should do. ‘Its chief business,’ he said, ‘should be finding the cost of production.’ ‘My dear man,’ I said, ‘haven’t you discovered that there is no such animal, that the cost of production differs always with management? I can take you to five factories in one community, all making the same kind of goods, and each having a different cost of production. In the case of two factories of which I know, one making money and the other not, the condition was exactly reversed by swapping managers.’” After quoting him Tarbell added that “Mr. Wilson . . . really knows something about the tariff. He knows something about everything he touches, and the subjects of which he talks so well are very far apart.”<sup>257</sup>

In the Tarbell interview Wilson began to shift back to the more partisan or doctrinal line that a nonpartisan, scientific tariff commission would tend to support continued movement toward free trade. Later in October, in a campaign document, Wilson made this shift more explicit. He was trying to unify his political base behind his shift to support of the Tariff Commission, reassuring Democratic loyalists that he remained a steadfast foe of protectionism. He asserted that the Democrats “have released our foreign trade from the shackles of a tariff contrived in the interest of special groups of favored producers, and have created a Tariff Commission intended to substitute public for private influences, facts for theories and pretensions, in all future legislation with regard to duties and restrictions on imports.”<sup>258</sup> Wilson continued in this

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<sup>255</sup> On Tarbell’s role in promoting tariff reform, see Goodwin, *The Bully Pulpit* (2013), 492, 495–96, 584–85, and 590–92. The quotation from “Juggling the Tariff,” is from 590–591. Although Taft and Tarbell were seated together at a cabinet dinner shortly after the 1908 election, he apparently never sought any subsequent communication with her. See 592.

<sup>256</sup> Ida Tarbell, *The Tariff in Our Times* (New York: Macmillan, 2011).

<sup>257</sup> “An Interview by Ida M. Tarbell,” October 3, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 333.

<sup>258</sup> “Woodrow Wilson to My Fellow-citizens,” October 15, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 463–64.

vein throughout the campaign, speaking subsequently to, for example, the Chicago Press Club; to 4,000 “nonpartisan” women in Chicago; to 15,000 New Yorkers who had traveled down to Shadow Lawn, New Jersey; and to 500 people in Buffalo.<sup>259</sup> Meanwhile, Charles Evans Hughes, the Republican candidate, hewed to a partisan line of his own, calling simply for a return to protective tariffs after the war.

The exact contribution of the tariff issue to the hard-fought and narrow victory of Woodrow Wilson in 1916 is unknown. But at the time the election results seemed to bear out the advice of his advisors who had called on him to embrace the idea of a tariff commission. Wilson succeeded in attracting former Progressives in the West, carrying California, which he had lost in 1912. The other crucial state to his victory was Ohio, the only large Northeastern and Great Lakes state that he won in 1916. There, too, the appeal of the tariff commission proposal may have won important support from former Progressive Party voters and small businesses.<sup>260</sup>

## Appointing the Commission

During the campaign, after the passage of the Revenue Act, Wilson came under some pressure to appoint the members of the Commission swiftly. His advisers believed this would help counter the charge of Republicans that the prospect of postwar trade problems called for action immediately.<sup>261</sup> Wilson, however, moved slowly, largely because of his active involvement in the campaign, but for two other reasons as well. One was a desire not to offend some of many people who might see themselves as candidates for the position. Another was that Wilson had come to understand that in order to win public support for the Tariff Commission and its work he had to avoid—or at least to appear to avoid—appointing commission members with strong party identifications.

Occasionally during the campaign, Wilson complained publicly about the provision of the legislation that allocated positions between the two major parties. As early as July, Wilson had said he would rather not have to take party identification into account at all “because my desire

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<sup>259</sup> Woodrow Wilson, “A Luncheon Address to the Chicago Press Club,” October 19, 1916; “An Address in Chicago to Nonpartisan Women,” October 19, 1916; “A Campaign Address to New Yorkers at Shadow Lawn, October 28, 1916; and “A Luncheon Address in Buffalo,” November 1, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 478, 486, 555–56, and 574.

<sup>260</sup> On the outcome of the 1916 election, see Cooper, *Woodrow Wilson* (2009), 357–61 and Arthur S. Link, *Wilson: Campaigns for Progressivism and Peace, 1916–1917* (Princeton: Princeton University Press, 1965), 160–64.

<sup>261</sup> See, for example, Bernard Baruch to Woodrow Wilson, August 17, 1916, William Joel Stone to Joseph P. Tumulty, September 25, 1916, Edward M. House to Woodrow Wilson, September 29, 1916, William G. McAdoo to Woodrow Wilson, October 4 and 11, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 44, 278, 297, 335–36, and 393. However, near the end of the campaign, Colonel House had changed his mind, telling Wilson he was “glad you have not made the appointments” to the Commission. “It will be much better to do it after the election and for reasons which of course you have had in mind for not making them before.” Edward M. House to Woodrow Wilson, October 27, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 546.

would be not to have a bipartisan, but an absolutely nonpartisan commission of men who really applied the tests of scientific analysis of the facts, and no other tests whatever, to the conclusions that they arrived at.”<sup>262</sup> In October he told the Chicago Press Club: “I asked Congress for a nonpartisan commission, and they gave me a bipartisan commission.” He explained to Chicago’s nonpartisan women that he had been slow to make appointments “because I hate as much to ask them which party they belong to as to ask them which church they belong to.”<sup>263</sup>

After the November 1916 election, the intensification of the European crisis, the expansion of preparedness planning, his determined efforts to broker a peace, and then the onset of the crisis that brought America into the war all preoccupied Wilson and his cabinet. McAdoo managed the appointment process, though he was especially busy as he worked out the complex and innovative financial plans for American intervention. He conferred closely with Secretary Houston and Colonel House, and cleared all names with the President.

The first person they asked to serve was Frank Taussig. In fact, as early as February 1916 Wilson had alluded to Taussig as his first choice.<sup>264</sup> In October, during the campaign, McAdoo had asked Houston “to sound out Taussig” and suggested other candidates, as had House.<sup>265</sup> The journalist Ida Tarbell, who had done so much to dramatize the tariff issue, was also high on Wilson’s list. Tarbell had a long meeting with House but at the end of December turned down the offer, pleading health problems.<sup>266</sup> About the same time Taussig told Houston that he would serve. On January 8, 1917 Wilson announced to a correspondent of *The New Republic* that Taussig had accepted an appointment to the Commission.<sup>267</sup>

After Taussig’s acceptance, McAdoo retrieved the file of candidates from Wilson. McAdoo, with the help of Houston and House, went on to vet the finalists, including Herbert Emery, Carl Shurz Vrooman (Houston’s Assistant Secretary of Agriculture), and candidates suggested by

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<sup>262</sup> Woodrow Wilson, “A Luncheon Address in Detroit,” July 10, 1916, in Link *et al.*, *PWW*, vol. 37 (1981), 393.

<sup>263</sup> Woodrow Wilson, “A Luncheon Address to the Chicago Press Club,” October 19, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 378; “An Address in Chicago to Nonpartisan Women,” October 19, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 486. *See also* “A Luncheon Address in Buffalo,” November 1, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 574.

<sup>264</sup> In the speech in which he referred obliquely to Taussig, Wilson described him as the only “impartial” man on the tariff that he knew. “I shall have to institute a very elaborate search for the rest,” he added. “An Address to the Chamber of Commerce of the United States,” February 10, 1916, in Link *et al.*, *PWW*, vol. 37 (1981), 156.

<sup>265</sup> William G. McAdoo to Woodrow Wilson, October 4, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 335. *See also* Edward M. House to Woodrow Wilson, September 29, 1916, in Link *et al.*, *PWW*, vol. 38 (1982), 297.

<sup>266</sup> On Taussig’s appointment, *see* William G. McAdoo to Woodrow Wilson, December 28, 1916, in Link *et al.*, *PWW*, vol. 40 (1983), 347, and Houston to McAdoo, December 29, 1916, McAdoo Papers. On the effort to appoint Tarbell, *see* Diary of Edward M. House, December 20, 1916, Woodrow Wilson to Ida M. Tarbell, December 28, 1916, Woodrow Wilson to Jane Addams, December 28, 1916, Ida M. Tarbell to Woodrow Wilson, December 30, 1916, and Woodrow Wilson to Ida M. Tarbell, January 3, 1917, in Link *et al.*, *PWW*, vol. 40 (1983), 343, 372, and 384.

<sup>267</sup> “A Report of a News Conference by Charles Merz,” January 8, 1917, in Link *et al.*, *PWW*, vol. 40, 347.

Taussig.<sup>268</sup> It took until the first week in March for McAdoo to complete his final recommendations. One of the most difficult constraints was the requirement that not more than three of the members of the commission could be of the same party. At the end of the process Wilson appointed two Independents, two Democrats, and two Republicans.<sup>269</sup>

The Independents were Taussig and William Kent.<sup>270</sup> Kent, of Marin County, California, had served three terms in Congress, from 1911 to 1917, as a progressive Republican and then as an Independent. Kent had advised Wilson on details of the Rainey bill and had led in sponsoring the legislation that, just two weeks before the enactment of the Tariff Commission, established the National Park Service.<sup>271</sup> In November he had heard that he was under consideration and wrote to Norman Hapgood, the former editor of *Collier's*, the current editor of *Harper's Weekly*, and a prominent Wilson supporter, to tell him that the position would “open up the possibility of economic study and investigation in which I believe I could be of good service,” and to ask Hapgood, if he agreed, “to suggest it at headquarters” [the White House, presumably]. He added: “I probably could secure the governorship here if I wanted it, but I do not like the idea of getting down to state matters when my view has been directed to national affairs.”<sup>272</sup>

The first Democrat the Wilson administration settled on was Daniel C. Roper, who agreed to serve as Vice Chair of the Commission. He had impressive credentials as an experienced federal bureaucrat, having served as a clerk for the Interstate Commerce Commission, a researcher on textiles for the Bureau of the Census, a clerk of the House Ways and Means Committee, and First Assistant Postmaster General. Roper may well have been campaigning for the appointment to the Tariff Commission. While serving in the U.S. Post Office Department he made it known that he had great enthusiasm for the tariff commission idea, and even wanted to expand its scope. Roper was also a highly partisan figure. In July 1916 he had resigned from

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<sup>268</sup> McAdoo to Wilson, December 29, 1916, and March 9, 1917, McAdoo Papers. With regard to Emery's role on Taft's Tariff Board, see 80-81, above.

<sup>269</sup> For McAdoo's final recommendations, see McAdoo to Woodrow Wilson, March 9, 1917, Link *et al.*, *PWW*, vol. 40 (1983), 379.

<sup>270</sup> The Wilson administration had been uncertain about Taussig's party identification. In Houston's letter to McAdoo reporting Taussig's agreement to serve, Houston had originally written: “I understand that Taussig is a Wilson Democrat.” Before sending the letter, Houston had scratched out this sentence and scrawled “Doubtful” in the margin. In his official recommendation to Wilson, McAdoo put Taussig in the Independent category. Houston to McAdoo, December 29, 1916, McAdoo Papers; McAdoo to Woodrow Wilson, March 9, 1917, in Link *et al.*, *PWW*, vol. 41 (1983), 379.

<sup>271</sup> William Kent to Woodrow Wilson, February 23, 1916,” in Link *et al.*, *PWW*, vol. 36 (1981), 206–07 and Woodrow Wilson to William Kent, February 28, 1916, in Link *et al.*, *PWW*, vol. 36 (1981), 227.

<sup>272</sup> William Kent to Norman Hapgood, November 29, 1916, in Link *et al.* *PWW*, vol. 40 (1983), 173.

the Post Office to work at the Democratic national headquarters.<sup>273</sup> The other Democrat Wilson appointed was a former member of Congress, David J. Lewis, who had been Chair of the House Committee on Labor but lost a campaign for the Senate from Maryland in 1916.

The two Republicans were Edward P. Costigan and William Smith Culbertson. Costigan was a Progressive Republican and an attorney from Denver. He had helped found the Progressive Party in Colorado in 1912, represented the United Mine Workers during a 1914 Congressional investigation of the coal strike, and ran unsuccessfully for governor in 1912 and 1914.

Culbertson was the least known of the six, but his credentials were superb. He had served on the staff of the Tariff Board, had made a major policy contribution to the Progressive Republicans in 1912, had provided bill and speechwriting support to Senator Robert La Follette in 1913, had earned a law degree, and since November 1915 had been serving as special counsel for the FTC. His nomination had come to Wilson from the Progressive Kansas editor William Allen White. McAdoo may also have heard good things about him from Emery; from Taussig, who had been impressed by an article Culbertson had written in *The American Economic Review*; and from Edwin N. Hurley, the Chair of the FTC.<sup>274</sup>

The terms were staggered, as required by the legislation. Taussig was asked to serve 12 years; Roper, 10; Lewis, 8; Kent, 6; Culbertson, 4; and Costigan, 2. In picking an Independent as chair of the commission, assigning him the longest term, and appointing an additional Independent, Wilson had upheld his commitment to nonpartisanship. However, in making the other appointments he revealed his partisan preference. He assigned the next-longest terms to the two Democrats; identified Roper as the vice chair, in which capacity he would clearly provide advice to Taussig on both bureaucratic and partisan matters; and relegated the two Republicans to the shortest terms.

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<sup>273</sup> In January 1916, Roper had advised his boss, Postmaster General Albert S. Burluson, who worked closely with McAdoo and House on patronage issues, that he, Roper, not only agreed with the recommendation of "Professor Taussig" but also thought the commission should take up "all internal sources of revenue, corporation, and inheritance and all internal revenue taxes." Roper proposed naming it "the Federal Tariff and Revenue Commission." The broad-scope commission should "make its inquiry and recommendations to Congress the entire revenue requirement of the government, the most equitable means under changing conditions of meeting those requirements, and the encouragement of American industry and trade both at home and abroad." Roper to Burluson, January 28, 1916, McAdoo Papers. In September 1917 Roper would resign from the Tariff Commission to become Commissioner of Internal Revenue, a position he held throughout World War I. Brownlee, "Social Investigation and Political Learning" (1993), 348–499, 353.

<sup>274</sup> See note 190 above and Culbertson, "Ventures in Time and Space." On his nomination, see Link *et al.*, *PWW*, vol. 38 (1982), 3, n. 2. In less than a year after his appointment to the Tariff Commission Culbertson had published a substantial article in *The North American Review* on the Commission's work. See William Smith Culbertson, "The Tariff Commission and Its Work," *The North American Review*, 207 (January 1918), 57–65.

On March 21, 1917, the President made recess appointments to the Commission because Congress was not in session,<sup>275</sup> and the formal organization of the Tariff Commission took place at the end of the day on March 31, 1917. This occurred only six days before Congress recognized a state of war between the United States and Germany.

## Wilson's Intentions and His Legacy

Between 1913 and 1916 Wilson made a significant shift in political tactics. He made a transition from his partisan leadership in crafting the Underwood Tariff to his campaign on behalf of an independent, nonpartisan, and permanent Tariff Commission. But Wilson's shift did not mark a fundamental change in his concept of what was progressive tariff reform. Wilson continued to believe in both the goals and the strategic premises that had shaped his leadership of the enactment of the Underwood Tariff. His goal remained to move the nation toward a policy of free trade. And he remained convinced that the Democratic Party remained the superior vehicle for advancing reform of tariff policy.<sup>276</sup>

During late 1915 and early 1916, however, he had become persuaded of several realities. The first was that the Democratic Party had not yet replaced the Republican Party as the nation's dominant political agency, and that there was thus a significant political risk of a Republican victory in 1916. The second was that economic uncertainty, coupled with the challenges of financing military preparedness, increased the risk of a Republican victory.<sup>277</sup> The third was that the prosperity of the United States in the international economy of the postwar era might well depend on having a more supple, aggressive, and well-informed tariff policy.

These realities led Wilson to pivot from the tariff policies of the New Freedom program to embrace the Tariff Commission. Wilson continued to believe that a vital Democratic Party was necessary for the ultimate victory of free trade. However, he had concluded that the establishment of the Tariff Commission might be necessary to persuade the American public that the tariff damaged the nation's economic and social fabric and that tariff reform under

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<sup>275</sup> U.S. Tariff Commission (USTC), *First Annual Report of the United States Tariff Commission for the Fiscal Year Ended June 30, 1917*, H. Doc. 65–616 (Washington, DC: Government Printing Office, November 15, 1917), 3–4. The Senate confirmed the appointments on April 12.

<sup>276</sup> Like Arthur Link, Joseph Kenkel, and Karen Schnietz, I heavily attribute Wilson's shift in supporting the Tariff Commission to partisan motivations. But, in contrast with those scholars, I place great emphasis on the continuing influence of Wilson's deep grounding in the ideas of international liberalism and his distrust of commission government. Accordingly, even more than Link and Schnietz, I would emphasize the tactical nature of his shift. See note 156 above.

<sup>277</sup> Also like Link, Kenkel, and Schnietz, I attach great importance to the historical contingency associated with the wartime crisis in 1915–16, but I emphasize far more than they do the political and fiscal impact of financing preparedness on the enactment of the Tariff Commission. For my analysis of the response of the Wilson administration to the fiscal crisis of 1914–16, see W. Elliot Brownlee, "Wilson and Financing the Modern State" (1985), 173–210.

Democratic leadership would be fair and competent. Democratic partisan politics had driven the process of creating the Tariff Commission, and after the 1916 election Democratic leaders were optimistic that they would remain in control of the federal government. McAdoo himself harbored the ambition to run for the Presidency in 1920.

The country's entry into the First World War almost immediately after the opening of the Tariff Commission's doors changed the roles that the Wilson administration had intended for the Commission and its members. Other chapters in this volume will discuss the changes that occurred during the 1920s. But one thing that did not change was Wilson's belief in the power of free trade. If anything, the war strengthened this belief. In 1918, in crafting the third of his Fourteen Points, Wilson advanced one of his most eloquent and concise statements for free trade. He called for "the removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance." This was more than economics. Wilson declared: "What we ourselves are seeking is a basis which will be fair to all and which will nowhere plant the seeds of such jealousy and discontent and restraint of development as would certainly breed fresh wars."<sup>278</sup> Perhaps the most important question to address in evaluating Wilson's long-term accomplishments in creating the Tariff Commission is whether or not the Commission succeeded in advancing the lofty goals for promoting international comity articulated by Wilson in the Fourteen Points.

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<sup>278</sup> Wilson to Sidney Mezes, November 12, 1917, in Link *et al.*, *PWW*, vol. 45 (1984), 17.





# Part II

## Evolution



# Chapter 4

## The Substantive and Institutional Evolution of the U.S. Tariff Commission/U.S. International Trade Commission (1917–2016)



**Photo:** A spiral staircase, one of the finest architectural features of the former USITC building.

**Will E. Leonard and F. David Foster<sup>279</sup>**

The U.S. Tariff Commission was established in 1916 and became operational in early 1917. It was created to be an independent, impartial, and nonpartisan provider of facts and information to Congress and the President with respect to setting and administering U.S. customs tariffs. It was also to conduct investigations and provide other information and advice to Congress and to the President on U.S. international trade matters. For much of the first 50 years after its establishment, the focus of the Commission's work was primarily such activities. However, since then the Commission (renamed the U.S. International Trade Commission by the Trade Act of 1974)<sup>280</sup> has devoted increasing time and resources to the administration of U.S. trade remedy laws addressing both fair and unfair international trade, while continuing to perform its original mission. This evolution has occurred in phases including the formative early years, the World War II and immediate post-war years, and the "modern era," demarked by the passage of the Trade Act of 1974.

The law establishing the Commission also mandated certain institutional characteristics aimed at maintaining its independent, impartial, and nonpartisan posture. As described below, these institutional features have also evolved over the decades to a point where the Commission is believed by many to be a unique government agency in terms of its independence and nonpartisanship, as befits an organization that has been a consistent and important part of the development and implementation of the international tariff and trade policy of the United States for the last century.

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<sup>280</sup> "Commission" will be used in this chapter to cover both the U.S. Tariff Commission and the U.S. International Trade Commission, or either of them, as the context of its use indicates.

# Evolution of the Commission's Work

## The Early Years (1916–39)

Consistent with its mission, the Commission spent much of the five years from inception until the passage of the Tariff Act of 1922 (1922 Tariff Act) building a repository of data, information, and expertise on the U.S. customs tariff and its administration to be made available to Congress and the President. This included developing so-called Summaries of Tariff Information as well as statistics on U.S. imports and duties, informational series which continue in one form or another even today. This resource was first significantly resorted to by Congress in its considerations leading to enactment of the 1922 Tariff Act.

While the Commission's provision of this information did not "take the tariff out of politics" as some posited it might (the Republican majority established an average duty on dutiable imports of 38.5 percent in the Fordney-McCumber 1922 Tariff Act compared to the 27 percent rate set by the Democratic majority in the Underwood-Simmons 1913 Tariff Act),<sup>281</sup> it plainly put at the disposal of Congress and the President more accurate and robust data than ever before with respect to individual articles within the tariff.

The Commission also devoted considerable time leading up to consideration of the 1922 Tariff Act to "technical" aspects of the tariff, including the arrangement of the various schedules within the tariff, improving on the classification of articles, and the relationship between duties on raw materials, semi-finished goods, and finished goods. It also undertook a detailed, comprehensive study of and prepared a report for Congress on the customs administrative laws (at the time, knowledgeable persons considered those laws to be hopelessly confused). The work of the Commission in these areas was adopted without significant change in the 1922 Tariff Act.

The Commission's earliest work on U.S. international trade policy is also reflected in the inquiries conducted and reports prepared at the request of Congress in a number of areas. Some of the major inquiries and reports included the use of foreign trade zones; reciprocity in commercial treaties; international tariff relations and commercial treaties; and dumping and unfair competition. The dumping and unfair competition inquiry resulted in a 1919 report<sup>282</sup> which reflected the influence the Commission possessed in the development of trade policy.

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<sup>281</sup> See Edward S. Kaplan, "The Fordney-McCumber Tariff of 1922," found at [http://www.washingtontraderreports.com/analysis/chapter\\_2.pdf](http://www.washingtontraderreports.com/analysis/chapter_2.pdf).

<sup>282</sup> "Dumping and Other Unfair Competition in the United States and Canada's Anti-Dumping Law," transmitted to the House Ways and Means Committee and Senate Finance Committee on October 4, 1919. USITC, *Annual Report for 1919*, at 10–12.

The 1919 report recommended to Congress that an administrative provision be enacted to address dumping (generally, the sale of imported merchandise to the United States for less than its foreign market value or cost of production). This recommendation contributed to the enactment of the Antidumping Act of 1921. The Commission also recommended that “some official body moving along lines sanctioned by Congress in the Federal Trade Commission act” be authorized to deal with unfair acts and unfair methods of competition in the import trade, including dumping, under a broad law to protect U.S. industries and international commerce, and in part to prevent the undercutting of the protection to U.S. industries achieved by the tariffs established under the 1922 Tariff Act. Congress addressed this recommendation in section 316 of the 1922 Tariff Act, providing that the Tariff Commission itself should conduct investigations of such unfair acts and practices and report the facts and law to the President with recommended actions for the President. This was the beginning of the Commission’s activities in enforcing U.S. trade remedy laws, and the specific genesis of the Commission’s important authority under section 337 of the Tariff Act of 1930, as amended, to directly address unfair practices in the U.S. import trade.

The provisions of the 1922 Tariff Act had the effect of determining the main activities of the Commission for the next several decades. The major provision of this act was section 315, the “flexible” or “scientific” tariff provision. Seeking to further the efforts to remove tariffs as a perennial political issue, it provided that future changes to enacted tariff rates could be made by the President based on equalizing the cost of production (COP) of an article in the United States with the COP of “like or similar” articles “in the principal market or markets in the principal competing country or countries.” Upon application from a private entity, at the request of the President, or pursuant to a Congressional resolution, the Commission was to conduct an investigation to assist the President by determining the COP differential rate and reporting it to the President. The President, conditioned upon the receipt of that report, would then be able to change the rate up or down based upon the President’s determination of the COP differential.

These section 315 COP investigations (later conducted under section 336 of the Tariff Act of 1930, which essentially re-enacted section 315) became the principal work of the Commission for the next 20 years. The investigations were extremely complex and difficult, with particular problems associated with determining what were “like or similar” articles, what was the “principal competing country,” and what were the “principal markets” to examine. This was further complicated by various factors such as exchange rates and transportation costs issues, particularly as the world slid into the worldwide depression of the late 1920s and the 1930s.

The result was a very significant expenditure of Commission time on such cases, but with relatively few determinations resulting. For example, from 1922 through 1929, the Commission received 603 applications under section 315 covering 375 separate commodities, with

increased duties sought for 200 commodities; lower duties sought for 125 commodities; and the remaining applications seeking some combination of higher and lower duties for different articles within a commodity classification or some other adjustment of duties. During this same period, the Commission issued 48 COP reports covering 56 commodities based upon 110 of the applications. These reports resulted in the President increasing duties on 33 commodities, decreasing duties on 5 commodities, and making no change with respect to the remaining 18 commodities.<sup>283</sup>

The Commission's work under sections 315/336 was sharply reduced beginning in the early 1930s. The Smoot-Hawley Tariff Act of 1930 (1930 Tariff Act) significantly raised tariff rates, obviating many COP issues. Further, beginning with the Reciprocal Trade Agreements Act of 1934, the determination of tariff rates shifted from a model of Congressional enactment of flexible tariffs to a model based on reciprocal reduction in tariffs based upon trade agreements. This new approach was adopted to try to counter both competitive tariff increases in which countries had engaged since the 1922 Tariff Act and competitive currency devaluations, which activities accelerated during the worldwide depression and caused great economic harm. For example, from 1929 to 1933, U.S. domestic production declined by 45 percent and U.S. exports declined by more than 65 percent.<sup>284</sup> The reduction in section 315/336 investigations was hastened by the disturbed and rapidly changing economic conditions of the early 1930s, which made calculation of COP even more difficult.

This shift in the Commission's work had noticeably begun by 1933/34: only 12 section 336 investigations were completed in 1934. By the end of the decade, work relating to the reciprocal trade agreements program had become the greater part of the Commission's work, although the Commission undertook one section 336 investigation as late as 1961. The early reciprocal trade agreements program was administered by the Secretary of State and characterized by bilateral negotiations, resulting in 22 bilateral agreements by 1940. Among the activities undertaken by the Commission during the 1933–40 period to support this program were analyses of and reports on imports and exports of thousands of individual commodities; consideration of tariff bargaining under most-favored-nation treatment; U.S. trade with 39 important foreign countries, and the trade of those countries with the rest of the world; the principal trade restrictions imposed by foreign countries; and the trend of imports in relation to U.S. production and height of duties, among many others. Further to support the trade agreements program, the Commission also did an extensive update of the Summaries of Tariff Information which, as noted below, it had previously prepared to assist Congress in its consideration of the 1930 Tariff Act.

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<sup>283</sup> USTC, *Thirteenth Annual Report of the USTC*, 1929 (Washington, DC: GPO, December 2, 1929), at 10.

<sup>284</sup> USTC, *Eighteenth Annual Report of the USTC*, 1934 (Washington, DC: GPO, January 2, 1935), at 10.

Through the early period the Commission continued its activities related to assisting Congress and the President with respect to trade and tariff legislation and providing data and expert advice as called upon. The Commission prepared hundreds of reports under its general authority under the 1922 Tariff Act and under section 332 of the 1930 Tariff Act. For example, in preparation for consideration of the 1930 Tariff Act, the Commission updated and expanded its Summaries of Tariff Information (a series published beginning in 1919), providing approximately 2,750 pages relating to specific commodities. Each of these summaries covered topics such as domestic production, prices, cost of production, and competitive conditions (e.g., changes in style, process, new commercial conditions, etc.) for the covered commodity. The Commission continued this work after the 1930 Tariff Act, and by 1939 had prepared over 1,700 summaries relating to specific commodities.

Among the many other studies prepared under Section 332 and prior similar authority were reports on such varied matters as crude petroleum and liquid refined products; depreciated exchange; unemployment; a dictionary of tariff information; regulation of tariffs in foreign countries by administrative action; bases of value for assessment of *ad valorem* duties (duties as a percentage of a good's value) in foreign countries; and the relationship of duties to the value of imports. It prepared over 2,000 reports for all parts of the U.S. government. The Commission also began during this period a practice of issuing a printed list entitled "Changes in Import Duties Since the Passage of the Tariff Act of 1930," kept current with supplements, setting forth all changes made to the 1930 Tariff Act duty rates by section 336 adjustments or as a result of concessions under the trade agreements program, foreshadowing its work from 1965 onward relating to the U.S. tariff schedules.

In addition to work such as the above, the Commission staff was heavily and directly engaged with Congress, assisting committee staff and members, attending and providing support at hearings, and digesting testimony and other materials. For example, during the consideration of the tariff by Congress in 1929 and 1930, virtually all the commodity experts at the Commission regularly provided assistance to the House Ways and Means and Senate Finance Committees. Further, at the specific request of the minority of Senate Finance Committee, the Commission even provided four economists to assist its members during their considerations leading to the 1930 Tariff Act.<sup>285</sup>

Beyond the section 315 investigations and its general support work, the Commission engaged in activities relating to its early involvement in trade remedies. Work under section 316 of the 1922 Tariff Act (which, as noted above, declared unlawful unfair acts and unfair methods of competition in the import trade) began and continued under its counterpart in the 1930 Tariff Act, section 337. From 1922 to 1929, the Commission received 31 applications under section

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<sup>285</sup> USTC, *Annual Report for 1929*, at 12–16.



316 and instituted 6 investigations (the other applications were dismissed or referred to other government entities). The investigations resulted in orders from the President prohibiting imports of such articles as revolvers, Bakelite products, Manila rope, and laminated paper products. In the 1930s, the Commission received a similar volume of applications under section 337.

The Commission also prepared 18 reports under section 317 of the 1922 Tariff Act, which required the Commission to investigate discriminatory actions and regulations maintained by foreign countries affecting U.S. trade and provided the President with authority to retaliate against such actions or regulations. The products involved in these investigations included automobiles, hardwood flooring, and refined oil and gasoline, among others. Activity in this area continued by the Commission under section 338 of the 1930 Tariff Act (which continued the substance of section 317), but it never constituted a major focus of the Commission during its early years or thereafter. By 1974 Commission activity in this area ended with the enactment of Section 301 of the Trade Act of 1974.

Since its inception, the Commission's mission has included cooperating with other U.S. governmental agencies as appropriate to provide data, information, expertise, and advice, which it routinely did in these first decades. An example of this in the 1930s was the Commission's efforts under Section 3(e) of the National Industrial Recovery Act (NIRA). Under Section 3(e), the Commission reported on the effects of imports on the codes of fair practice set under the NIRA; for several years this was a major area of activity for the Commission. Further, beginning in 1934, a Commissioner chaired the Presidentially-created interagency Committee for Reciprocity Information related to the trade agreements program, which was largely staffed by the Commission. Its function was to receive oral and written data and views from the public interested in trade agreement matters. By 1940 it had received and analyzed over 4,500 statements and 1,200 appearances at hearings. From 1935 to 1941, numerous Commission staff worked with the Works Progress Administration on the assembly of statistics; the projects included producing a complete revised classification of imports,<sup>286</sup> among others.

## The Middle Years (1940–1974)

As World War II consumed much of the time and energy of the world from 1939 to 1945, so it did with the Commission, with normal work put aside. The Commission provided data and support to the War Production Board and, in particular, to the Bureau of Stockpiling and Transportation, including most notably domestic production information. It also provided cost-of-production information on numerous products to the Office of Price Administration. For the War Food Administration it provided cost studies for Lend-Lease and military purchases and for

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<sup>286</sup> USTC, *Twentieth Annual Report of the USTC*, 1936 (Washington, DC: GPO, December 1, 1936), at 52.

products subject to subsidy payments. The Commission's specific expertise in trade also was called upon by the Foreign Economic Administration. The Commission prepared numerous reports on commodities of strategic importance. It prepared detailed assessments of the economy and trade of Japan, as well as information for the Inter-American Defense Board.

During 1944 and 1945, the Commission began to turn its attention to postwar foreign trade. It prepared detailed reports for Congress and the President on the effects of wartime economic changes on the general foreign trade position of the United States. It examined and reported on individual U.S. industries affected by the war, and the effect on their competitive position vis-à-vis competing foreign industries. It also reported on the industrial and trade policies of individual foreign countries.

From the end of World War II through the 1950s, the Commission's work focused on supporting Congress and the President, particularly with respect to the resumption of the trade agreements program begun in 1934 that had been interrupted by the war. In 1946, responding to Congressional committees and members concerning changes in industries brought about by the war and the international trade policies of foreign countries, and reporting on tariff and trade bills (a function of the Commission since its inception), accounted for about one-fourth of the Commission's work. This included preparing an updated compendium of changes to U.S. duties as a result of agreements reached pursuant to the Trade Agreement Act of 1934, section 336 of the 1930 Tariff Act, and various other Congressional acts, necessitating updates on some 1,300 commodities that had experienced changes.

But most of the work of the Commission in 1946—and, indeed, most of its work for the next decade or more—involved specific support for the program of reciprocal trade negotiations. For example, in 1946, the Commission prepared digests containing pertinent technical and statistical trade information on each of the 1,300 commodities for which the President indicated that concessions would be considered during the 1947 program of trade negotiations. This information, combined with the Summaries of Commodity Information series that the Commission maintained, provided critical support to the negotiations.

By 1947, negotiations were well underway on the General Agreement on Tariffs and Trade (GATT), resulting in eventual adoption of the GATT in 1949 by the mechanism of the Protocol of Provisional Application (the United States was an early signer in 1947). After that, negotiations under the reciprocal trade agreements program of the United States would occur under GATT auspices, and shifted from bilateral to multilateral negotiations. As preparations began for the first GATT round in Annecy, France, the Commission's principal supporting effort for the program took statutory form.

The Trade Agreements Extension Act of 1948 (TAEA), extended in the 1951 and 1958 TAEAs, provided for the Commission to conduct “peril point” investigations (modified somewhat by section 221 of the Trade Expansion Act of 1962 into “probable economic effects” investigations). The act required that the Commission determine for each article listed by the President for consideration for inclusion in a proposed trade agreement the maximum concession that could be made without causing or threatening serious injury for U.S. producers of like or similar articles. This effort was undertaken for the Annecy negotiations, and continued for five subsequent rounds, over more than two decades, and required determinations on some 2,400 statistical classifications. Combined with the previously referenced series called *Summaries of Tariff Information* (covering 2,500 products and for each providing the tariff history, statistics on U.S. production analyses of imports and exports, and conditions of competition), the support provided to U.S. negotiators was unrivaled in other countries.

In 1949, the Commission also began work in an area that was to be a major consumer of Commission resources for three decades. Initially by executive order (and later by the provisions of § 7 of the Trade Agreements Extension Act of 1951, § 301(b) of the Trade Expansion Act of 1962, and § 201 of the Trade Act of 1974), the Commission was to investigate whether, as a result of tariff concessions under the trade agreements program, increased imports were the cause of serious injury or threat thereof to U.S. industries producing like or directly competitive products.

The facts developed and the determination made by the Commission were to be provided to the President for possible action (e.g., quotas or increased duties for limited periods). These investigations, and the actions taken pursuant to them, were intended to build support for the trade agreements program by providing a temporary safety valve if fairly traded, increased imports resulting from duty concessions seriously harmed U.S. industries. By 1952, the Commission’s work on these “escape clause” (“escape” from U.S. trade obligations) or “safeguard” investigations—and periodic reviews of the relief provided—was its most important trade agreement activity. In that year, for example, the Commission received 23 applications for such investigations and completed 11 investigations, on such products as garlic, blue-mold cheese, watches, motorcycles, and tuna. From 1949 to 1964, the Commission instituted 127 investigations. The largest number of investigations completed or dismissed—18—occurred in 1961.

The Trade Expansion Act of 1962 added an important new responsibility for the Commission: adjustment assistance for U.S. workers and firms adversely affected by import competition. This program was intended to serve as an alternative to safeguard relief. In investigations initiated upon petitions from workers or firms, when the Commission found that the major cause of unemployment or serious injury to such workers or firms was increased imports attributable in major part to trade agreement concessions, then the workers and firms would

be eligible for assistance (retraining, loans, etc.) to adjust to the import competition if authorized to apply for it by the President. While experiencing a slow start (26 petitions were received in the first seven years of the program, but no relief was provided), by the early 1970s there was considerable activity before the Commission, which by then had received dozens of firm petitions and well over 200 workers' petitions.

With respect to the Commission's work involving unfair trade, an important new authority was provided to the Commission by the Customs Simplification Act of 1954. Pursuant to this law, under the Antidumping Act of 1921, the Commission was to determine, once the Secretary of the Treasury determined there to be sales at less-than-fair-value, whether a U.S. industry making the articles in question was being or was likely to be injured, or was prevented from being established. If the Commission made an affirmative finding, then duties could be imposed to offset the dumping. The number of injury investigations carried out by the Commission under this authority was, however, rather limited until passage of the 1974 Trade Act.

In addition to its Antidumping Act investigations, the Commission continued its work under section 337 of the Tariff Act of 1930, although at a reduced level compared to the early period. From 1936 to 1968, the Commission received only 36 complaints under section 337 and recommended relief in only 3; in all 3 cases, relief was rejected by the President. There were a number of years in which there were no investigations conducted. As will be seen below, this changed dramatically following 1974.

Finally, in considering the evolution of the Commission's work during these "middle years," it should be remembered that the Commission's mission continued from its earliest years to assist Congress and the President with respect to the tariff and to develop and maintain data and expertise in trade-related matters. Most notable, perhaps, was the work the Commission performed related to the enactment of the Tariff Schedules of the United States in 1963. The Commission staff had devoted years to a careful, detailed consideration of the U.S. tariff schedules and the classifications therein, with the 1963 enactment representing the most thorough revision since the 1922 Tariff Act. Much as in 1922, the revisions proposed by the Commission were enacted with few changes. With the fading of the flexible tariff concept from the 1920s and the 1930s, most of the duties actually enacted were based on concessions negotiated in various reciprocal trade agreements.

The Commission also continued to devote considerable effort to its reporting on trade matters. Beginning in 1949, it issued annual reports on the operation of the trade agreements program. It continued to maintain and update its publication on U.S. import duties, tracing in detail the genesis of current import duties through various actions, enactments, and agreements, beginning in 1965 its publication of the Tariff Schedules of the United States Annotated. It continued its annual reports on synthetic organic chemicals, which it began in embryonic form

in 1918 and continued to 1995. Work also continued unabated on the *Summaries of Tariff Information*; a new 62-volume set of summaries was completed in 1967, replacing the 1950 set.

## The Modern Era (1975– Present)

In the early 1970s, members of the GATT began to contemplate another round of tariff and trade negotiations to follow the Kennedy Round (the sixth GATT round) concluded in the late 1960s. In the fall of 1973, the United States and over 100 other countries committed themselves to such a round. Work began on legislation to authorize the President to engage in such negotiations, and in the course of its consideration, attention was paid to all aspects of U.S. trade law and policy. The result was the Trade Act of 1974 (effective January 1, 1975) (1974 Trade Act). This law set the Commission on the path it follows even today.

One change made by the 1974 Trade Act recognized the evolution that had occurred in the functions of the Commission: the U.S. Tariff Commission was renamed the U.S. International Trade Commission. The tariff, while still an important part of the Commission’s work, was no longer the overwhelmingly dominant focus, and indeed had not been for some time. Commission authority and activity under the trade agreements program and in the trade remedy area had grown significantly over the years, and the breadth of the investigations conducted and expertise developed by the Commission had increased enormously.

The political background surrounding the enactment of the 1974 Trade Act helps explain some of the changes made to the Commission’s work by that law (as well as some institutional changes discussed below). In the early 1970s, there was some tension between the executive branch and Congress over control of U.S. trade policy, with some in Congress believing the balance between Congress and the President had tilted too much to the President. Exemplary of this was the negotiation by the U.S. Trade Representative (USTR, an ambassadorial position created by enactment in 1962 to lead the development, coordination, and implementation of U.S. trade policy and to exercise the trade negotiation authority of the President) during the Kennedy Round of an executive agreement establishing a new international antidumping code. It was signed unconditionally by the USTR on the basis that nothing in it conflicted with existing U.S. law. Congress differed (based in part on a Commission report<sup>287</sup> to the Senate Finance Committee saying a conflict existed). Congress enacted a law (Renegotiation Amendment Act of 1968 (Pub. L. No. 90-634)) providing that the provisions of the code would be applied only to the extent that they did not conflict with U.S. law and did not limit the discretion of the Commission in its injury determination under the Antidumping Act of 1921. There were also

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<sup>287</sup> See U.S. Senate, Committee on Finance, 90th Cong. 2nd sess., Report of the U.S. Tariff Commission on S. Cong. Res. 88, Regarding the International Antidumping Code Signed at Geneva on June 30, 1967 (Washington, DC: U.S. Government Printing Office, March 18, 1968).

concerns in Congress that the executive branch, particularly in the person of the Secretary of State, was too willing to sacrifice U.S. economic interests for geopolitical ends.<sup>288</sup> Finally, the consideration of the 1974 Trade Act occurred during the Watergate investigations (1973–74), with obvious implications for the Congressional view of executive authority.

The 1974 Trade Act made significant changes to the trade remedy work of the Commission, particularly as it concerned unfair trade. Perhaps the most dramatic change occurred in the Commission's jurisdiction under section 337 of the 1930 Tariff Act. The 1974 Trade Act provided that the Commission itself would not only determine the facts and law with respect to unfair practices in the import trade under then existing law (under section 337, unfair practices had come to most often involve patent infringement and other intellectual property violations), but would also determine what relief to provide (exclusion orders or cease and desist orders, or both). Prior to the 1974 Trade Act, the determination of whether to provide relief and in what form had been the province of the President. The President's role instead became one of reviewing the action taken by the Commission and being able to disapprove it for policy reasons (which in fact has occurred on only a few occasions).

Importantly, the law also was changed to make section 337 proceedings before the Commission quasi-judicial. Full trial-type administrative procedures became applicable, conducted before administrative law judges (ALJs) who issued initial determinations reviewable by the Commission, with the Commission's final determination reviewable by the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit). Effectively the proceedings became similar to non-jury trials before federal district courts, involving a complainant represented by counsel and a respondent (defendant) or, most often, multiple respondents represented by counsel, with extensive discovery activities before trial (in some cases exceeding 1 million pages of document production and more than 50 depositions), trials before an ALJ typically running 5 to 10 days, and extensive pretrial and post-trial briefings. Some past cases involved so many respondents and such important products that there were sometimes between 50 and 100 counsel in the Commission's courtroom for proceedings.

As part of its conduct of section 337 investigations, the Commission has established the Office of Unfair Import Investigations (OUII), staffed by attorneys who participate as a full party to investigations. Their purpose is to insure that the public interest is represented, but they usually participate in all aspects of an investigation, including the issues of violation and remedy. Today, OUII consists of about 20 attorneys.

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<sup>288</sup> This led to restrictions on executive authority such as the so-called Jackson-Vanik Amendment in the 1974 Trade Act, preventing the Presidential grant of MFN treatment to the Soviet Union absent policies in the Soviet Union permitting freer emigration from the Soviet Union.

Since the 1974 amendment, the Commission's work under section 337 has increased significantly, and constitutes a major part of the Commission's current workload, in some years consuming about 25 percent of Commission resources. In the nearly 42 years that have elapsed since 1975, over 1,000 investigations have been instituted under section 337, compared to approximately 100 in the 58 years prior. Products involved in these cases have included computers, cellphones, optical waveguide fibers, integrated circuits, recombinantly produced human growth hormone, video games and controllers, televisions, energy drink products, baseband processors, wind turbines, dynamic random-access memory data storage (DRAMs), erasable programmable read-only memory chips (EPROMs), rare-earth magnets, light-emitting diodes (LEDs), truck transmissions, automobile parts, agricultural tractors, hardware logic emulators, magnetic resonance imaging systems (MRIs), burn recovery beds, cube puzzles, ink cartridges, and electric power tools, to name a few. In FY 2014, the Commission had 100 active investigations and related proceedings under section 337.

Another aspect of the Commission's unfair practice jurisdiction that was changed—with dramatic impact on the Commission's workload—by the 1974 Trade Act involved investigations under the U.S. antidumping and countervailing duty laws under Title VII of the 1930 Tariff Act. As noted above, the Commission had been involved in determining whether imports injure or threaten injury under the antidumping laws since 1954. Pursuant to this prior authority, the Commission conducted about 150 investigations in the 20 years following 1954.

Since the amendments to the law in 1974, however, which also provided that the Commission should conduct injury investigations under the U.S. countervailing duty law (a law to offset with increased U.S. duties certain subsidies to exports to the U.S. market provided by foreign governments), the Commission has conducted over 1,250 antidumping injury investigations (since 1979, each investigation involving both a preliminary and a final determination on injury), and over 500 countervailing duty injury investigations (again, since 1979, each involving both a preliminary and a final injury determination). Over this span, the number of cases initiated in any given year varied widely (from 10 to over 100). The products involved have included various steel products (hot-rolled and cold-rolled, sheet and strip, pipe and tube, etc.), softwood lumber, sugar, sweaters, aluminum plate, color televisions, ball bearings, uranium, vector computers, DRAMs, wheat, crawfish, wood flooring, portland cement, power transformers, orange juice, EPROMs, cellphones, live swine, pasta, polyethylene terephthalate (PET) resin, shrimp, typewriters, passenger/truck tires, and many other products important in trade.

Beginning in 1998, as required by the Uruguay Round Agreements Act of 1994, the Commission also began reviewing each outstanding antidumping and countervailing duty order every five years (or more frequently if there are changed circumstances) to determine whether revocation of an order or suspension agreement would likely lead to continuation or recurrence of

material injury to the U.S. industry benefiting from the order within a reasonably foreseeable time. This has resulted in 50 to 100 review investigations each year.

These original and review antidumping and countervailing investigations are still a significant part of the current work of the Commission. In FY 2014, the Commission had over 30 active countervailing duty investigations, over 50 active antidumping investigations, and over 60 active reviews. Each investigation involves considerable effort. A Commission staff team—typically, an investigator, an economist, a commodity/industry analyst, an accountant, a statistician, and an attorney, all under a supervisory investigator—develops a report for the Commissioners to consider. Among the data gathered are the relevant U.S. industry's production, capacity utilization, shipments, employment, and financial data, and other information such as imports, market shares held by U.S. and foreign participants, pricing of U.S. and foreign participants, and other conditions of competition. The information is typically gathered by questionnaires, on-site visits, contact with specialists in the industry, public hearings, and other techniques. The Commissioners consider all this varied and voluminous information in arriving at a determination in a case.

In contrast to activity under section 337 and the antidumping/countervailing laws, following the 1974 Trade Act some of the Commission's trade remedy work, which had been robust in prior years, ceased or was reduced significantly. Since 1975, the Commission no longer conducts Injury investigations with respect to adjustment assistance for firms and workers, which are now the responsibility of the Departments of Commerce and Labor, respectively. Also, while never a significant part of its work (from 1937 to 1994 averaging perhaps two cases per year), Commission investigations under Section 22 of the Agricultural Adjustment Act of 1933 ceased in 1994 as a result of the Uruguay Round Agreements Act.

Similarly, while from the 1950s through the early 1980s there were numerous safeguard cases before the Commission (involving products ranging from automobiles and footwear to glass, carpets and rugs, stainless steel, wrapper tobacco, and cut flowers, to name a few), there are now sometimes years between such cases (including cases under the global safeguard provisions (referenced earlier); the China safeguard provisions, which expired in 2013; and bilateral safeguard investigations under the North American Free Trade Agreement (NAFTA) and other statutes implementing bilateral trade agreements.)

While work ramped up following the 1974 Trade Act in trade remedies, the Commission's extensive work in industry and economic analysis, trade information services, and trade policy support continued. Section 131 of the 1974 Trade Act provided that the President should publish and submit to the Commission a list of articles for which duty modifications may occur under his authority to negotiate trade agreements or for which he intended to provide duty-free treatment for specific products under the U.S. Generalized System of Preferences (a



program under which the President can provide for duty-free treatment on particular products from less-developed countries). The Commission was then to determine the probable economic effects of such duty modifications or duty-free treatment on U.S. industries and consumers.

This provision has resulted in rather significant work for the Commission from time to time (as had similar provisions in earlier periods, as noted above), such as during the Tokyo Round of trade negotiations (the seventh round under the GATT) in the later part of the 1970s, and with respect to the negotiations of the NAFTA in the 1990s. With respect to the Tokyo Round, for instance, the Commission conducted hearings across the United States, and provided to the President thousands of pages of Trade Agreement Digests as to probable economic effects. Activity continues under section 131, as well as under sections 2104 (b) and 2104 (f) of the Trade Act of 2002 (relating to tariff reductions on import-sensitive agricultural products and proposed free trade agreements, respectively). For example, proposals such as the Trans-Pacific Partnership agreement still generate requests for probable economic effects studies.

The Commission's general fact-finding studies have continued to be a substantial aspect of its mission. The periodic series of detailed reports on the thousands of products imported to and exported from the United States remain part of these activities. These reports, currently known as *Industry and Trade Summaries*, include information and analysis of U.S. and foreign production and inventories, duties and customs treatment, and conditions of competition, among other topics. Since 1994, the Commission also has conducted an annual investigation and prepared a report reviewing the trade performance of key U.S. agricultural and manufactured products, adding services to the investigation and reports in 1995. The annual report on the operations of the trade agreements program (now titled *The Year In Trade*), begun in 1949, provides information on U.S. international trade laws and actions, activities of the World Trade Organization, U.S. free trade agreements and trade preference programs, and U.S. bilateral trade relations with major trading partners.

The demand for Commission investigations under section 332 of the 1930 Tariff Act has also remained robust. These studies, generally requested by the U.S. Trade Representative, the House Ways and Means Committee, or the Senate Finance Committee, have covered a wide range of subjects involving tariff and international trade. No recommendations on policy or other matters are made in these reports; rather, they represent independent and objective analysis, such as the Commission has provided since 1917. The range of studies is enormous, e.g., the effects of greater integration within the European Community on the United States (with numerous follow-up reports); the impact of NAFTA; NAFTA rules of origin; global competitiveness of U.S. advanced manufacturing industries; apparel; trade patterns in sub-Saharan Africa; wheat trading practices; pricing of prescription drugs; the Multifibre Arrangement; rice; digital trade in the United States and globally; the impact of significant U.S.

import restraints (updated periodically); and Cuban imports and the effects of the U.S. embargo, among hundreds of others.

Important trade information services have also continued without abatement. One major activity has been the maintenance of the Harmonized Tariff Schedule of the United States (HTS), which provides applicable tariff rates and statistical categories for all merchandise imported into the United States. This is the successor to the Commission's earlier work on the Tariff Schedule of the United States Annotated, published periodically from 1965 until superseded by the HTS in the 1990s. A new edition of the HTS is published each year, and it is updated throughout the year to reflect classification and duty rate changes to any of its over 10,000 statistical classifications. An important aspect of this maintenance is the work of the Committee for Statistical Annotation of the Tariff Schedules, which the Commission chairs and which decides on changes in HTS statistical reporting categories. Since 2001, the Commission has also maintained the Interactive Tariff and Trade DataWeb that is open to the public, and provides worldwide interactive access to current and historical U.S. import and export trade data, on a monthly, quarterly, annual, and year-to-date basis.

The Commission also has reported annually on tariff-related bills before Congress, providing for each commodity covered by a bill such information as imports (including duties collected), U.S. production, and uses in the United States, etc. The number of bills on which reports were prepared often exceeded 300 in each session of Congress. Pursuant to the American Manufacturing Competitiveness Act of 2016, the Commission now receives petitions requesting duty suspensions and reductions, and will report to Congress concerning these petitions.<sup>289</sup>

As it has from its beginning, the Commission continues to provide support to Congress and the executive branch for the development of U.S. trade policy and implementation. Commission staff serve as observers to the Trade Policy Review Group (TPRG) (cabinet deputy secretary level) and as technical advisors on the underlying interagency Trade Policy Staff Committee (TPSC) and each of its numerous subcommittees; the TPRG and the TPSC and its subcommittees, all chaired by USTR officials, play a major role in development of U.S. trade policy and its implementation. Commission staff provide continuing support to the USTR for negotiations, dispute settlement, work on nontariff measures, and the GSP and other preference programs, among other activities. Commission staff have long participated in international customs organizations, such as the Customs Cooperation Council and now the World Customs Organization, which is responsible for the continuous development and maintenance of the global Harmonized System of tariff classification. Of course, the

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<sup>289</sup> Pub. L. No. 114-159, May 20, 2016; see the Commission's MTB Petition System, at <https://mtbps.usitc.gov/external/> (accessed December 1, 2016).

Commission continues to respond each year to hundreds of Congressional requests, both formal and informal, for technical assistance.

In short, following the 1974 Act, while the Commission continues to provide support to Congress and the President/USTR and continues to conduct numerous investigations under its general investigative authority, there has been and remains a notable shift of resources to addressing unfair trade practices. In fact, it is typical in recent years for the Commission to devote 50 percent of its resources and staff to section 337 and antidumping/countervailing duty investigations.

## Institutional Evolution

From its inception, the Commission has been structured institutionally to be independent, nonpartisan and impartial. It is a structure consistent with the functions of the Commission as set forth above to engage in independent fact-finding and provide unbiased advice not subject to politics. As such, it would be expected that insulation from the executive branch, and indeed insulation from partisanship in Congress, would be an objective. During the course of the past 100 years, this structure has endured and been strengthened.

As originally instituted, the Commission comprised six members, appointed by the President, subject to Senate confirmation. A Commissioner was appointed for a 12-year term, and no more than three members could be from the same political party. The President annually was to designate a Chairman and Vice Chairman. The even number of members, the length of the term, and the limitation on party membership were all designed to result in the best chance for the desired independence, impartiality, and nonpartisanship.

Over the years, the even number of Commissioners provided by statute has not changed. Attempts to change to an odd number have been rejected. For example, in the consideration of the 1974 Trade Act, the Senate Finance Committee proposed changing the number to seven. This was objected to in the Conference Committee by the House Ways and Means Committee, and the Senate provision was dropped. Rather than risk losing the benefits of the even number for nonpartisanship, the effect of even-numbered Commissioners yielding more tie votes than normal (and hence the Commission effectively not being able to decide) has instead been dealt with by specific tie-breaking statutory provisions, e.g., a tie vote will result in a Section 337 investigation being instituted, or a tie vote under section 202(b) of the 1974 Trade Act (safeguard) means the President may accept the determination of either set of Commissioners.

It should also be noted that the statute permits the Commission to continue to function in spite of vacancies among its membership. Because the President and the Senate have not always been in a position to immediately replace departing Commissioners, the actual number of

Commissioners serving at any one time has varied from six to three and in fact there have often been an odd number of Commissioners serving. This occurrence, and because the Commission often acts unanimously or by clear majority, has meant that concerns related to a tie vote have rarely materialized.

The length of the term for a Commissioner has changed over the years. Originally set at 12 years, in 1930 it was changed to 6. This in turn was changed by the 1974 Trade Act to 9 years, the length it remains today. Nine years was likely chosen because it is beyond the 8 years of a two-term President, making an appointed Commissioner not beholden to the appointing President. This was strengthened still further by adding a provision that a person who has served 5 years or more as a Commissioner is not eligible for reappointment.

The requirement that no more than three Commissioners be from the same political party has never changed. Indeed, this balancing of party affiliation has been extended to the President's appointment of the Chairman and Vice Chairman. In 1974, the law was amended to provide that the Chairman and Vice Chairman could not be from the same political party, and that a Chairman from one party could not be succeeded by a Chairman from the same party. This, combined with a current 2-year term limit for a Chairman and Vice Chairman, seeks to prevent a single party from gaining any significant control of the Commission's Chairmanship.

Regarding the Chairman's role compared to that of other Commissioners, from 1916 to 1977 the Chairman had no formal duties prescribed by statute, nor any substantive role different from that of any other Commissioner. Most decisions, even about personnel and other relatively routine administrative questions, were addressed by the Commission as a whole. This led to delay in decision-making on routine matters that were unlikely to result in introducing any partisanship or undue influence on substantive decisions. It also resulted in consideration in the 1970s of whether there should be a "strong Chairman," a first among equals.<sup>290</sup> This ultimately was rejected, but recognizing the then existing administrative inefficiencies, the law was changed in 1977 to provide for the Chairman to make most personnel decisions and handle most other administrative matters, though subject to a veto in some situations by the Commission.

The 1974 Trade Act saw the addition of two provisions intended by Congress to further increase the independence of the Commission from the executive branch. It has already been noted that there was a confluence of events at the time of the Act that resulted in a desire to constrain executive authority in the international trade area. Originating in the Senate Finance Committee, the first provision added that the annual budget developed by the Commission

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<sup>290</sup> GAO, *International Trade Commission: Administrative Authority is Ambiguous*, Report NS/AD-92-45, February 25, 1992, at 11–12.

would be submitted with the Executive's budget proposal without change. This meant that the Office of Management and Budget no longer ultimately controlled the Commission's budget. Of course, it was anticipated (and practice has borne out) that the Commission would work with both Congress and the executive branch in developing its budget. At the time of the enactment of this provision, the Commission was the only agency receiving this particular treatment.

The second provision added by the 1974 Trade Act was also a striking departure from the norm, and again reflected Congress' concern for the Commission's independence. The provision provided that the Commission had the option of representing itself in federal court proceedings involving the Commission's authority and decisions. The Attorney General wrote to the Senate Finance Committee (the originator of this provision) strongly objecting to the change, but the Conference Committee accepted the provision. This provision has led to the current practice in which the Commission, through attorneys in the General Counsel's office, routinely represents itself in appeals of antidumping, countervailing duty, and section 337 unfair trade practices cases before the U.S. Court of International Trade and U.S. Court of Appeals for the Federal Circuit.

Of course, discussion of the institutional evolution of the Commission would not be complete without a consideration of the Commission staff. The Commission has been headquartered in Washington, DC, since its inception. It also maintained a New York City office from 1922 until 1983. For a period from 1925 to 1936, the Commission also maintained an office in Brussels, Belgium, which was moved there from an office previously maintained in Berlin, Germany; the Brussels office was used to facilitate contacts for investigations in Europe. The vast majority of Commission staff has always been in Washington, and is exclusively so since 1980, unless detailed to negotiation delegations or the like.

The work of the New York office reflected the depth of and breadth of information which the Commission routinely sought and needed to carry out its functions and develop its expertise. Located at the Custom House originally, its function throughout its existence was to collect and analyze original data on the import and export trade directly from Customs records and from importers and producers in the region. It often reviewed tens of thousands of entry records to provide direct input on such matters as classification, trade flows, dutiable and non-dutiable trade, and more.

The Commission's staff began its existence with the wholesale transfer in early 1917 of the staff of the Cost of Production Division of the Department of Commerce. By 1919, the staff consisted of 73 persons (including Commissioners), with some 26 experts (economists, commodity specialists) and 34 clerks. In FY 1925, reflecting principally the effect of the 1922 Tariff Act's flexible tariff provision, the staff had grown to 201, including 100 experts and 75 clerks. In 1939, the staff had grown to over 300 in total. It then declined to about 200 in the 1950s, to a point

where the Commission indicated it was so short of staff that it could not do all the work that needed to be done. In the last several decades the staff has grown to between 350 and 380.

Following enactment of the 1922 Tariff Act, the Commission had organized its staff into four broad divisions: the Office of the Chief Economist, the Office of the Chief Investigator, the legal division, and the administration division. The chief economist supervised general investigations, while the chief investigator supervised the section 315 flexible tariff cost of production investigations. Commodity divisions were formed, each with a chief and experts; there were also an accounting division and a preferential tariffs and commercial treaties division. An advisory board, reporting to the Commission, supervised the staff's work; the board consisted of the chief economist, chief investigator (the Chairman of the Board), a representative from legal, and the chief of the commodity division under which the subject of an investigation fell.

With modification, this basic organization remains the nucleus of the staff organization persisting even today. While the composition of the staff has varied over the years, the Commission today maintains an expert staff of professional trade and nomenclature analysts, investigators, attorneys, economists, information technology specialists, and administrative and research support personnel. The same staff units have predominated relatively consistently. The major units in terms of personnel have been the Office of Investigations, Office of Industries (containing the commodities divisions), the Office of Economics, and the Office of the General Counsel. This consistency somewhat reflects the way the Commission has conducted its investigations over its history.

The Commission conducted its early investigations in a fashion perhaps unique at the time. Investigations were conducted using a team bringing together a number of disciplines. This remains the situation today. For example, as noted earlier, a current import injury team has typically consisted of an investigator, an economist, a commodity/industry analyst, an accountant/auditor, a statistician, and an attorney. All are managed by a supervisory investigator. (For investigations under more general investigatory authority, such as section 332 of the 1930 Tariff Act, the team may typically not include an investigator or accountant/auditor.) This approach has resulted in fully developed investigations and reports. It has also led to an appreciation of the Commission as a leader in independent research and expertise in trade matters.

There has always been an interest in Congress to request, and for the Commission to supply, staff support to Congress, especially the House Ways and Means Committee and the Senate Finance Committee. As noted earlier, during the consideration of the 1930 Tariff Act, Commission staff directly supported Congress, including even supplying four economists to the minority side. During the consideration of the 1974 Trade Act, the General Counsel of the Commission as well as Commission attorneys and economists directly participated in

supporting the House Ways and Means, Senate Finance, and the Conference Committees in executive session mark-up, and assisted in drafting both the statute and committee reports. This relationship continues to this day.

The Commission staff has also served as a source of talent for both other parts of the government and for the private sector. Over the years, a number of Commission staff alumni have become professional staff members of the House Ways and Means Committee and Senate Finance Committee. They have also taken positions as General Counsel at USTR and even as Deputy USTR, as well as other staff positions at USTR. They have served on the GATT Secretariat, in senior positions of the Customs Cooperation Council, and in other international organizations. They have joined leading law firms and various consulting groups relating to international trade. In addition to these permanent moves, Commission personnel have served on details to the executive and legislative branches as well as international organizations. All this is implicit recognition of the expertise represented by the Commission staff.

## Conclusion

The Commission was conceived in 1916 as an agency to be a trusted assistant to Congress and the executive branch in the formation and implementation of U. S. trade policy and trade remedy laws. From the beginning it was structured to be non-partisan, impartial, and independent. Over the last century its structure and administrative authority have evolved to reinforce these important characteristics, making it perhaps unique as an agency and permitting it to be the trusted partner of both Congress and the executive branch.

The past century has seen significant shifts in the work of the Commission. From an early focus on tariff and customs administration, the Commission's functions shifted more to supporting the reciprocal trade agreements program. Over the last 50 years or so, and particularly with the enactment of the Trade Act of 1974, the Commission has shifted even more resources to remedy aspects of U.S. international trade, and in particular combating unfair trade practices.

While the above shifts were occurring, the Commission has continuously maintained its core competency and responsibilities to advise and assist Congress and the executive branch with data, analysis, and expert input on U.S. trade policy and implementation. This continues to absorb a significant part of Commission resources. From its inception, the staff of the Commission has been key to its success in this and all its work.

As the Commission heads into its second century, it continues in its role of providing important support to Congress and the President in the development and implementation of U.S. trade policy.





# Chapter 5

## Evolution of the Chairmanship of the U.S. International Trade Commission



**Photo:** The office of the Chairman.

**Shara L. Aranoff, Deanna Tanner Okun, and Daniel R. Pearson<sup>291</sup>**

In its 100-year history, 35 individuals have served one or more terms as Chairman of the U.S. International Trade Commission (USITC or Commission). The position has been held by 17 Democrats, 16 Republicans, and two Independents.<sup>292</sup> Currently, Chairmen serve 2-year terms,<sup>293</sup> but the length of the Chairman's term has varied and changed with the evolution of the agency.<sup>294</sup> Commissioners serving as Chairmen by operation of law<sup>295</sup> have served much shorter terms—sometimes as short as a few days or weeks, reflecting the statutory provisions designed to ensure that the Commission continues to function, even when political processes delay the designation of a Chairman.

Although there has been a Chairman since the United States Tariff Commission first opened its doors in 1917, the powers and responsibilities of the office have evolved through changes in law and agency practice. This chapter chronicles the legal requirements and major legislative and practical changes that have shaped the Chairmanship during the Commission's first

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<sup>291</sup> Former Commission Chairman Aranoff is of counsel at Covington & Burling LLP. Former Chairman Okun is a partner at Adduci Mastriani & Schaumberg LLP. Former Chairman Pearson is a principal of Pearson International Trade Services. The authors gratefully acknowledge the support and input of former colleagues and aides, including Catherine DeFilippo, Director, Office of Operations; Stephen Koplun, Senior Vice President, Wessel Group, and former Chairman of the Commission; and Elizabeth Ravesteijn, Economic Advisor to Chairman Schmidlein and current and former Chief of Staff.

<sup>292</sup> For a complete list of Commission Chairmen, please see the list at the end of this volume. Regarding Chairman Taussig's political party affiliation, see Select Senate Committee on Investigation of the Tariff Commission, *Hearings Pursuant to S. Res. 162, Part 1, 69th Cong. 1st Sess.*, HRG-1926-TAR-001 (March 23–24, 1926), 15–16.

<sup>293</sup> 19 U.S.C. § 1330(c)(2)(B).

<sup>294</sup> The longest-serving Chairman was Oscar B. Ryder, who held the office for almost 11 years, from July 28, 1942 to March 5, 1953.

<sup>295</sup> Prior to the passage of the 1991 Act to amend the Tariff Act of 1930 to provide appropriate procedures for the appointment of the Chairman of the United States International Trade Commission, Pub. L. No. 102-185, § 1(a), 105 Stat. 1280 (December 4, 1991), the term "Acting Chairman" was used by Chairmen serving by operation of law. See, e.g., USITC, *1990 Annual Report*, USITC Publication 2354 (Washington, DC: USITC, May 1991), 5. Following the enactment of the 1991 Act, "Acting" was dropped from the Chairman's title. Press releases and annual reports denoted that the Chairman was serving by operation of law. See, e.g., USITC, "Deanna Tanner Okun Becomes Chairman of U.S. International Trade Commission," News Release 10-067, [https://www.usitc.gov/press\\_room/news\\_release/2010/er0617hh1.htm](https://www.usitc.gov/press_room/news_release/2010/er0617hh1.htm); USITC, *2010 Year in Review*, USITC Publication 4212 (Washington, DC: USITC, December 2010), 5; and USITC, "Irving A. Williamson Becomes Chairman of U.S. International Trade Commission," News Release 16-072, June 20, 2016, [https://www.usitc.gov/press\\_room/news\\_release/2016/er0620ll615.htm](https://www.usitc.gov/press_room/news_release/2016/er0620ll615.htm).

century.<sup>296</sup> In addition, we share our personal recollections on the Chairmanship as three former Chairmen who served in that role collectively from 2006 to 2012, and as Commissioners for terms covering 2000–2014.

## Creation of the Chairman and Vice Chairman in 1916

When Congress created the Tariff Commission in the Revenue Act of 1916 (the “1916 Act”), it provided that the Commission would consist of six members, who would be appointed by the President with the advice and consent of the Senate, no more than three of whom could be members of the same political party, and who would serve for 12-year terms. Commissioners were expressly precluded from engaging in “any other business, function, or employment,” and could be removed from office by the President for “inefficiency, neglect of duty, or malfeasance in office.” The 1916 Act further provided that a vacancy would not impair the right of the remaining Commissioners to exercise the powers of the Commission, but added that “no vacancy shall extend beyond any session of Congress.”<sup>297</sup>

The 1916 Act also created the offices of Chairman and Vice Chairman, stating that the President “shall designate annually the chairman and vice chairman of the commission.”<sup>298</sup> While Congress instructed the President to “alternate as nearly as may be practicable” between the political parties when appointing new Commissioners, it placed no such limitation on the selection of the Chairman.<sup>299</sup> The first Chairman, Harvard economics professor Frank Taussig, was nominated as an Independent, and was a long-time advocate of the Tariff Commission’s creation. The first Vice Chairman, South Carolina Democrat Daniel Calhoun Roper, was the first in a long line of Commissioners to have served on the staff of the House Committee on Ways and Means.<sup>300</sup>

Although it tasked the Commission with certain responsibilities and provided the powers necessary to pursue its institutional mission,<sup>301</sup> the statute was silent as to the responsibilities of the Chairman and Vice Chairman. In fact, rather than assigning specific powers to the Chairman, the Act appeared to authorize each individual Commissioner to exercise certain

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<sup>296</sup> Congress passed a number of tariff acts and statutes implementing trade agreements throughout the Commission’s first century. Although those statutes made broad changes in the Commission’s responsibilities and operations, most did not change the Chairmanship.

<sup>297</sup> Revenue Act of September 8, 1916, Pub. L. No. 64-271, § 700, 39 Stat. 756, 795 (1916).

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*

<sup>300</sup> John M. Dobson, *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission* (Washington, DC: USITC, 1976), 89–90.

<sup>301</sup> Pub. L. No. 64–271, §§ 702–06.

powers of the Commission. For example, the Act stated that “the commission may, by one or more of its members, or by such agents as it may designate, prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country.”<sup>302</sup> Similarly, it provided that “any member of the commission may sign subpoenas, and members and agents of the commission, when authorized by the commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.”<sup>303</sup>

The United States’ entry into World War I, only six days after the Tariff Commission opened its doors in March 1917, led President Woodrow Wilson to assign certain war-related duties to Chairman Taussig. For example, the President directed the Chairman to serve on the Price-Fixing Committee of the War Industries Board, on various Food Administration committees, and as a director of the Sugar Equalization Board. In 1919, the Chairman of the Tariff Commission served as an economic advisor to the American delegation at the peace conference and helped draft the customs provisions of the peace treaty.<sup>304</sup> In peacetime, however, the early Chairmen shared their powers with the other five Commissioners.

## The Tariff Act of 1930

Throughout the 1920s, political dissention severely hampered the Commission’s effectiveness and provided ample opportunities to test the independence of its Chairman.<sup>305</sup> Accusations of politicization were not new to the Tariff Commission. Each of the first several Presidents to appoint nominees to the Commission was accused of favoring individuals who shared his own trade philosophy. When President Woodrow Wilson appointed the first Commissioners in 1917, Republicans complained that five of the President’s six nominees were free trade proponents.<sup>306</sup> Similarly reflecting their own policy preferences, Presidents Warren Harding and Calvin Coolidge both appointed Commissioners who favored protectionist policies, regardless of their political party.

In 1924, the Commission experienced the first of several crises, when Commissioner Henry Glassie, whose family held considerable financial interests in the sugar industry, refused to recuse himself from a sugar investigation. His fellow Commissioners had demanded he step down from the investigation, citing the need for impartiality. Chairman Thomas Marvin settled

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<sup>302</sup> *Ibid.*, § 701.

<sup>303</sup> *Ibid.*, § 706.

<sup>304</sup> Bernhardt, *The Tariff Commission: Its Histories, Activities and Organization* (New York: D. Appleton and Company, 1922), 32.

<sup>305</sup> Dobson, *Two Centuries of Tariffs*, 1976, 98–101.

<sup>306</sup> *The New York Times*, “President Names Tariff Commission,” March 15, 1917; *The Washington Post*, “Attack Tariff Board; Wilson Sends Six Nominations to Senate; Amazes Old Guard,” March 15, 1917; Thomas Logan, “That Non-Partisan Board: Only One Protectionist Among the Six Members of the New Tariff Commission,” *American Economist* 59, no. 12 (1917).

the dispute by reading a message from President Coolidge, in which the President expressed his expectation that the Commissioners conduct their investigation in accordance with the law. However, the President also counseled Glassie to do as he saw fit, and “offered Executive support for any decision the Commissioner made.” Later that day, President Coolidge appointed Marvin as Chairman for another year.<sup>307</sup>

Members of Congress learned of these events, and acted to restore the Commission’s integrity by attaching a proviso to the Commission’s appropriation stating that

no part of this appropriation shall be used to pay the salary of any member of the United States Tariff Commission who shall hereafter participate in any proceedings under said sections 315, 316, 317, and 318 of said act, approved September 21, 1922, wherein he or any member of his family has any special, direct, and pecuniary interest, or in respect to the subject matter of which he has acted as attorney, legislative agent, or special representative.<sup>308</sup>

Executive actions throughout the 1920s further exacerbated tensions on the Commission, as President Coolidge continued to politicize the Commission.<sup>309</sup> In response, the Senate created a special committee to investigate the Commission’s operations.<sup>310</sup> The committee launched its investigation in 1926 with the following mandate:

The inquiry shall have particular reference to the regulations and procedure of the Tariff Commission, the powers exercised and the functions performed by said commission, and to the institution, investigation, hearing, and decision of cases arising under said section. . . . The committee shall also investigate the appointment of members of said commission and report to the Senate whether any attempt has been made to influence

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<sup>307</sup> Although the Tariff Commission did not have a formal policy against commissioners participating in investigations in which they had direct interests, Commissioner Edward Costigan cited the Interstate Commerce Commission’s policy and asked that the Tariff Commission adopt similar standards. His proposal was rejected by a 3–3 vote. Commissioners Costigan, Culbertson, and Lewis, the remaining Wilson appointees to the Commission, voted in favor of adopting the policy. Chairman Marvin and Commissioners Burgess and Glassie, appointed by Presidents Harding and Coolidge, opposed. U.S. Tariff Commission (USTC), *Proceedings*, December 19, 1923.

<sup>308</sup> Executive and Independent Offices Appropriation Act, Proviso Affecting Commission’s Appropriation, Pub. L. No. 68-214, 43 Stat. 529 (June 7, 1924), cited in U.S. Tariff Commission (USTC), *Eighth Annual Report of the USTC, 1924* (Washington, DC: USTC, December 1, 1924), 41–42.

<sup>309</sup> In 1925, Former Chairman Taussig publicly decried the President’s appointments to the Commission, stating that “the endeavor seems to have been to make it not an organization for unbiased inquiry on the facts, but one for preparing such recommendations as are known in advance to be acceptable to the party and the Administration in power.” *The New York Times*, “Demands an Inquiry on Tariff Board to Purge it of Politics,” December 30, 1925.

<sup>310</sup> Senate, *Select Committee Investigation of the United States Tariff Commission*, 69th Cong., 1st sess. (1928).

the official action of members of said commission by any official of the Government or other person or persons; and if so, what were the means or methods so used.<sup>311</sup>

The investigation culminated in a complete restructuring of the Commission as part of the Tariff Act of 1930.<sup>312</sup> Although some members of Congress wanted to eliminate the Tariff Commission entirely, most sought to preserve the Commission. As a result, the Tariff Act of 1930 preserved the Commission, but made significant changes in its structure that were designed to restore the agency's independence. Among other things, the 1930 Act provided that each existing member of the Commission could only "continue to serve until his successor (as designated by the President at the time of nomination) takes office, but in no event for longer than ninety days after the effective date of this Act."<sup>313</sup> By requiring that President Hoover replace all of the existing Commissioners ninety days after the statute's effective date, Congress sought to ensure the President would "create a whole new Commission—one that would be more acceptable to its many critics."<sup>314</sup>

The 1930 Act also stipulated the qualifications to be a Commissioner: it required Commissioners to be citizens of the United States and to possess the qualifications needed to develop an expert knowledge of tariff problems and efficiency in the administration of the Commission's functions.<sup>315</sup> After much internal debate in Congress on the matter,<sup>316</sup> the Act further specified that no more than three Commissioners could be members of the same political party. The Act also repeated the 1916 Act's requirement that Commissioner appointments alternate political parties as nearly as may be practicable<sup>317</sup> and drastically shortened Commissioners' terms in office. Specifically:

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<sup>311</sup> S. Res. 162, 69th Cong., 1st sess. (March 11, 1926). From March 1926 to February 1927, the committee held 41 sessions. The hearings comprised 1,461 pages. According to the Commission's *1927 Annual Report*, "The commissioners and the chief of the economics division were present at practically all of the hearings." U.S. Tariff Commission (USTC), *Eleventh Annual Report of the USTC, 1927* (Washington, DC: USTC, December 5, 1927), 112. On February 17, 1927, the Senate passed a resolution to continue the investigation until the end of the first regular session of the Seventieth Congress. *Ibid.*, 113.

<sup>312</sup> See generally Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930).

<sup>313</sup> Pub. L. No. 71-361, § 330.

<sup>314</sup> Dobson, *Two Centuries of Tariffs*, 1976, 102.

<sup>315</sup> Pub. L. No. No. 71-361, § 330(a).

<sup>316</sup> Dobson, *Two Centuries of Tariffs*, 1976, 102. Minutes of the Senate Finance Committee's Executive Session on August 20, 1929, reveal that Sen. Smoot put forth a motion to disagree with House amendment 1129, which proposed a seven-member Commission, in favor of a six-member Commission, with no more than three Commissioners from the same political party. The vote carried 7 to 4. Senate Finance Committee, Executive Session Minutes on H.R. 2667, SF-T.27, HRG-1929-FNS-0077. The House receded from the amendment (H.R. 2667, 71st Cong., 2d sess. (January 6 (calendar day March 24), 1930), and the final bill as passed reflected Sen. Smoot's motion.

<sup>317</sup> Pub. L. No. 71-361, § 330(a).

Terms of office of the commissioners first taking office after the date of the enactment of this [1930] Act, shall expire, as designated by the President at the time of nomination, one at the end of each of the first six years after the date of the enactment of this Act. The term of office of a successor to any such commissioner shall expire six years from the date of the expiration of the term for which his predecessor was appointed, except that any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term.<sup>318</sup>

With regard to the Chairman and Vice Chairman, the 1930 Act reiterated the 1916 Act's requirement that the President "annually designate one of the commissioners as chairman and one as vice chairman," but further elaborated that the Vice Chairman would act as Chairman "in case of the absence or disability of the chairman." The 1930 Act also clarified that a "majority of commissioners in office shall constitute a quorum," but the Commission "may function notwithstanding vacancies."<sup>319</sup> Through these changes, Congress structured the Commission and its leadership in such a way that business could continue unabated, even in the absence of one or more Commissioners.

## Administrative Gridlock in the 1970s Leads Congress to Reshape the Chairmanship

By the early 1970s, Congress had again become concerned about the independence of the Tariff Commission, worrying that it was becoming too closely aligned with the executive branch to provide politically independent advice to Congress.<sup>320</sup> As noted by the Senate Finance Committee in its report on the Trade Act of 1974, "The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch."<sup>321</sup> The Committee also expressed its concern that "sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission," causing frequent tie votes at the Commission.<sup>322</sup>

To rectify these perceived problems, the Trade Act of 1974 expanded the term of Commissioners to nine years and provided that a Commissioner who had served for more than

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<sup>318</sup> *Ibid.*, § 330(b).

<sup>319</sup> *Ibid.*, § 330(c).

<sup>320</sup> The Commission's Chairman and Vice Chairman at the time were both designated by the President (and the President at the time was a Republican while both Houses of Congress were controlled by the Democrats).

<sup>321</sup> Senate Finance Committee, *Report of the Committee on Finance*, S. Rep. No. 93-1298 (November 26, 1974), 115.

<sup>322</sup> *Ibid.*

five years could not be reappointed.<sup>323</sup> The 1974 Act also rescinded the President's power to appoint the Chairman and Vice Chairman. Instead, the most senior Commissioner with at least 18 months left in his/her term would serve automatically as Chairman for 18 months, while the most senior Commissioner of the other political party with at least 36 months remaining in his/her term would serve as Vice Chairman. Thus, under the Act, the Chairmanship would rotate automatically between the parties every 18 months.<sup>324</sup> According to the Senate report on the Act:

This amendment is intended to strengthen the independence of the Commission by removing the power to appoint the chairman and vice chairman of the Commission from the President. Also, it would provide, in the normal course of events, that the chairman and vice chairman of the Commission are the two most senior in service among Commission members. It is hoped that this may provide an incentive to commissioners to serve their entire terms and avoid vacancies, as well as provide that the most experienced members of the Commission serve as chairman and vice chairman, which is generally desirable.<sup>325</sup>

The 1974 Act also aimed to incentivize Commissioner participation in votes by making their voting records public. Finally, to further support the agency's independence, the 1974 Act authorized the Commission to be represented in all judicial proceedings by its own attorneys and for the Commission's budgets to be submitted to Congress without revision by OMB.<sup>326</sup>

Although Congress adopted these reforms in an attempt to provide the Commission with a structure that would motivate the Commissioners to address matters before the agency in a timely and independent manner, it treated administrative matters differently from the substantive work of the Commission. Commissioner votes on substantive matters would be made public, but the same was not true for votes on administrative matters. According to the Senate Report: "It is not the intent of this Committee that votes on internal Commission matters (work schedules, personnel matters, etc.) would be covered."<sup>327</sup>

Not long after passage of the 1974 Act, the trade committees began hearing reports of gridlock within the Commission, with the Commissioners spending inordinate amounts of time

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<sup>323</sup> This rule remains in effect today. 19 U.S.C. § 1330(a).

<sup>324</sup> Trade Act of 1974, Pub. L. No. 93-618, § 172, 88 Stat. 2009–2010 (January 3, 1975).

<sup>325</sup> S. Rep. No. 93-1298 (1974), 117.

<sup>326</sup> Pub. L. No. 93-618, §§ 173–75; S. Rep. No. 93-1298 (1974), 117–18. Prior to the passage of the 1974 Act, the Commission's budget was subject to change by the Office of Management and Budget (OMB), and the Commission was dependent on the U.S. Department of Justice for representation in court, including on matters relating to the laws the Commission administered.

<sup>327</sup> S. Rep. No. 93-1298 (1974), 117.



disagreeing over seemingly minor administrative matters.<sup>328</sup> The passage of the 1974 Act had prompted a major reorganization within the Commission, as the agency determined the best structure and staffing to meet its broadened responsibilities.<sup>329</sup> Differences of opinion over the reorganization and other administrative matters began to diminish the Commission's efficacy and endanger its reputation.<sup>330</sup> According to the Ways and Means Committee, there had been "a completely unwarranted amount of time spent by Commissioners bitterly debating minor administrative or personnel matters, often in public sessions" or in the press. The Ways and Means Committee declared that "the amount of hours the Commission has spent failing to decide on minor administrative matters is poor management. The dissension created ultimately impacts on the substantive work of Commissioners and their ability to function as a Commission."<sup>331</sup>

In addition to Commissioners publicly airing their disagreements about administrative matters, the Committee was concerned that "too often individual Commissioners stress[ed] to an inordinate degree their own independence in both administrative and substantive matters."<sup>332</sup> For example, disagreements among the Commissioners on personnel matters were leading individual Commissioners to add to their personal staffs rather than rely on agency staff. For that reason, the Committee determined to permanently limit the Commissioners to four personal staff members each, noting that:

to permit the Commissioners to add to their personal staff because *individual* Commissioners are unable to obtain what they deem to be appropriate staff response to request or directions would not contribute in the long run to an efficient and effective Commission. Proliferation of personal staff could well contribute to further dissension among the staff and among the Commissioners. The limitation should serve to remind the Commissioners that their role is one of leading the entire staff to perform the work necessary to carry out responsibilities imposed on the Commission as a whole. It is a task for which the Commissioners are individually and collectively responsible.<sup>333</sup>

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<sup>328</sup> House Committee on Ways and Means, *Administration of, and Authorization of Appropriations to, the International Trade Commission*, H. Rep. No. 95-217 (April 21, 1977), 4–6, 9. The Committee noted the minutiae prompting the disagreements, such as whether Commission publications should be single-spaced rather than double-spaced to save printing costs, "the appointment of one temporary law student intern over the Christmas holiday"; "sentence by sentence a job description of an employee (an investigative attorney)"; and the "color, size, stitching, distribution, and other printing details of an historical report." *Ibid.*, 9.

<sup>329</sup> USITC, "Message from the Chairman," *1976 Annual Report*, (Washington, DC: GPO, 1977).

<sup>330</sup> H. Rep. No. 95-217 (1977), 3–4.

<sup>331</sup> *Ibid.*, 6, 9.

<sup>332</sup> *Ibid.*, 6.

<sup>333</sup> *Ibid.*, 5, emphasis in original.

Moreover, the Ways and Means Committee suggested, the Commissioners should delegate more administrative tasks to agency staff rather than performing the day-to-day management of the agency themselves, explaining that doing so would give the Commissioners more time to work on substantive matters and reduce acrimony amongst them.<sup>334</sup>

The Senate Finance Committee agreed, noting that the Commission was “suffering from internal administrative problems, particularly personnel problems which . . . inhibited efficient administration and hurt employee morale.” The Committee believed that “these problems result from the inability of the Commissioners to agree among themselves and the cumbersome requirement that the full Commission act on all administrative matters.” As a result, the Committee concluded, it had become “convinced that the best way to end these problems [was] to give the Chairman . . . administrative authority subject to disapproval of the full Commission.”<sup>335</sup>

In an attempt to improve the administration of the Commission, in 1977, Congress amended 19 U.S.C. § 1330. The 1977 Act gave the power to designate the Chairman and Vice Chairman back to the President, subject to the requirement that the Chairmanship rotate between the parties every two years and that the Vice Chairman and Chairman not come from the same party. The second and more critical change was to provide, for the first time, that the Chairman would “exercise and be responsible for” all administrative functions of the Commission (including the hiring of its employees and procurement of the services of experts and consultants), with two exceptions: the termination of certain senior personnel and the formulation of the Commission’s annual budget.<sup>336</sup>

In the case of these latter administrative matters (that is, terminating certain senior personnel and formulating the annual budget), however, Congress provided that any decision of the Chairman was subject to disapproval “by a majority vote of all the Commissioners in office.”<sup>337</sup> As the House Ways and Means Committee explained, the need for Commission approval of

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<sup>334</sup> *Ibid.*, 9.

<sup>335</sup> Senate Finance Committee, *U.S. International Trade Commission Budget Authorization*, S. Rep. No. 95-122 (May 5, 1977), 2.

<sup>336</sup> Authorization and Appropriations for the U.S. International Trade Commission, Pub. L. No. 95-106, §§ 2–3, 91 Stat. 867 (August 17, 1977). Specifically, the two exceptions are the Chairman’s decisions to: “(A) terminate the employment of any supervisory employee of the Commission whose duties involve substantial personal responsibility for Commission matters and who is compensated at a rate equal to, or in excess of, the rate for grade GS-15 . . . , and (B) formulate the annual budget of the Commission.” Pub. L. No. 95-106, § 3(a), 91 Stat. 868.

<sup>337</sup> *Ibid.*, § 3(a).

terminations of key senior personnel was necessary “to maintain the type of organization the Commission should be—an objective, independent, nonpartisan, fact-finding body.”<sup>338</sup> Similarly, the Committee explained, “the budget of the Commission should continue to be the responsibility of the entire Commission since at least a majority of the Commission should agree in broad terms on the magnitude of the resources to be sought and the general priorities to be assigned in the utilization of these resources.”<sup>339</sup>

In adopting these changes, both the House Ways and Means and Senate Finance Committees were aware that Congress had historically rejected the idea of a “strong” Chairman, but emphasized that “the failure of the Commissioners to agree on minimal delegation of authority of responsibility to the Chairman or to the staff should not be allowed to continue.” The 1977 Act was considered “a sound middle ground, between the present chaotic situation and the strong chairman concept” originally proposed in the Senate version of the 1977 Act. According to its House sponsor, the 1977 legislation was intended to “enable the Commission to devote all its energies to substantive matters within the jurisdiction of the Commission, leaving responsibility for administration of the Commission to the Chairman and his delegates. The conferees believe that ending full Commission debate of administrative matters should result in more definitive majority decisions on matters of substance.”<sup>340</sup>

## Congressional Action in 1991 to Address Anomalies in Designation of the Chairman

In 1991, Congress revisited the designation of the Chairman and Vice Chairman after an unusual succession in leadership. In 1986, President Ronald Reagan named an Independent, Susan W. Liebeler, as Chairman of the USITC for the two-year term that expired on June 16, 1988; he named a Republican, Anne E. Brunsdale, as Vice Chairman.<sup>341</sup> Then, in 1988, President Reagan did not designate a new Chairman, but reappointed Vice Chairman Brunsdale to a two-year term as Vice Chairman, which meant that, under the statute, she became Acting Chairman.<sup>342</sup> Brunsdale served as Acting Chairman from June 27, 1988, until March 28, 1989, when newly-elected President George H. W. Bush designated her to be the Chairman for the term expiring

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<sup>338</sup> H. Rep. No. 95-217 (1977), 10. *See also Shewmaker v. Parker*, 479 F. Supp. 616, 619 (D.D.C. 1979): “While the overall purpose [of the 1977 Act] was to correct poor ITC management by delegating most administrative authority to the Chairman, Congress refused to sacrifice traditional nonpartisanship to administrative efficiency. Indeed, Congress sought to avoid the possibility of a ‘strong chairman’ making the key staff responsible only to him or her rather than to the whole Commission.”

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*, 8–9; 123 Cong. Rec. H8673 (August 4, 1977).

<sup>341</sup> USITC, *1986 Annual Report*, USITC Publication 1935 (Washington, DC: USITC, January 1987), iii.

<sup>342</sup> USITC, *1988 Annual Report*, USITC Publication 2140 (Washington, DC: USITC, January 1988), 4. Under the 1977 Act, the Vice Chairman served as Chairman “in case of the absence or disability of the Chairman.” Pub. L. No. 95-106, §3(a).

on June 16, 1990.<sup>343</sup> At the conclusion of that term, President Bush designated Commissioner Brunsdale to be Vice Chairman for the term expiring on June 16, 1992. Since President Bush did not designate a new Chairman at that time, Vice Chairman Brunsdale again became Chairman, by operation of law.<sup>344</sup>

Congress viewed the actions of Presidents Reagan and Bush as an effort by the executive branch to politicize the Commission:

Congress [has] struggled for years to find a workable administrative structure for the ITC which would not compromise the agency's mission as both an independent source of knowledgeable trade advice to the Congress and the executive branch and as an independent arbiter of trade cases. The solution found in 1977 ensured that no single political party or individual could exercise undue influence over the commission on substantive issues.<sup>345</sup>

The delicate balance that we struck in that legislation has been deliberately undercut by the administration in recent years. Instead of complying with the law, the administration has chosen to ignore it.<sup>346</sup>

Thus, in 1991, Congress took action to eliminate this practice. The 1991 Act sought to prevent this abnormal sequence of Commission leadership by reformulating the procedures for the appointment of the Chairman. It specified that, when the President has not designated a new Chairman by the date that a new term begins, the Commissioner that "is a member of a different political party than the chairman of the Commission for the immediately preceding term, and has the longest period of continuous service as a commissioner" would serve as Chairman until an individual designated by the President takes office.<sup>347</sup>

Additionally, the 1991 Act modified the seniority rule for commissioners eligible to be designated Chairman.<sup>348</sup> Prior to the 1991 Act, the two most recently appointed members of the Commission were not eligible to be designated Chairman.<sup>349</sup> The 1991 amendments were designed to give the President flexibility, while ensuring that any new Chairmen had spent a certain measure of time in office and had gained experience dealing with complex USITC

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<sup>343</sup> USITC, *1989 Annual Report*, USITC Publication 2264 (Washington, DC: USITC, March 1990), 4; USITC, *1990 Annual Report*, 1990, 6.

<sup>344</sup> House Committee on Ways and Means, *Appointment of Chairman of the U.S. International Trade Commission*, H. Rep. No. 102-279 (October 30, 1991), 2. Brunsdale served as Vice Chairman and as Acting Chairman of the Commission throughout FY 1991.

<sup>345</sup> 137 Cong. Rec. S17239-40 (November 20, 1991).

<sup>346</sup> *Ibid.*

<sup>347</sup> Pub. L. No. 102-185, § 1(a).

<sup>348</sup> *Ibid.*, § 1.

<sup>349</sup> Pub. L. No. 95-106, § 2(a).

issues.<sup>350</sup> Specifically, Congress amended the statute to provide that that any Chairman who was appointed on or after June 17, 1996, must have served at least one year of continuous service as a USITC Commissioner prior to his/her appointment as Chairman.<sup>351</sup> However, the service requirement was waived in times of transition;<sup>352</sup> if a Commissioner did not complete a term as Chairman or Vice Chairman “by reason of death, resignation, removal from office as a commissioner, or expiration of his term of office as a commissioner,”<sup>353</sup> the 1991 Act specified that the President could designate as Chairman or Vice Chairman for the remainder of the term a Commissioner of the same political party designation “without regard to the 1-year continuous service requirement.”<sup>354</sup>

Furthermore, the 1991 Act required the President to designate a Democratic Chairman for the term beginning on June 17, 1992, in order to resume the alternation of political parties for the Chairmanship.<sup>355</sup> The 1991 Act also provided an exception for the appointment of the Chairman in 1992, specifying that the requirement for one year of continuous service as a Commissioner did not apply to the term of the Chairman beginning on June 17, 1992.<sup>356</sup> Shortly after the enactment of the 1991 Act on December 4, 1991, President Bush designated Commissioner Don E. Newquist, a Democrat, as Chairman for the term ending on July 16, 1992. Then, consistent with the 1991 Act, President Bush re-designated Commissioner Newquist as Chairman on June 16, 1992, for the term ending June 16, 1994.<sup>357</sup>

The succession of Chairmen at the USITC alternated by presidential designation until almost two decades later. In 2010, Deanna Tanner Okun, a Republican, who had already served one term as Chairman, became the second Chairman of the USITC to accede to that position by operation of law. When outgoing Democratic Chairman Shara L. Aranoff’s term expired on June 16, 2010, President Barack Obama chose not to designate a Republican Chairman. Thus, according to the statute, Commissioner Okun, as senior Republican on the Commission, became Chairman again.<sup>358</sup> Commissioner Okun served as Chairman until June 2012,<sup>359</sup> when President Obama designated a Democrat, Irving Williamson, as Chairman for the term ending on June 16,

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<sup>350</sup> 137 Cong. Rec. H9160–61 (November 5, 1991).

<sup>351</sup> Pub. L. No. 102-185, §1(a); 19 U.S.C. §1330(c)(3)(A).

<sup>352</sup> 137 Cong. Rec. S15256 (October 25, 1991).

<sup>353</sup> 19 U.S.C. 1330(c)(3)(C).

<sup>354</sup> Pub. L. No. 102-185, § 1(a); 19 U.S.C. §1330(c)(3). In 1996, newly-designated Commissioner Marcia E. Miller became Chairman of the Commission under this provision, completing outgoing Chairman David B. Rohr’s term.

<sup>355</sup> Pub. L. No. 102-185, § 1(b)(2).

<sup>356</sup> Pub. L. No. 102-185, § 1(b)(1).

<sup>357</sup> U.S. International Trade Commission (USITC), *1992 Annual Report*, USITC Publication 2624 (Washington, DC: USITC, June 1993), 6.

<sup>358</sup> USITC, *2010 Year in Review*, 5; 19 U.S.C. § 1330(c)(1).

<sup>359</sup> Commissioner Okun previously served as Chairman from June 17, 2002, to June 16, 2004.

2014. Thus, the 1991 Act has ensured that, whether by designation or by operation of law, the Chairmanship continues to alternate between parties.

## The Modern Chairmanship

The statutory structure put in place in 1977, whereby the Chairman has the authority to make most administrative decisions for the Commission (subject to disapproval by a majority of the Commissioners), has been in force now for almost 40 years.<sup>360</sup> The Chairman's authority in administrative matters is limited to the authority set out in section 331 of the Tariff Act of 1930 and does not extend to matters of substance, such as whether to institute an investigation or the determination in that investigation. In the case of investigations, while the Chairman may preside at the hearing or at the meeting at which the Commissioners vote, the Chairman is only one among six equals.

To assess how these dual roles of the Chairman work in practice, the authors consulted a number of former Chairmen, Chiefs of Staff, and long-time Senior Executive Service (SES) managers, as well as contributing their own recollections. The responses of these individuals generally reflected three themes:

- a) The USITC is unique among federal independent agencies in that the Chairman's views on substantive matters seldom, if ever, carry special weight with the other Commissioners;
- b) To be effective, an USITC Chairman needs to balance his or her statutory authority to make administrative decisions with a commitment to assure collegial decision-making whenever possible; and
- c) As government-wide administrative requirements multiply in areas like fiscal accountability and cybersecurity, Chairmen struggle to find a balance in managing administrative matters efficiently, so as to provide sufficient supervision and guidance to career staff charged with implementing decisions without micromanaging those staff.

Every Commissioner maintains a staff of professionals, which usually includes attorneys and economists, to provide assistance on substantive investigations. When a Commissioner becomes Chairman, however, he or she is also authorized to hire a Chief of Staff, which is typically a non-career SES position. Some Commissioners have selected a member of their existing staff as the Chief of Staff, while other Commissioners have selected an individual from outside of their office to fill the position. The Chief of Staff may assist the Chairman with ongoing investigations, but is primarily focused on administration of the agency and tends to

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<sup>360</sup> 19 U.S.C. §1330(c).

build up considerable expertise on agency operations during the Chairman’s term. For that reason, the same individual has, on occasion, served as the Chief of Staff for more than one Chairman.<sup>361</sup>

The Chief of Staff typically works closely with the Chairman to ensure that the Chairman achieves his/her strategic goals and that the agency functions efficiently and effectively. Because he/she is the Chairman’s primary adviser and staff member, the Chief of Staff is essentially responsible for overseeing most of the Commission’s activities on behalf of the Chairman. In performing this role, the Chief of Staff is required to carry a heavy workload. As a result, in 2011, the Commission created the position of Deputy Chief of Staff to help the Chief of Staff perform his duties, including following up on audits by the Commission’s Office of Inspector General. Unlike the Chief of Staff, who is a Schedule C political appointee, the Deputy Chief of Staff holds a career position that is intended to ensure continuity across Chairmen in addressing issues critical to the management of the agency.

## Conclusion

The evolution of the USITC Chairmanship provides an interesting example of the challenge of finding appropriate balance among competing factors: dealing with substantive vs. administrative matters; preserving the agency’s independence from the executive and legislative branches, while being responsive to both; and maintaining a relatively strong hand as the Chairman while working collaboratively with the other Commissioners.

Policy-makers have intentionally structured the USITC and its Chairmanship to make it one of the most—if not the most—“independent” of all U.S. independent agencies. Among other things, Congress provided that Commissioners serve for nine-year terms without the opportunity to be reappointed. As a result of this relatively lengthy tenure, a Commissioner need not consider whether his voting record pleases the President who appointed him. Further, since the Chairmanship is only a two-year term, the ability of any Chairman to consolidate administrative power is reduced—albeit at the cost of losing continuity and efficiency each time a new Chairman must come up to speed on the agency’s ongoing and complex administrative challenges. By rotating the Chairmanship between the two parties, regardless of the party of the President, a designation as Chairman is less susceptible to being used as a political prize to reward politically loyal Commissioners. With an even six, rather than an odd number of Commissioners, there is no edge given to the Commissioners who are of the same party as the President. Finally, and perhaps most importantly, Congress did not delegate substantive policy-making authority to the Commission. Unlike other agency heads, the Chairman of the USITC is

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<sup>361</sup> For example, one individual served as Chief of Staff or its equivalent for Chairmen Don Newquist and Lynn Bragg, after having served as an aide to Chairmen Catherine Bedell and Alfred Eckes.

not expected to make policy changes—nor is capable of doing so. The statute allows Commissioners to vote individually on substantive issues based on their own interpretations and application of the law to the facts on record, yet also provides incentives for the Chairman and Commissioners to work together in administering the affairs of the Commission.

Throughout the past 100 years, the members of Congress who drafted the laws governing the agency's structure and operations have worked continually to create and improve a framework for the Chairmanship and for the agency that encourages independent decision-making on substantive matters and efficiency through collaboration on agency administration. From a position of one among many to that of first among equals, serving as Chairman of the USITC in the 21st century involves managing an agency employing approximately 400 people, with a budget of over \$90 million. The Chairman juggles the substantive work of a Commissioner with advisory responsibilities to both the executive and legislative branches and management issues as varied as information technology security concerns, physical space requirements, and budgetary constraints. While the role of the Chairman continues to evolve along with the substantive and administrative challenges facing the agency, the current structure of the Commission, designed to strike a balance, with neither a “strong” nor a “weak” Chairman, has on the whole, proven effective.



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## Chapter 6

# The Commission's Headquarters and Field Office Buildings



**Photo:** The old and current Commission headquarters buildings.

## Paul R. Bardos

The U.S. International Trade Commission has since 1988 housed its personnel in a single building at 500 E Street, SW, in Washington, DC. Prior to 1988, the Commission and its predecessor the U.S. Tariff Commission occupied space at a number of locations in Washington and elsewhere. The following is a brief description of this history.

In addition to acquiring its own office space, the Commission has sent employees to assist other agencies, such as the Office of the U.S. Trade Representative, and has used space in various locations, such as the Washington Navy Yard, for offsite storage of documents and other materials.<sup>362</sup> Such activities are beyond the scope of this chapter.

## Offices in Washington, DC, 1917–Present

The Commission’s organic statute provides: “The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place.”<sup>363</sup> Throughout its history, the Commission has maintained its headquarters in the city of Washington.

Although the Tariff Commission was created by statute on September 8, 1916, the agency did not move into office space until early 1917. According to the Commission’s first annual report, “The Commission was compelled to remain in temporary quarters until the close of the fiscal year [ending June 30, 1917]. During this period arrangements were made for permanent quarters, which have been secured with convenient and ample accommodations at moderate cost, at 1322 New York Avenue.” The address of the temporary quarters is not indicated, but in the event, occupancy was brief.<sup>364</sup>

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<sup>362</sup> Such materials have included physical exhibits in Commission investigations. At one time, the agency had in storage an operational Ms. Pacman videogame console, a large iron stove, and athletic shoes and luggage sliced in half to show their construction.

<sup>363</sup> 19 U.S. Code (U.S.C.) § 1331(d).

<sup>364</sup> U.S. Tariff Commission (USTC), *First Annual Report of the United States Tariff Commission for the Fiscal Year Ended June 30, 1917*, H. Doc. 65–616 (Washington, DC: GPO, November 15, 1917), 4.

The Commission remained at its headquarters on New York Avenue until April 1922.<sup>365</sup> Today, 1322 New York Avenue is no longer a separate address, but has been subsumed in 1300 New York Avenue, NW, the headquarters of the Inter-American Development Bank.<sup>366</sup>

In April 1922, the Commission moved its headquarters to the Old Land Office Building, also called the General Post Office Building, at 701 E Street NW.<sup>367</sup> Occupancy of this space would continue until January 1988.<sup>368</sup>

The Commission's new headquarters had had an eventful history. This edifice, which became the U.S. International Trade Commission Building, occupies the block bordered by 7th, 8th, E, and F Streets, NW. In 1795, soon after Washington became the nation's capital, building began on Blodgett's Hotel on the south portion of this block. Attributed to James Hoban, architect of the White House, the hotel hosted the first theatrical performance in the city. In 1810, the federal government purchased the building to house the Post Office Department, the City Post Office, and the Patent Office. On August 24, 1814, British army troops occupied Washington. In response to the American burning of what would later become Toronto, Canada, the British put to the torch the Capitol, the White House, and other public and private structures. Dr. William Thornton, the Commissioner of Patents, faced down British troops at Blodgett's Hotel, calling on them to spare "the Patent Office, the depository of the ingenuity of the American Nation." Somehow this appeal worked, and the invaders withdrew. In 1815, Congress convened temporarily in this building. The structure burned down—without British assistance—in 1836, the cause attributed to "an incautious servant who inadvertently deposited live fireplace ashes in a wooden dustbin."<sup>369</sup>

Design and construction began on a new building, commissioned by President Andrew Jackson, in 1839. Architect Robert Mills, who would later design the Washington Monument, designed a neoclassical structure that referenced Italian Renaissance architect Andrea Palladio. The building was completed in 1842. Thomas Ustick Walter, who designed the U.S. Capitol dome, oversaw the building's expansion, which began in 1855 and continued through 1866 in the

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<sup>365</sup> USITC, *Tenth Annual Report of the USITC June 30, 1926* (Washington, DC: GPO, December 7, 1926), 3.

<sup>366</sup> <http://www.iadb.org/mobile/common/contacts/headquarters.cfm>.

<sup>367</sup> USITC, *10th Annual Report, 1926*, 3. The website of the General Services Administration (GSA) lists the occupation year as 1932 (see the Overview tab at "General Post Office, Washington, DC," <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/870>). However, both the National Register of Historic Places Nomination Form (see p. 65) and a General Services Administration report (see p. HR-2) list the date as 1922. This discrepancy in the year may be due to the fact that the Commission shared the building with several other entities between 1922 and 1932 but, by 1932, the Commission "filled all except the entrance floor of the building." Denys Peter Myers, General Services Administration, *Historic Report of the General Post Office (Now International Trade Commission Building)*, ("Historic Report"), HR-2).

<sup>368</sup> USITC, *Annual Report 1988*, USITC Publication 2140 (Washington, DC: USITC, January 1988) 3.

<sup>369</sup> See *Historic Report*, HR-4.

Roman Corinthian style. The rectangular structure surrounds a central courtyard. The building's walls range in thickness from 2½ feet to 3½ feet, with the outer walls covered in Carrara marble. The structure was reinforced with iron railroad ties. One window still shows messages scratched into it by soldiers from the Civil War and Reconstruction eras.

A notable feature of the building is its two spiral stairways, cantilevered and built of granite and marble, overlooked by skylights. The top floor room that housed the Commission's library was decorated with columns, ornate domes, and another skylight. In order to permit air circulation while providing privacy, office doors were equipped with louvered swinging doors in addition to their conventional doors. Employees found that they had to walk down the center of corridors to avoid being hit by a swinging door.

Originally intended to house the Post Office Department, the building continued to include a post office throughout the Commission's occupancy. At various times, the building also housed staff of the General Land Office of the Interior Department (hence the building's alternative name), the Panama Canal Commission, the War Claims Commission, the Selective Service Board, a Congressional subcommittee, and General of the Armies John J. "Black Jack" Pershing. General Pershing made the building his headquarters while he wrote his report on the American Expeditionary Forces' conduct during World War I.<sup>370</sup> The General Services Administration (GSA) used a building in the central courtyard as a school for its security guards. An Army detachment was garrisoned in the building during the 1968 riots. The Commission at first occupied only a relatively small portion of the building, but gradually took over more space until by 1987 it controlled most of the structure.<sup>371</sup> The building was placed on the National Register of Historic Places on November 11, 1971.<sup>372</sup>

For most of the Commission's tenure at 701 E Street, that building was the only location the agency occupied in Washington. However, construction of the underground Metrorail system significantly altered this situation. On February 25, 1975, it was discovered that the work had damaged the foundation of the southeast corner of the Commission's building. As a result, significant portions of the staff had to be relocated. The first relocation was to the Federal

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<sup>370</sup> See *Historic Report*, HR-1.

<sup>371</sup> Information about the building's construction and occupancy is from U.S. International Trade Commission, *The International Trade Commission Building* (Washington, DC: GPO, 1980), and conversations with Kenneth Mason, former Secretary. GSA used the guard school in part for training in firefighting and prevention. The building included a large set of fire alarms to help guards familiarize themselves with such equipment, and a fireproof room for setting and extinguishing fires. The smoke went up through a huge chimney. After this practice ended around 1970, the chimney was taken down. Because of the historic nature of the structure, the demolition had to be by hand. A brave man climbed into the chimney and hammered out the bricks one by one. The guard school was later used for exhibit and publication storage.

<sup>372</sup> See the Significance tab at GSA, "General Post Office, Washington, DC," <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/870>.

Triangle Building on 9th Street, NW.<sup>373</sup> Staff also was relocated to the Bicentennial Building, 600 E Street, NW.<sup>374</sup>

Repairs of the Metro-related damage were completed during FY 1977.<sup>375</sup> However, the Commission continued to move personnel to satellite locations. In addition to the Bicentennial Building, these included the Dodge Center (later renamed the Waterfront Center), at 1010 Wisconsin Avenue, NW, in Georgetown, and the Interstate Commerce Commission (ICC) Building, at 12th Street and Constitution Avenue, NW.<sup>376</sup>

Since the Commission's main building did not have space suitable for courtrooms, the Office of the Administrative Law Judges was moved to the ICC Building after a temporary stay in the Georgetown office. Features of the offices occupied by Commission personnel there included very tall windows, sinks, and an overactive heating system. Designed by architect Arthur Brown, Jr. and completed in 1934, the building's look was popular with filmmakers, who used it for the 1983 television miniseries *The Winds of War*. In addition, some internal and external shots were filmed for the 1987 movie *Suspect*. This may have interfered with some Commission functions, as employees were drawn downstairs to get a peek at movie star Cher.<sup>377</sup>

At headquarters, the undermined foundation was not the only problem. The aging structure experienced roof leaks,<sup>378</sup> falling plaster, and electrical problems. Drinking fountains were blocked off due to the poor quality of the water. Anticipating that the Commission building would be taken over by the Smithsonian Institution, GSA decided not to make major repairs.<sup>379</sup> In addition, the building suffered from a rodent infestation in the early 1980s. An employee reported: "The squeamish cannot survive long here."<sup>380</sup> The situation worsened when poison was put down that caused the rats to burst when they drank water. When it was announced that the Commission was moving, *Washington Business* declared: "No more exploding rats for the staff of the International Trade Commission."<sup>381</sup>

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<sup>373</sup> USITC, *Annual Report 1975*, USITC Publication 790 (Washington, DC: USITC, November 1976), 27.

<sup>374</sup> USITC, *Annual Report 1976*, 23.

<sup>375</sup> USITC, *Annual Report 1977*, USITC Publication 868 (Washington, DC: USITC, March 1978), 31.

<sup>376</sup> USITC, *Annual Report 1980*, USITC Publication 1084 (Washington, DC: USITC, July 1981), 58; *Annual Report 1981*, USITC Publication 1352 (Washington, DC: February 1983), 27; *Annual Report 1983*, USITC Publication 1580 (Washington, DC: USITC, September 1984), 33; *1984 Annual Report*, USITC Publication 1718 (Washington, DC: USITC, July 1985), 34.

<sup>377</sup> Judge David Shaw, February 24, 2017; conversation with Monty Fusco, formerly a law clerk in the Office of the Administrative Law Judges, May 12, 2016.

<sup>378</sup> In June 1983, a rainstorm drenched the work area of Commission economists, and they found themselves working in about 2 inches of water. Alfred. E. Eckes, *Diary*, June 25–July 1, 1983.

<sup>379</sup> *Federal Times*, May 2, 1983.

<sup>380</sup> *Washington Times*, April 2, 1985.

<sup>381</sup> *Washington Business*, June 16, 1986.

To make room for the Smithsonian, GSA considered moving the Commission to various alternative locations. One of these was the Bicentennial Building, which Commission personnel found to be sub-standard and roach-infested. GSA tried to deal with the infestation but its exterminator set off noxious fumes that forced the Commission to send several staff members home. A press headline read "Insecticide Routs 17 ITC Staffers."<sup>382</sup>

On April 21, 1983, for the first time in the Commission's history, members of the Senate Finance Committee, including Chairman Bob Dole (R-KS) and Ranking Member Russell Long (D-LA), came to lunch at the agency. They toured the building and were told of concerns about its condition. In June 1983, the Senate Public Works Committee voted to transfer the building to the Smithsonian. However, the Commission escaped being moved to the Bicentennial Building.<sup>383</sup> Instead, starting in late 1987 the agency moved to an entirely new building at 500 E Street, SW.

The Commissioners of the time participated in a groundbreaking ceremony for the new building. At that groundbreaking, Senator Long, representing the Finance Committee, said that Congress has "confidence in the quality" of the Commission's "work and independence," and that "it is appropriate that an agency with such an important function should have good quarters."<sup>384</sup>

Boston Properties, the owner of the Commission's current headquarters building, has described it as follows: "This nine-story Class A headquarters-quality office building features court rooms, a roof-top terrace facing both the U.S. Capitol and Potomac River, and a below-grade parking garage with approximately 214 spaces."<sup>385</sup> Designed with input from the Commission, the building is recognizable by a distinctive rounded "bullnose" feature on its west end, topped by a gazebo on the roof. The structure is located across 6th Street from Saint Dominic's Catholic Church, which was built in the 19th Century. To an extent, the bullnose and gazebo harmonize with the church's spire.

The Commission completed its move to its new headquarters building in January 1988, closing all satellite offices in the process. The agency has made its home at 500 E Street, SW, through the present day. The Commission occupies most of the building (including space on the first through the seventh floors), sharing it with staff of the Social Security Administration and, at times, other entities. The building initially included a Main Hearing Room and four courtrooms. For a time, the agency gave up control of the second floor, with its two courtrooms, but more

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<sup>382</sup> Alfred E. Eckes, *Diary*, March 30—July 1, 1983.

<sup>383</sup> *Ibid.*

<sup>384</sup> USITC, *Annual Report 1986*, USITC Publication 1935 (Washington, DC: USITC, January 1987), 35.

<sup>385</sup> Boston Properties, "500 E Street, SW," <http://www.bostonproperties.com/properties/washington-dc/ahNzfmJvc3RvbnByb3BlcnRpZXMyYcgwLEgRQYWdlGKSeAww/500-e-street,-sw>.



recently increasing activity related to intellectual property cases prompted a resumption of the occupation of that floor, and a renovation to accommodate an additional courtroom that was fitted with modern video and internet technology.

The lease for the Commission's office space was to expire on August 10, 2017, but GSA entered into a new, 15-year lease that will allow the Commission to retain its current location.

Meanwhile, the former headquarters building at 701 E Street, NW, was substantially renovated and is now occupied by the Kimpton Hotel Monaco. Converting the building into a 183-room hotel took two years and cost \$36 million. The Hotel Monaco offers 183 guest rooms, including 16 suites. The old designation of a basement and three stories was replaced by four stories. During the renovation, the hotel removed and catalogued the swinging doors and stored them in a basement that had once been used as a firing range. The old library and the main hearing room were turned into ballrooms. The Guard School became Poste, a restaurant whose name reflects the Post Office's links with the building. GSA imposed strict limits on the renovation because of the historic nature of the building. For example, no hole larger than a quarter could be drilled without GSA's permission. For its part, GSA removed one of the building's elevators, allowing for the restoration of one of the grand spiral stairways.<sup>386</sup>

As a final note on the building, here is how a GSA report described it:

One of the finest works of two of America's most distinguished architects of their day, Robert Mills and Thomas Ustick Walter, this Designated National Historic Landmark epitomizes the architectural aspirations of the Jacksonian age—aspirations toward classical balance combined with restrained elegance that were splendidly fulfilled in this, the first major marble building in Washington.<sup>387</sup>

## Offices in New York, 1922–83

The organic statute provides for at least one office outside of Washington, DC:

The commission is authorized to establish and maintain an office at the port of New York for the purpose of directing or carrying on any investigation, receiving and compiling statistics, selecting, describing, and filing samples of articles, and performing any of the duties or exercising any of the powers imposed upon it by law.<sup>388</sup>

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<sup>386</sup> Information about the Hotel Monaco was provided by Ed Virtue, general manager of the hotel; a brochure from the hotel entitled "*Where History Stays In Style*"; and Kimpton Hotel & Restaurant Group, "the Heart of the Action," <http://www.monaco-dc.com/hotel/penn-quarter.html>.

<sup>387</sup> *Historic Report*, HR-78.

<sup>388</sup> 19 U.S.C. §1331(e).

In 1922, the Commission opened a field office on the southern tip of Manhattan in the Custom House at 1 Bowling Green, New York, New York.<sup>389</sup>

Designed in the Beaux-Arts style by architect Cass Gilbert, the building, later renamed the Alexander Hamilton U.S. Custom House, was constructed at the start of the 20th century. The U.S. Customs Service moved out in the 1970s and into the World Trade Center. The building now houses the U.S. Bankruptcy Court for the Southern District of New York and, since 1994, part of the Smithsonian’s National Museum of the American Indian.<sup>390</sup>

In 1978, the Commission’s New York office moved to the World Trade Center.<sup>391</sup> This new occupancy was short-lived, however, as the New York office was eliminated as a separate unit in 1980, and closed in 1983.<sup>392</sup>

## Office in Richmond, 1935–41

In 1935, the Commission began participating in a series of projects in cooperation with the Works Progress Administration (WPA) shortly after President Franklin D. Roosevelt created that New Deal agency. Two of the projects took place in cities where the Commission already had a presence, i.e., Washington and New York. The first project, however, begun in December 1935, was located in Richmond, Virginia. The office there was staffed mainly by people recruited from WPA relief rolls and supervised by a small number of Commission personnel. All of the WPA projects ended during FY 1941.<sup>393</sup>

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<sup>389</sup> USITC, *Annual Report 1978*, USITC Publication 982 (Washington, DC: USITC, June 1979) 28.

<sup>390</sup> See [nyc-architecture.com](http://nyc-architecture.com/LM/LM012-ALEXANDERHAMILTONCUSTOMHOUSE.htm), “Alexander Hamilton Custom House,” <http://nyc-architecture.com/LM/LM012-ALEXANDERHAMILTONCUSTOMHOUSE.htm>. Gilbert also designed the Woolworth Building in New York in 1910, state capitol buildings, and the U.S. Supreme Court building in Washington, DC.

<sup>391</sup> USITC, *Annual Report 1978*, 28. In particular, the Commission maintained a library in Suite 629, 6 World Trade Center. *Ibid.*

<sup>392</sup> USITC, *Annual Report 1980*, 48; 45 Fed. Reg. 75025, November 13, 1980. Then-Chairman Alfred Eckes visited the office’s two employees in 1982. They were collecting synthetic organic chemical statistics. They had an office with no telephone, no electricity except for neon lighting, and a “rather dreadful interior room.” Alfred E. Eckes, *Diary*, April 23, 1982.

<sup>393</sup> *Twentieth Annual Report of the USTC, 1936* (Washington, DC: GPO, December 1, 1936), 53; *Twenty-fifth Annual Report of the USTC, 1941* (Washington, DC: GPO, December 1, 1941), 50.

## Offices in Europe, 1923–36

Early in its history, the Commission decided that it needed offices in Europe in order to gather trade data. In July 1923, the agency opened a European headquarters in Berlin, Germany. From there, a chief investigator began to direct field investigations in central Europe. In the same year, a field office was established in Paris, France, for investigations in western Europe.<sup>394</sup> The Paris office did not last long; it was closed in the fall of 1924 when the Commission agent in Paris resigned.<sup>395</sup>

In June 1925, the European headquarters moved from Berlin to Brussels, Belgium.<sup>396</sup> The Commission's annual reports do not identify the street addresses of the European offices. Nevertheless, the address of the Brussels office (for at least part of the time the agency had a presence in Belgium) can be identified through another source. In 1927, a Commission accountant visited the office in Brussels and sought reimbursement for travel expenses. This led to a decision by the Comptroller General denying part of those expenses. In his determination, the Comptroller General identified the address as Rue de Spa 15 in Brussels.<sup>397</sup> Today, according to Google Maps, Rue de Spa 15 is a townhouse occupied by offices; it is not a modern building, so it may not look substantially different than it did in the 1920s.

The Brussels office appears to have been closed in 1936.<sup>398</sup> This was the last of the Commission's offices outside of the United States.

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<sup>394</sup> USTC, *Seventh Annual Report of the USTC, 1923* (Washington, DC: GPO, December 3, 1923), 3. The Commission also determined to establish a London office, prior to the consolidation of offices in Brussels. Senate Finance Committee, *Minutes of the Meetings of the United States Tariff Commission*, 69th Congress, 1st sess., Document No. 83, 141 (1926).

<sup>395</sup> USTC, *Ninth Annual Report of the USTC, 1925* (Washington, DC: GPO, December 8, 1925), 3.

<sup>396</sup> *Eleventh Annual Report of the USTC, 1927* (Washington, DC: GPO, December 5, 1927), 4.

<sup>397</sup> 7 Comp. Gen. 276, A-20116, "Subsistence-Per Diem in Lieu of-Headquarters" (October 19, 1927).

<sup>398</sup> The 1936 annual report shows a "European representative" was in place as of June 30, 1935, but was no longer there by June 30, 1936. USTC, *Twentieth Annual Report, 1936*, 58.



# Part III

## Tariffs



# Chapter 7

## Tariff Activities

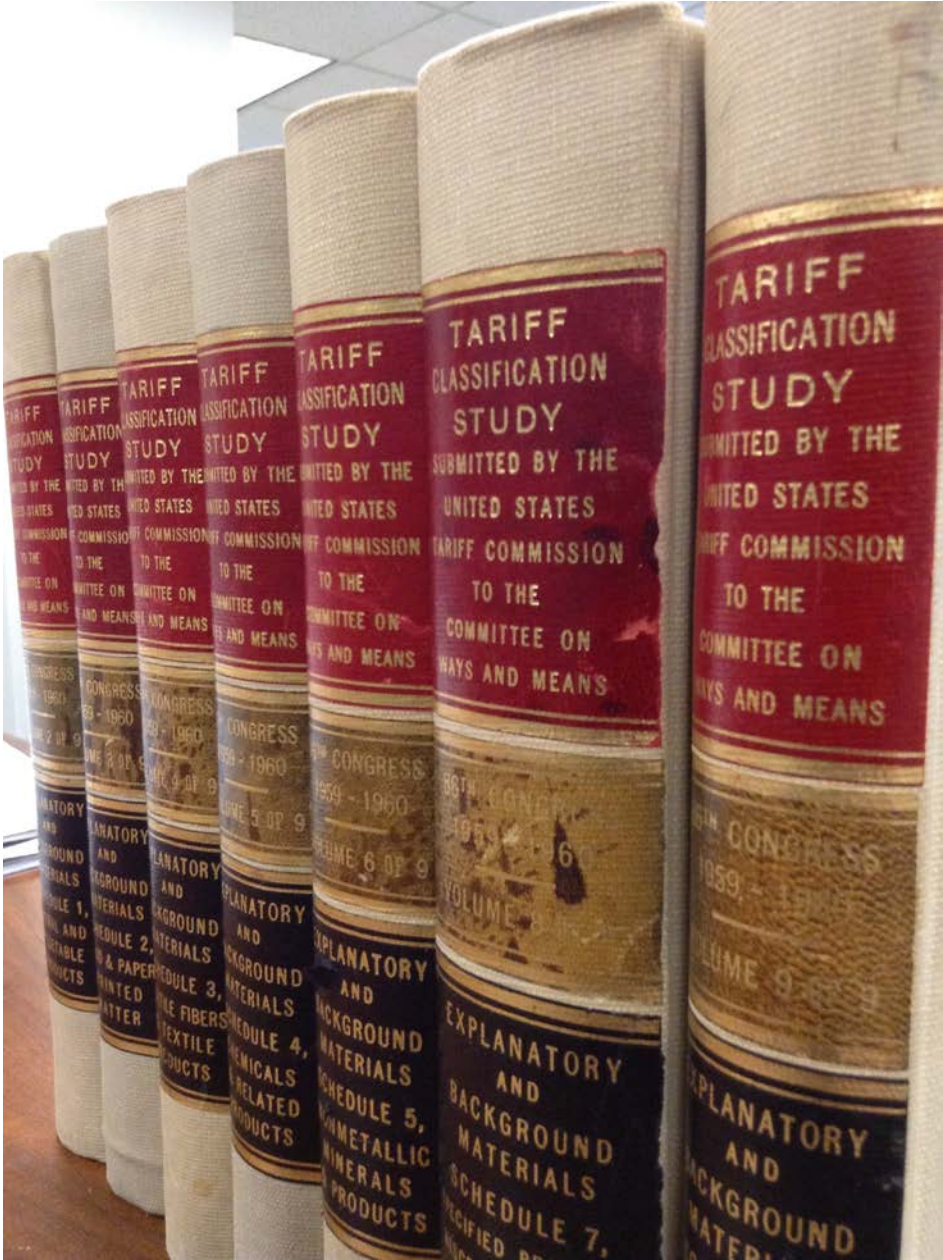


Photo: 1960 Commission tariff study that led to the Tariff Schedule of the United States.

**Gene Rosengarden, Janis Summers, and Arun Butcher<sup>399</sup>**

As suggested by its name, and as discussed in other chapters, the United States Tariff Commission's central initial purpose was to focus on tariff matters. Due to the contentious nature of tariff policy debates in American politics,<sup>400</sup> the Tariff Commission (the "Commission") was created in response to a bipartisan desire that "tariff making should be more scientific, and that Congress should have a permanent and reliable source of tariff information at its disposal."<sup>401</sup> The Commission was established as a nonpartisan agency of experts tasked with investigating the effects of present and future customs laws and the effects of duties and tariffs on the United States and its economy. The Commission's employees were also expected to respond to questions about the arrangement of and classification within the tariff schedule.<sup>402</sup> The Commission and its staff had a responsibility to provide Congress and the President with an independent source of facts on these matters, with which the politicians could debate and decide on tariff policy.<sup>403</sup>

World War I disrupted the Commission's work in the years immediately following its founding. Nevertheless, during the war, the Commission began collecting and analyzing tariff information and data (in a document called the Tariff Information Catalog), including information about the effects of The Great War on tariffs.<sup>404</sup> The Commission also sought to fulfill its statutory mandate to examine the administration of U.S. customs laws,<sup>405</sup> but the war made the timely

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<sup>399</sup> Mr. Rosengarden was the Director of the Commission's Office of Tariff Affairs and Trade Agreements. He prepared the portion of the chapter on events starting in 1954. Ms. Summers and Mr. Butcher are current staff in that office, and wrote the other portion of the chapter.

<sup>400</sup> Karen E. Schnietz, "The 1916 Tariff Commission: Democrats' Use of Expert Information to Constrain Republican Tariff Protection," *Business and Economic History* vol. 23, no. 1 (Fall 1994) (Carnegie Mellon University), 178.

<sup>401</sup> William S. Culbertson, "The Tariff Commission and Its Work," *The North American Review*, vol. 207, no. 746 (January 1918), 57.

<sup>402</sup> Omnibus Revenue Act of 1916, § 702.

<sup>403</sup> Culbertson, *The Tariff Commission and Its Work*, 1918, 58.

<sup>404</sup> 1st Report of the Tariff Commission, 1917, 15-16.

<sup>405</sup> Omnibus Revenue Act of 1916, § 702.



completion of these efforts impossible.<sup>406</sup> Only after the Versailles Treaty of 1919 ended World War I did the Commission make one of its first suggestions to Congress: to add “elasticity” or “flexibility” to U.S. tariffs (i.e., enable the executive branch to raise or lower the statutory duty rate of a good) to allow the President to retaliate against unfair or discriminatory trade practices of other countries.<sup>407</sup>

In the 1920s, the Commission organized itself into sub-offices of experts designed to reflect the tariff schedule’s categories of goods, as outlined in the Underwood Tariff Act. It began a longstanding practice of the Commission to survey American industry and to send collected information to Congress—to both the House Committee on Ways and Means and the Senate Committee on Finance—in its *Tariff Information Surveys*. An example of one such survey, sent to Congress in 1921, deals with glass and glassware as well as goods related to glass.<sup>408</sup> The Commission also spent the early 1920s studying foreign tariff practices and policies, producing a number of “major reports” of varying focus and specificity such as: the *Handbook of Commercial Treaties Between All Nations*, the report on colonial tariff policies, and another on reciprocity between the U.S. and Canada.<sup>409</sup>

Congress passed the Tariff Act of 1922 (more commonly referred to as the Fordney-McCumber Tariff Act) to “adopt new methods in tariff making” due to “the rapidly changing economic conditions, both in the United States and foreign countries.”<sup>410</sup> The Act raised tariff rates significantly. Also, under the Fordney-McCumber Tariff Act, the elasticity power recommended by the Commission became law, and the Commission was given the task of investigating whether cost inequalities existed between products produced by American firms and those produced by their foreign competition (i.e., whether the duty made up the difference between the cost of production in the United States and the competing country). In addition, the Commission was expected to investigate whether importers or exporters were engaging in unfair or discriminatory trade practices (i.e., practices that would substantially injure U.S. industry or monopolize trade and commerce in the United States).<sup>411</sup> After conducting a thorough investigation, the Commission was to present a recommendation for Presidential action.

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<sup>406</sup> John Dobson, *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission* (Washington, DC: USITC, 1976), 91.

<sup>407</sup> U.S. Tariff Commission (USTC), *Fourth Annual Report of the USTC*, 1920 (Washington, DC: GPO, December 6, 1920), 9–10.

<sup>408</sup> USTC, *Tariff Information Surveys on the Articles in Paragraphs 83, 84, 85, 86, 87, 88, 89, 90, and 95 of the Tariff Act of 1913 and Related Articles in Other Paragraph* (Washington, DC: GPO, 1921).

<sup>409</sup> USTC, *Twentieth Annual Report of the USTC* (Washington, DC: GPO, December 1, 1936), 4.

<sup>410</sup> USTC, *Sixth Annual Report of the USTC*, 1922 (Washington, DC: GPO, December 4, 1922), 2.

<sup>411</sup> Fordney-McCumber Act of 1922, §§315–17.

One such cost investigation into Argentinian linseed and corn exports resulted in those exports being threatened by the United States with an increase in duties.<sup>412</sup> A second inquiry involved a 16-month cost investigation into sugar imports—a hugely important product, over which much external political pressure was exerted on the Commission. While the Commission ultimately recommended that the duty be reduced, that recommendation was rejected by President Calvin Coolidge.<sup>413</sup> Conducting such an inquiry was an extremely time-consuming process for the Commission, as evidenced by the fact that by 1924 the Commission had only completed 3 of the 37 investigations it had commenced.<sup>414</sup>

In the years after the passage of the Fordney-McCumber Tariff Act, the Commission's role in cost investigations and unfair trade investigations led many to question its independence and nonpartisanship. A Senate special committee was formed in 1926 to investigate the Commission's operations and found "ample evidence of politicization and unusual or suspicious proceedings."<sup>415</sup> Among the committee's findings was that Commission investigations rarely resulted in duty reductions and that, when they did, the reductions applied to less-than-meaningful portions of the tariff schedule.<sup>416</sup> The Senate also accused the Commission of sluggishness in its operations and, in particular, of neglecting its role in data collection. As such, the special committee concluded its investigation and advised the Senate to repeal the flexible provisions of Fordney-McCumber and to reorganize the Commission as a Congressional agency.<sup>417</sup> However, these recommendations were not acted upon.

In 1930, Congress enacted the Smoot-Hawley Tariff Act.<sup>418</sup> The Smoot-Hawley Act is, of course, most famous for raising duty rates across the tariff schedule to very high levels. At the same time, however, the Act continued the Commission's role in investigations and recommendation of duties vis-à-vis flexible tariffs originally authorized in the Fordney-McCumber Tariff Act.<sup>419</sup> Indeed, Congress' drafting of the Smoot-Hawley Act was heavily influenced by Commission reports and collections of Commission surveys (with results described in the Commission's *Summary of Tariff Information* series, which succeeded the *Tariff Information Surveys*) sent to Congress, as well as the testimony of Commission staff members over the preceding year. The Act changed the specifics of the Commissioners' terms as well as revised the duties and

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<sup>412</sup> Guido Di Tella and Desmond C. M. Platt, eds., *Political Economy of Argentina, 1880–1946* (Basingstoke, England: St. Anthony's/Macmillan, 1986), 86.

<sup>413</sup> USTC, *Seventh Annual Report of the USTC, 1923* (Washington, DC: GPO, December 3, 1923), 55.

<sup>414</sup> Dobson, *Two Centuries of Tariffs*, 1976, 97.

<sup>415</sup> Dobson, *Two Centuries of Tariffs*, 1976, 100.

<sup>416</sup> *Ibid.*

<sup>417</sup> *Norwegian Nitrogen Co. v. U.S.*, 288 U.S. 294, 313 (U.S. 1933)

<sup>418</sup> Tariff Act of 1930, Pub. L. No. 71-361.

<sup>419</sup> Dobson, *Two Centuries of Tariffs*, 1976, 34.

organization of the Commission. It was also the last of the “full-schedule congressional tariff schedule statute[s]”<sup>420</sup>—that is, it included the entire tariff schedule in the text of the law.

As the United States economy was seriously slowed by the stresses of the Great Depression, the post-Smoot-Hawley mechanisms developed by the Commission for altering tariff levels “seemed inadequate to the task of reviving world trade.”<sup>421</sup> The investigations required by the Smoot-Hawley Act consumed so much of the Commission’s time that, according to the Commission’s annual report for 1932, “not a day [since the passage of the Act] has [the Commission] had its docket cleared;”<sup>422</sup> its activities gathering tariff information were said to have suffered as a result.

However, in 1933, the Commission still managed to produce new trade and tariff data, as well as large reports to aid Congress in considering trade and tariff policies. In addition to its *Summaries of Tariff Information*, the Commission, in its *Economic Analysis of Foreign Trade of the United States in Relation to the Tariff*, “placed tariff rates and associated trade regulations in a broader perspective.”<sup>423</sup> The Senate also asked the Commission to prepare analyses of U.S. trade with 23 countries. Although the National Industrial Recovery Act of 1933<sup>424</sup> (the law authored with the help of this Commission-provided information) was ultimately ruled unconstitutional by the U.S. Supreme Court, President Franklin D. Roosevelt started to focus on addressing pressing issues of U.S. international trade policy as part of attempts to revive the U.S. economy. As such, Roosevelt included the Commission as a member of his newly formed Executive Committee on Commercial Policy (ECCP).

In addition to the Commission members, the ECCP was made up of high-ranking cabinet members from a number of important departments and agencies, including the Departments of State, Commerce, and Agriculture. The ECCP was tasked with carrying out a change in U.S. trade policy to a policy of reciprocity in tariff reductions with the United States’ trade partners. The Commission participated in this committee and produced reports that aided Congress in passing the Reciprocal Tariff Act in 1934,<sup>425</sup> which officially adopted a policy of reciprocity concerning tariffs. This Act gave President Roosevelt the authority to adjust tariff rates, as well as the power to negotiate bilateral trade agreements—without prior Congressional approval—

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<sup>420</sup> Dobson, *Two Centuries of Tariffs*, 1976, 104.

<sup>421</sup> Dobson, *Two Centuries of Tariffs*, 1976, 105.

<sup>422</sup> USITC, *Sixteenth Annual Report of the USITC*, 1932 (Washington, DC: GPO, November 30, 1932), 5.

<sup>423</sup> Dobson, *Two Centuries of Tariffs*, 1976, 106.

<sup>424</sup> National Industrial Recovery Act of 1933, Pub. L. No. 73-67.

<sup>425</sup> Reciprocal Tariff Act, 19 U.S.C. §1351.

that would reduce tariffs of U.S. trade partners in return for reciprocal reductions in U.S. tariffs.<sup>426</sup>

To help implement this Act, the ECCP formed the Interdepartmental Committee on Trade Agreements, which also included members from the Commission. This new committee formed 28 subcommittees, made up in part of Commission experts, each devoted to the study of a specific country with which the United States traded. These subcommittees made recommendations to the President and Secretary of State about rate changes to be considered in future bilateral trade agreements. Commission staff experts played a prominent role in this process, aiding the United States at many stages between subcommittee recommendations and the final agreement, identifying principal foreign suppliers of certain imported commodities, and suggesting negotiation strategies.<sup>427</sup>

A 1935 amendment to the Agricultural Adjustment Act of 1933 gave the Commission a new responsibility to conduct investigations into any import that might interfere with the Act's programs aimed at maintaining prices of goods produced by American farmers. The Act required these investigations, and their resulting Commission recommendations, before the President could impose import fees or quotas on the import or on any related article.<sup>428</sup>

As a result of this legislation, the Commission's tariff-related activities up to and during the Second World War focused on four matters: investigations of agricultural products, its work with reciprocal trade agreements, general data collection, and the issuance of reports on tariff matters. The conclusion of the Second World War, however, would see the Commission take a prominent role in helping to create a new international trade order. The agreement that would govern postwar international trade relations for almost 50 years, the General Agreement on Tariffs and Trade (GATT), was signed by the United States and 22 other nations in Geneva in October 1947. The GATT was a set of multilateral trade agreements crafted with the goal of abolishing or reducing quotas and tariff rates among its member nations and easing barriers to trade.

The Commission's data gathering and analysis were vital to U.S. postwar trade policy in general, and had been crucial to the U.S. negotiators of the GATT in particular, providing them with lists of articles where tariff reduction should be sought.<sup>429</sup> Along with sending various Commissioners and staff to the negotiations in Geneva, the Commission prepared reports containing some 1,300 line items "on which the United States was prepared to offer

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<sup>426</sup> Abraham Berglund, "The Reciprocal Trade Agreements Act of 1934," *American Economic Review* 25, no. 3 (September 1935), 411.

<sup>427</sup> Dobson, *Two Centuries of Tariffs*, 1976, 108–109.

<sup>428</sup> USTC, *Nineteenth Annual Report of the USTC*, 1935 (Washington, DC: GPO, January 3, 1936), 18.

<sup>429</sup> Dobson, *Two Centuries of Tariffs*, 1976, 114.

concessions.”<sup>430</sup> It also gave input to negotiators on the lists of concessions the United States sought from each of the other nations participating in the GATT. At the time of its completion, the GATT represented the largest multilateral trade negotiation ever held. The final product of the 1947 negotiations covered more than 45,000 items in the tariff schedules of the GATT member countries.

As one might expect with such an important milestone in tariff agreements, the Commission’s work changed after the GATT was signed by the President and entered into force. Executive Order No. 9832,<sup>431</sup> issued in February 1947, laid out how the United States would administer the GATT Article XIX escape-clause mechanism allowing the United States to withdraw from or modify any agreement in which negotiated concessions caused serious injury to U.S. industries. As a consequence, it also announced that all future trade agreements would contain an “escape clause” like the one found in the GATT. The Commission became responsible for investigating any complaint of import-related injury by conducting surveys, holding hearings, and then making its recommendations to the President.<sup>432</sup> These escape-clause investigations became a major function of the Commission. As for example, the first of these arose from relief requested by domestic producers from GATT concessions on spring clothespins after a Commission preliminary report found a formal investigation was justified.<sup>433</sup> It was the first request to proceed to formal investigation, but many other relief requests were made in the following years that all required at least a preliminary report to be produced by the Commission. Executive Order No. 9832 also required that the Commission produce a yearly report documenting the changes that had occurred as a result of reciprocity activities, including a summary and analysis of concessions made by and to the United States. These reports began in 1948.

The Trade Agreements Extension Act of 1948<sup>434</sup> ended the Commission’s direct involvement with trade agreement negotiations, but it initiated the Commission’s conduct of what became known as “peril-point analyses,” which required the Commission to produce reports analyzing all items the President was considering for tariff concessions to identify the limit to which the proposed concession could be extended without causing or threatening to cause serious injury to competing domestic industries.<sup>435</sup> However, such “peril-point analyses” were a source of

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<sup>430</sup> Dobson, *Two Centuries of Tariffs*, 1976, 114.

<sup>431</sup> Exec. Order No. 9832, 12 Fed. Reg. 40 (February 26, 1947).

<sup>432</sup> Dobson, *Two Centuries of Tariffs*, 1976, 115.

<sup>433</sup> USTC, *Thirty-third Annual Report of the USTC*, 1949 (Washington, DC: GPO, January 3, 1950), 15.

<sup>434</sup> Trade Agreements Extension Act of 1948, Pub. L. No. 792.

<sup>435</sup> Dobson, *Two Centuries of Tariffs*, 1976, 117.

continual disagreement between the Republicans and Democrats in Congress, and this new responsibility was repealed and reinstated over the next several years as a result.<sup>436</sup>

## Tariff Activities from 1954

### Tariff Schedules of the United States<sup>437</sup>

In a report to President Dwight D. Eisenhower in 1954, the Commission on Foreign Economic Policy (known as the Randall Commission) recommended that the Tariff Commission commence a study of the tariff structure then in place and to propose simplification of duty rates and product nomenclature.<sup>438</sup> The existing tariff had not undergone a thorough revision since its enactment in the Tariff Act of 1930. That Act was the 23rd principal tariff act passed by Congress since 1789.

As a result of the report, Congress enacted Public Law No. 83-768, which was known as the Tariff Simplification Act of 1954. The Tariff Simplification Act directed the Commission to compile a revision of the tariff under the following guidelines:

1. Establish schedules of tariff classifications which would be logical in arrangement and terminology and adapted to the changes that had occurred since 1930 in the character and importance of articles produced in and imported into the United States and in the market in which they were sold.
2. Eliminate anomalies and illogical results in the classification of articles.
3. Simplify the determination and application of tariff classifications.

Following a comprehensive review, numerous public hearings, and the receipt of comments from interested government agencies and parties, the Commission issued its report as the *Tariff Classification Study* (Washington, DC: GPO) on November 15, 1960. The report comprised seven volumes and included the draft tariff itself, along with explanations and the record of proceedings. Seven supplemental reports were issued through 1963.

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<sup>436</sup> Martha Liebler Gibson, *Conflict amid Consensus in American Trade Policy* (Washington, DC: Georgetown University Press, 2000), 80–84.

<sup>437</sup> USITC, excerpt from USITC Report on Investigation No. 332-131 under section 332 of the Tariff Act of 1930, USITC Publication 1400 (Washington, DC: USITC, June 1983).

<sup>438</sup> "Report to the President on Foreign Economic Policy, January 1954," 45–46.

**Box 7.1:** Russell Newton Shewmaker

This prodigious effort consumed approximately 300 work-years of Commission effort, but largely reflected the drafting and direction of the Commission's then-Assistant General Counsel, Russell N. Shewmaker.

Shewmaker served at the Commission from 1951 to 1981, and became General Counsel in 1964. He was chief drafter of the Tariff Classification Act of 1962 and, in 1963, of the Tariff Schedules of the United States. For this work he received letters of commendation from President John F. Kennedy and from the Chairmen of the Senate Finance Committee and the House Ways and Means Committee.

In 1963 and 1964, Shewmaker served as U.S. representative to the European Economic Community (EEC) on tariff nomenclature and further helped to influence tariff nomenclature in the EEC. He was a delegate to the Customs Cooperation Council in Brussels in 1964 and 1965 and a member of the U.S. delegation to the GATT in Geneva in 1967.

Russell Shewmaker died on January 4, 1988.<sup>a</sup>

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<sup>a</sup> *Washington Post*, "Russell Shewmaker, Trade Counsel Who Drafted Tariff Laws, Dies," January 6, 1988.

After consideration, Congress enacted the revised tariff schedules in the Tariff Classification Act of 1962.<sup>439</sup> Pursuant to that act, the President proclaimed the new tariff, the Tariff Schedules of the United States (TSUS), effective August 31, 1963.<sup>440</sup>

The new tariff schedules represented a sea change in organization and detail from the old paragraph system of the Tariff Act of 1930.

The TSUS attempted to provide descriptions of articles by name, in categories designating one or a group of related products, and sought to avoid more general descriptions of goods, such as by material of manufacture. In addition, the eight schedules of product categories were set forth in a hierarchical arrangement, arranged by sectors from basic products to finished goods and broken into 5-digit primary or legal provisions and their duty rates. The numbering system was consistently related to the overall organization of the system. In addition, the annotated version of the tariff incorporated further product detail by adding 2 more digits to designate statistical categories, designed to gather data on particular goods. Combining the tariff's legal provisions with import statistical requirements in a single integrated nomenclature generally assured greater accuracy in reporting and publishing data. To clarify the product scope of tariff provisions and to ensure that every imported good subject to the tariff was classified in one

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<sup>439</sup> Pub. L. No. 87-456, May 24, 1962, 76 Stat. 72, as amended by Pub. L. No. 87-794, October 11, 1962, 76 Stat. 882.

<sup>440</sup> Proclamation No. 3548, 28 Fed. Reg. 9279 (August 21, 1963).

place and one place only, special legal rules, known as General or Schedule Headnotes, were inserted at appropriate places in the tariff.

While many of these aspects were new to the U.S. tariff, they were reflected in other systems that influenced the development of the TSUS. Included among these were the Nomenclature for the Classification of Goods in Customs Tariffs (later referred to as the Brussels Tariff Nomenclature and, still later, as the Customs Cooperation Council Nomenclature (CCCN)) and the Standard Industrial Classification used to report U.S. industrial production. Nevertheless, the TSUS was unique and represented a significant step forward for the United States.

## The Harmonized Tariff System

### Roots of the Harmonized Tariff System<sup>441</sup>

For decades, the international trade community encountered difficulties caused by the number and diversity of classification systems covering goods moving in international trade. A study by the Department of Transportation indicated that goods moving from shipper to ultimate consignee had to undergo classification in as many as 17 different classification systems. Shippers, importers, and brokers had to understand and apply a number of different systems, each of which employed different product descriptions, numbering, and organizational formats. This situation complicated the preparation of customs and transport documents, impeded the use of electronic data processing in international transactions, hampered the analysis of trade data, and created uncertainty in the negotiation and interpretation of trade agreements.

Following a presentation from the Secretariat of the Customs Cooperation Council (CCC) in Brussels, the United Nations Economic Commission for Europe recommended that the CCC undertake a feasibility study to develop a classification to be known as the Harmonized Commodity Description and Coding System (HS). The CCC established a Study Group to assess the feasibility of developing such a system. The Study Group report concluded that the system was not only feasible but essential to the long-term needs of international trade.

Not surprisingly, the report recommended that the HS be based on the Council's own CCC nomenclature, but the report acknowledged that a new system should also constitute a more detailed classification scheme, containing many new subdivisions to reflect changes in technology, trade patterns, and user requirements. The Study Group's report was accepted by the plenary CCC in June 1973, and a Harmonized System Committee (HSC) was formed to develop the system. The committee was composed of a representative number of countries

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<sup>441</sup> USITC, excerpt from *Conversion of the Tariff Schedules of the United States*, 1983. This shorthand name of the international nomenclature refers to the Harmonized Commodity Description and Coding System.



from each trading continent and intergovernmental and international nongovernmental organizations. Work began in earnest during the fall of 1973.<sup>442</sup>

## U.S. Participation in Creating the Harmonized System

When the United States acceded to the CCC Convention in 1973, as a condition for the Customs Service to serve as U.S. representative to that organization, an Interagency Advisory Committee (IAC) on CCC Matters was established. The committee consisted of the agencies generally responsible for U.S. trade policy and included the Commission as a member.

On January 3, 1975, Congress approved the Trade Act of 1974 (Public Law 93-618), which officially renamed the Tariff Commission as the U.S. International Trade Commission (section 330). Section 608(c) of the Act directed the Commission to undertake an investigation that would provide the basis for the Commission to participate in the U.S. technical contribution to the HS's development and to ensure that it recognized the needs of the American business community. Accordingly, the Commission initiated Investigation No. 332-73 on January 31, 1975.<sup>443</sup> Shortly thereafter, the IAC agreed that the Commission investigation would serve as the basis for the preparation and representation of U.S. technical work on the HS.

Development of the technical work at the World Customs Organization (WCO) proceeded from that time until the end of 1981. During that eight-year period, Commission staff and representatives of other participating agencies, particularly the U.S. Customs Service, the Bureau of the Census, and the Department of Agriculture, worked closely with U.S. agriculture and industry representatives to develop proposals. The U.S. delegation was chaired by members of the U.S. Customs Service, principally Paul Giguere followed by Dale Torrance, both of Customs' Office of Rulings and Regulations. Gene Rosengarden, then Commission Assistant General Counsel and later Director of the Commission's Office of Tariff Affairs, served as advisor or vice chair and occasionally chair of the U.S. delegation. Throughout the development process, Commission representatives were responsible for preparing and articulating U.S. technical positions and proposals at the HSC. Frequently, industry representatives were invited to serve as advisors to the U.S. delegation.

Meanwhile, in 1977, the Commission went through a painstaking reorganization of its staff. The long-term nature of the HS investigation and the need to maintain expertise on product nomenclature caused the Commission to consolidate all tariff and statistical nomenclature activities into the Office of Nomenclature, Valuation, and Related Activities (now the Office of Tariff Affairs and Trade Agreements), effective January 1978. The office was staffed with

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<sup>442</sup> It is interesting to note that the impetus for the HS came not from the agencies that normally take the lead in establishing trade policy but from the Department of Transportation, assisted by the Customs Service.

<sup>443</sup> USITC, excerpt from *Conversion of the Tariff Schedules of the United States Annotated*, June 1983.

product nomenclature specialists, attorneys, and administrative and support staff. It is a tribute to the vision and foresight of the Commission under the chairmanship of Will Leonard that the organization of this Office has remained largely unchanged since January 1978, merely expanding its role in trade support for the executive branch.

As technical work on the HS neared completion, the HSC turned its attention to the umbrella convention for which the HS itself would form the principal Annex. The International Convention on the Harmonized Commodity Description and Coding System required contracting parties to use and apply all the headings and subheadings of the system, without exception, addition, or modification (with certain special and differential treatment permitted for developing countries). Also, contracting parties had to make their import and export trade statistics available at least at the level of the HS 6-digit codes. Further subcategories beyond the 6-digit level of the HS could be included at the national level to reflect tariff and more detailed statistical requirements. Duty rates are not part of the HS itself and are shown only in national schedules.

A major issue in completing the HS concerned its continued maintenance going forward. Under the old CCCN, upon which the HS was based, there was a Nomenclature Committee that was primarily devoted to resolving classification issues and, it seemed, secondarily responsible for updating the nomenclature. Under the HTS, a new but similar committee, to be called the Harmonized System Committee, was envisioned. The Commission staff recognized that product nomenclatures, no matter how recent, are always out of date, as it is impossible for it to keep up with constant changes in technology and patterns of international trade. In light of these fast changes and the length of time it had taken to complete the HS, the Commission proposed that the United States seek the creation of a new WCO committee, separate from the Harmonized System Committee, to deal exclusively with the matter of updating the HS. Eventually, the HSC agreed to establish a Review Sub-committee (under the HSC) responsible solely for proposing amendments to modernize the system. Since coming into force in January 1988, the HS has been amended six times, resulting in many hundreds of modifications and improvements to the system.

## **Draft U.S. Tariff Conversion**

On August 24, 1981, the President requested the Commission to launch an investigation under section 332(g) of the Tariff Act of 1930 for the purpose of converting the Tariff Schedules of the United States (TSUS) into the structure of the HS. In preparing the new tariff, the Commission was to avoid rate changes “to the extent practicable and consistent with sound nomenclature principles.” In addition, the tariff was to be simplified “to the extent possible without rate changes significant for U.S. industry, workers, or trade.” In his guidelines on the conduct of the investigation, the President, among other things, directed the Commission to reflect units of

quantity in metric terms, continue existing statistical subdivisions, solicit public comments, and hold public hearings. Responsibility for the conduct of the investigation was assigned to the Commission's Office of Tariff Affairs and Trade Agreements.

Over the next two years, the Commission released drafts of the converted chapters for public comment. The drafts included cross-reference tables showing the derivation of the then-current tariff and statistical provisions to the converted schedule. The Commission held several hearings and received 270 written comments from interested parties and government agencies.

In an effort to simplify the tariff and eliminate illogical and outdated categories, the Commission draft contained literally hundreds of proposed rate changes. Some resulted from combining tariff categories at trade-weighted average rates; others were based on a preponderance of trade, in the case of a small trade category being combined into a larger category. The Commission would not propose modifying a rate for which there was yearly trade of over \$5 million—separate rate lines would be retained in those cases. Rate changes for imported goods generating less than \$5 million per year would not be proposed unless an interested party raised a justifiable objection.

The entire draft of the converted schedule was submitted by the Commission to the President on June 30, 1983. Besides the draft Harmonized Tariff Schedule, the Commission's final report included background information, explanations of the conversion, cross-reference tables that showed the TSUS origin of the HS tariff rates, and the Commission's views on the probable economic effect of adopting the converted schedule. The full report weighed 11 pounds.

## **Administration Review and WTO Submission**

Upon receiving the Commission's report and the draft tariff conversion, the Office of the U.S. Trade Representative (USTR) undertook a detailed examination of the draft and proposed a number of modifications, largely to correct oversights and update the draft. The draft proposed many rate changes that necessitated modifying the U.S. schedule of tariff concession obligations under the GATT in Geneva. To proceed with adjusting the HTS, Commission staff from the Offices of Executive Liaison and Tariff Affairs, principally Tariff Affairs Deputy Director Holm Kappler and Terry O'Brien, assisted USTR in preparing the extensive formal notification to the WTO. Messrs. Kappler and O'Brien also aided USTR in the related negotiations with U.S. trading partners, which took several years to complete.

## U.S. Adoption of the HTSUS

Adoption of the new tariff was one of the cornerstones of the Omnibus Trade and Competitiveness Act, enacted in 1988 (1988 Act). The HTS was made effective in section 1217 of the 1988 Act with respect to articles entered on and after January 1, 1989.

Under the 1988 Act,<sup>444</sup> USTR was made responsible for coordinating U.S. policy in relation to the HS Convention, with the Commission and the Treasury and Commerce Departments responsible for formulating positions on technical and procedural issues. USTR adopted a policy that the Commission would take the lead concerning matters involved in modernizing the system and would head the U.S. delegation to the HSC's WCO Review Subcommittee, while Customs would lead the U.S. delegation at the HSC.

Under section 105 of the 1988 Act, the Commission was also responsible for recommending to the President any modifications to the U.S. tariff that were needed to conform the HTS to the international system when amendments were adopted by the WCO. Since enactment, the WCO practice has been to propose amendments every five years. So far there have been five amendments to the international system.

Since the HS was implemented in 1988, the United States has proposed a number of significant amendments to keep the system abreast of technology and trading patterns. These include, among others, new provisions for high-technology ceramic materials, antimalarial commodities, and machines for manufacturing integrated circuits.

## The Success of the HS and the HTSUS

Under section 1216 of the Omnibus Trade and Competitive Act of 1988 (Public Law No. 100-418, August 23, 1988, 102 Stat. 1107–1574), the Commission was required to report on the first year of operation of the Harmonized Tariff Schedule (HTS), as the HS-based schedule became known in U.S. law. The report in Investigation No. 332-274, USITC Publication 2296, dated June 1990, responded to the call for an assessment of the impact of HS adoption by USTR, the U.S. Customs Service, and the Bureau of the Census. Comments from the private sector were also sought and summarized in the report.

According to submissions by the principal agencies concerned, the implementation of the HTS had proceeded without significant difficulty. While some private sector interests complained about tariff treatment for a small number of commodities, the most noteworthy observation was the overall absence of complaints concerning the new tariff schedule.

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<sup>444</sup> Pub. L. No. 100-418 (approved August 23, 1988), 19 U.S.C. 2902, §§ 1201–17.

USTR characterized the HTS as a great success and noted the benefits of comparable trade data for targeting U.S. market access opportunities. The Commissioner of Customs indicated that adoption had alleviated a number of administrative burdens. The Director of the Bureau of the Census stated that implementation of the HTS created the opportunity for developing new techniques in collecting and compiling U.S. foreign trade data.

Internationally, the implementation of the HS by over 200 countries attests to its global approval. Its adoption by virtually all major and minor trading nations has facilitated over 200 preferential trade agreements.

In consideration of his contributions in leading the U.S delegation in the negotiation of the international work and for directing the investigation to convert the TSUS to the HTSUS, Gene Rosengarden received the Presidential Meritorious Executive award.

## The 484 Committee

Under section 484(e) of the Tariff Act of 1930, as first enacted, the Commission, the Bureau of the Census, and the Treasury Department (represented by the U.S. Customs Service) became responsible for establishing and maintaining a product statistical system for imports. It was decided among the agencies that the Commission representative would serve as chair. Before the Tariff Schedule of the United States was enacted, the United States had maintained a statistical system for imports that was independent of the legal tariff. When the TSUS was enacted, it was decided to integrate the two systems by creating statistical annotations to the tariff, because it was then prepared as a tabular arrangement. The United States also maintained an export statistical nomenclature, but it was unrelated to the categories used for imports and was based on the United Nations product nomenclature.

Inserting statistical categories as subordinate extensions of tariff provisions was considered beneficial for obtaining the most complete and reliable reporting of data. The combined schedule relies on the adversarial relationship of the government seeking to protect the revenue and importers seeking to obtain favorable tariff treatment as creating the best opportunity of yielding correct classification decisions.

Under the Omnibus Trade and Competitiveness Act of 1988, the provision was amended (section 484(f)) to give the interagency group authority to address both the import and export statistical schedules and to seek comparability with the domestic production schedule. By agreement among the parties, it was agreed that the import schedule would serve as the basis of the comparable system, given that it was based on a legislated document.

With the adoption of the HS by both the United States and Canada, the 484(f) Committee took the initiative of negotiating an agreement with Canada to amend each of the import statistical systems to cover each country's export statistical requirements and to exchange the data. Implementation necessitated hundreds of modifications to each country's system, but at the same time it created the opportunity for each country to use the other's import data to report exports. In this way, approximately 9 million export reporting documents could be eliminated each year.

The foreign trade statistical program is vitally important to understanding the international trade of the United States. Without detailed statistical categories, one cannot say very much about the trade of goods on a product basis. The agencies responsible for the program are well aware of its importance and attempt to consider petitions for statistical refinement in a favorable light.

**Box 7.2: William Thomas Hart**

A history of the Commission's tariff work needs to include a discussion of the contributions of William Thomas Hart. Bill Hart was a member of the Commission's staff from 1948 to 1996, serving for nearly half the century of the agency's existence. He started as an international trade analyst in the Office of Industries, but he was soon assigned to the area of tariff negotiations. He advised U.S. trade negotiators in all of the principal rounds of multilateral negotiations under the GATT and in bilateral negotiations leading to free trade agreements with Canada, Mexico, and Israel. He and a small staff at the Commission drafted the tariff schedules for Congress to implement the negotiation results.<sup>a</sup>

Hart also provided substantial technical assistance to the deliberations of the U.S. interagency Trade Policy Staff Committee, which prepared documents and materials on trade policies and issues for Presidential consideration. When it came to implementing trade agreements and trade programs such as the Generalized System of Preferences, Hart supervised and double-checked the preparation of the necessary Presidential proclamations and/or executive orders. In addition, his office prepared and updated the tariff schedules that were submitted to the GATT and WTO as the text of U.S. obligations in these international trade organizations.<sup>b</sup>

Hart's last position before retirement was as the Commission's Director of the Office of Executive and International Liaison, the predecessor to the current Office of External Relations. His accomplishments during his career led to the award of the Commission's highest honor, the Commissioners' Award for Exceptional Service. In a rare and telling tribute, he received this award on two separate occasions.<sup>c</sup>

When Hart retired in 1996, Representative Sam Gibbons (D-FL), the former acting chairman of the Committee on Ways and Means and chairman of its Subcommittee on Trade (1981–94), published a tribute to William Hart in the *Congressional Record*. Gibbons cited Hart's "wise counsel and encyclopedic knowledge of events, both large and small, in the field of international trade," which, Gibbons said, were sought out by both government officials and business executives.<sup>d</sup>

Representative Gibbons characterized Hart's advice during negotiations as "invaluable," but considered his "most lasting contributions" to have been made after the negotiations had been concluded. The Congressman was referring to the work of Hart and his Commission colleagues on the production, under very stringent deadlines, of documentation necessary to record U.S. international tariff commitments

and update U.S. tariff schedules. Hart meticulously checked and cross-checked every line of information in these documents to ensure the commitments were accurately represented and new tariff rates properly calculated. In the case of the Uruguay Round, this amounted to almost 2,500 pages of documentation. Representative Gibbons noted that Hart's contributions and the critical support he provided to the agencies responsible for U.S. trade policy were recognized by the President's Trade Representatives from Christian Herter, the first Special Trade Representative, who served under Presidents Kennedy and Johnson, to Michael (Mickey) Kantor, who served under President Clinton.<sup>e</sup>

Bill Hart died on May 28, 2012, in Washington, DC. The Commission news release following his passing concluded: "Mr. Hart's accomplishments will live on in the future successes of the world trading system he loved and to which he gave the very best he had to contribute. We will remember him fondly, and with pride."<sup>f</sup>

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<sup>a</sup> USITC, "In Remembrance: William Thomas Hart," news release, n.d., [https://www.usitc.gov/press\\_room/documents/featured\\_news/hart\\_article.htm](https://www.usitc.gov/press_room/documents/featured_news/hart_article.htm) (accessed June 14, 2016).

<sup>b</sup> Conversation with Terry A. O'Brien, formerly with the Commission's Office of Tariff Affairs and Trade Agreements, June 14, 2016.

<sup>c</sup> *Ibid.*

<sup>d</sup> Representative Sam Melville Gibbons (D-FL, 1963–97), "Tribute to the Career of William Thomas Hart," *Congressional Record* 142, no. 49 (April 17, 1996) E552.

<sup>e</sup> *Ibid.*

<sup>f</sup> USITC, "In Remembrance: William Thomas Hart," n.d.





## Chapter 8

# The Tariff Commission in Transition, 1917–74



**Photo:** The Commissioners and staff of the U.S. Tariff Commission, 1922.

**Alfred E. Eckes, Jr.**<sup>445</sup>

For 57 years—from its birth during World War I to its redesignation as the International Trade Commission—the U.S. Tariff Commission struggled to establish an identity as a bipartisan, independent, fact-finding agency serving Congress and the Executive on tariff and trade issues. This chapter examines three distinct phases in the agency’s evolution—initial efforts to launch the Commission on its fact-finding mission, a second turbulent period of “scientific” tariff making, and a third distinct era in which the Executive mobilized the agency’s personnel and resources to support its trade-liberalization agenda. This phase would end in 1974, during the Watergate era, as an assertive Congress took important steps to establish the Commission’s independence.<sup>446</sup>

Historians have noted that officials supporting establishment of the Tariff Commission were motivated not only by the desire to enhance a technical understanding of tariffs but by multiple political goals. For the Wilson administration and Congressional Democrats, these included neutralizing public concerns about postwar conditions, such as the dumping of foreign merchandise in the U.S. market, and using a nonpartisan commission of experts to analyze and issue reports on the consumer-welfare costs of tariffs. Democrats also hoped to win over support of progressive Republicans by having the Commission prepare cost-of-production studies. In a preceding chapter, W. Elliot Brownlee concludes that Wilson’s goal “remained to move the nation toward a policy of free trade.”<sup>447</sup>

Because Wilson’s party would lose control of Congress in 1918, and the Presidency in 1920, it is important to consider how key Republicans on the Senate Finance Committee, such as Senators Boies Penrose (R-PA) and Reed Smoot (R-UT), viewed the initial Tariff Commission appointments. They perceived that Wilson’s nonpartisan Tariff Commission was not bipartisan

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<sup>445</sup> Professor Eckes is a former Commission Chairman and Eminent Research Professor Emeritus of History at Ohio University.

<sup>446</sup> This chapter presents an overview of Tariff Commission activities from its beginning in 1917 to 1974 when the Commission gained a new name and expanded responsibilities. Space limitations in a volume of this kind prevent a detailed exploration of individual investigations and reports, and a more extensive discussion of individual Commissioners and staff members.

<sup>447</sup> Schnietz, “Democrats’ 1916 Tariff Commission,” 1–45; Brownlee, “Creation of U.S. Tariff Commission,” 116.

or balanced, and was intended to advance the administration's tariff-cutting agenda. They complained that five of the six Commissioners favored low tariffs or free trade, and had supported the President politically. The list of nominees included no high-tariff Republicans, nor did it include individuals with extensive experience in manufacturing or agriculture. Smoot, the acknowledged tariff expert among Senate Republicans, concluded: "Most of them are appointed for political work for the President. I shall have no confidence in any report the Commission will make. Most of them are free traders." In particular, Smoot complained that Frank W. Taussig was a Democrat and a free trader, Daniel Roper a White House political operative, and David Lewis "a lame duck Democrat with socialistic tendencies." Smoot considered William Kent a lame duck, free-trade Republican congressman who had headed and financed Wilson's presidential campaign in California in 1916. William Smith Culbertson was viewed as a LaFollette-sort of Republican, and Edward P. Costigan, a former Progressive Republican, was thought to be a Wilson Democrat.<sup>448</sup>

## First Phase: Fact-finding and Research, 1917–22

In April 1917, the Tariff Commission opened for business in temporary quarters with an appropriation of \$300,000, and soon moved to 1322 New York Avenue. In 1921 it would take up permanent quarters in the so-called General Post Office Building, located in the block bounded by 7th, 8th, E and F Streets, N.W.<sup>449</sup>

As a wartime austerity move, Congress cut the Tariff Commission's appropriation to \$200,000 in 1918, equivalent to \$150,000 in 1916 prices. The reduction made it "impossible" for the Commission to hire and retain staff, and to carry on all the work it was intended to do. A year later Republicans in the Senate nearly submarined the new agency. In June 1919, Senator Smoot, who remained critical of Wilson's Commission, succeeded in eliminating the Commission's entire appropriation in committee as a cost-saving measure, but it was restored on the Senate floor with the help of Progressives like Senator Robert M. LaFollette, Jr. (R-WI).<sup>450</sup>

Along with funding issues, the early Commissioners had to resolve internal administrative matters and develop the agency's work agenda. One of the first disputes involved office space. Chairman Taussig decided that he preferred Commissioner Culbertson's office. When the latter

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<sup>448</sup> *New York Times*, "President Names Tariff Commission," March 15, 1917, 12; *Washington Post*, "Attack Tariff Board," March 15, 1917, 2; Reed Smoot Diary, March 15 and April 11, 1917, in RS Papers, Brigham Young University (BYU), Provo, UT. In 1930 voters in Colorado elected Costigan, then a Democrat, to the U.S. Senate.

<sup>449</sup> <http://www.gsa.gov/portal/category/21010> (accessed March 6, 2016).

<sup>450</sup> U.S. Tariff Commission (USTC), *First Annual Report of the USTC, 1917*, H. Doc. 65-616 (Washington, DC: GPO, November 15, 1917), 4; USTC, *Second Annual Report of the USTC, 1918* (Washington, DC: GPO, November 26, 1918), 37; *New York Times*, "Discontent under Republican Leaders," July 20, 1919, 38.

declined to move, Taussig simply moved his desk into Culbertson's outer-office and proceeded to conduct business. Culbertson vacated.<sup>451</sup>

Important differences about the Commission's work priorities soon emerged among the Commissioners. Those with close ties to the Wilson administration—Taussig, Roper (and his successor Thomas Walker Page), Kent, and Lewis construed narrowly the Commission's mission to involve only fact-finding. They chose to await specific assignments from the administration and Congress. But, Culbertson and Costigan, the ambitious progressives, perceived the Commission as an instrument of revolutionary tariff reform, a vehicle for “scientific tariff making.” They wanted to “determine the commercial policy of this country . . .” and to “bring honor and fame to our Commission.” Culbertson envisaged a judicial approach to tariff making. He desired “a system for adjusting tariff rates analogous to that which we now have for the adjusting of [interstate] freight rates.” He also wanted the Commission “to assist the President in negotiating commercial treaties . . .” To this end, Culbertson favored establishing a division within the Tariff Commission to collect information, comprehensively, on international commercial relations.<sup>452</sup>

From Culbertson's perspective, the economic circumstances of World War I presented the newly-created Commission with many promising subjects for investigation. He proposed a series of hearings across the country to focus on issues of “economic preparedness,” and he urged that Commission members travel to Japan, Russia and Western Europe to discuss postwar economic adjustments. When the State Department blocked the trip to Japan on grounds that it would “lend color to a belief that we are planning trade rivalries with Japan,” Culbertson was indignant. “The rapid changes which are now going on in Japanese economic life should be known and understood by us. Almost daily we hear fears expressed by business men of the rising strength of Japanese industries. If this fear has any facts back of it, it is the duty of this Commission to know them and to be prepared to advise Congress just what the facts are.” Culbertson emphasized that “our chief work is to study comparative competitive

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<sup>451</sup> William S. Culbertson (WSC), “Journal,” July 25, 1917, in WSC Papers, box 3, Library of Congress (LC).

<sup>452</sup> Taussig and the Democrats shared Wilson's position. The Commission should engage in impartial fact-finding, but not the computation of comparative costs of production. Ida Tarbell quoted Wilson in an October 1916 interview as saying: “. . . there is no such animal . . . the cost of production differs always with management.” Link, *Papers of Woodrow Wilson*, 38:333; WSC, “Journal,” August 15, 1917, box 3, LC; WSC, “Ventures in Time and Space,” LC, Manuscripts Division: unpublished manuscript, 1962, vol. 8, 13. In “Ventures,” vol. 7, 2–3, Culbertson asserts that one of his “overall policy objectives” was “to reduce the political element in tariff-making and to render effective permanent machinery which would contribute to the scientific determination of tariff rates in the national interest.” Taussig and the Democrats, who had closer personal ties to the White House, resisted this approach. Wilson had been critical of the Interstate Commerce Commission's rate-setting. WSC, “Journal,” January 23, 1918, box 3, LC.

strength of industries in this country and abroad.” He criticized Chairman Taussig for “indifference or opposition . . . .”<sup>453</sup>

Thwarted in this initiative, the young Commissioner secured a letter of introduction from former President Theodore Roosevelt and traveled on his own to Europe, ostensibly as a “representative of the YMCA,” to discuss post-war issues with leaders of Britain and France. At the British Foreign Office, he advanced his own idea for employing costs of production as a basis for determining tariff levels worldwide. He wanted to visit Russia, as well, thinking the Tariff Commission “may be able to do our 'bit' there toward concentrating Russia's liberal sentiment on the solution of our after-the-war trade problems.” The other Commissioners cooperated with various government agencies on war activities. Chairman Taussig aided the War Industries Board with price fixing, and then traveled to Paris to assist President Wilson at the Versailles Peace Conference on customs and trade issues. Others assisted with domestic industrial mobilization, postal communications, and food matters.<sup>454</sup>

In retrospect, while wartime circumstances and budgetary austerity limited the Commission’s progress with trade fact-finding, the first several years saw several significant accomplishments. With fewer than 100 employees, the agency produced several important studies of enduring significance. These contained major policy recommendations which were later enacted into law. Perhaps the most important for future U.S. trade policy was one on *Reciprocity and Commercial Treaties*, a study comparing European and American experiences with the conditional and unconditional forms of the most-favored-nation (MFN) clause. The principal author was Stanley Hornbeck, a political scientist who later gained fame as chief of the State Department’s Division of Far Eastern Affairs during the 1930s. Jacob Viner, one of Taussig’s doctoral students and later a prominent international economist, was a co-author. At the heart of MFN treatment is the principle of nondiscrimination among trade partners and the obligation to provide equal treatment to all parties to an agreement. When MFN is unconditional, nations are treated alike whether or not they make reciprocal concessions. When nondiscrimination is conditional, benefits are accorded only to the members who provide reciprocity. The Tariff Commission study urged that the United States pursue a policy of equal treatment to all nations, but it made no specific recommendation on whether to adopt the unconditional most-favored-nation clause.<sup>455</sup>

Other important Commission projects during this initial phase involved assembling, analyzing and publishing information regarding commodities and tariffs, and preparing several specific

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<sup>453</sup> USITC, *First Annual Report* (1917), 19; WSC, “Journal,” May–June 1918, box 3, LC.

<sup>454</sup> WSC, “Ventures,” 7:26; WSC, “Journal,” August 15, 1917, box 3, LC; USITC, *Second Annual Report* (1918), 35.

<sup>455</sup> USITC, *Reciprocity and Commercial Treaties* (Washington, DC: GPO, 1919). Culbertson thought the Commission's conclusion too cautious and sought a more affirmative endorsement of the unconditional most-favored-nation clause. WSC, “Ventures,” vol. 7, 56.

studies on commercial policy questions. A report in 1919 recommended authorizing the establishment of foreign trade zones in which imported products could be repacked or processed for shipment to other countries without payment of duty. Congress later enacted such a provision in 1934. Another early project involved a comparative study of antidumping laws, and evaluation of experiences with the Antidumping Act of 1916. The Commission, incidentally, recommended revising and strengthening the antidumping provisions, and Congress did so in 1921.<sup>456</sup>

Under Taussig and Page the Commission adhered to the basic Wilsonian concept. It acted as a fact-finding and advisory body, ready to place carefully-prepared information before Congress and the Executive. But, it chose not to initiate investigations on its own authority. As Taussig observed later on, the Commission had “sweeping powers of investigation, but no power to change the dot of an ‘i’ in the tariff schedule.” The rationale for an independent agency to conduct such fact-finding work rested in the last analysis on its claim to impartiality and to the belief that staff work in both the Executive and Congress reflected the political convictions of policy-makers. Most of all, under Taussig’s cautious leadership, and that of his successor Page, the Commission avoided political controversies as it prepared for the mission of providing impartial advice and information to Congress and the Executive.<sup>457</sup>

For Culbertson, the impatient, young progressive and enthusiastic exponent of scientific tariff-making, these early years were filled with recurring frustrations. Except for Commissioner Costigan, his older colleagues seemed excessively cautious. They initially opposed an active fact-finding agenda, involving extensive foreign travel to investigate changing competitive conditions—especially in the international chemical industry. Subsequently, the Commission would send staff to Europe and Japan to prepare studies on competitive conditions. Culbertson’s colleagues also rejected his proposal to spend available agency funds and then seek a “deficiency” appropriation in “line with Washington traditions.” Culbertson complained that “timidity” seemed to be the worst enemy of the Commission. He believed that it strengthened the hands of the Commission’s enemies and weakened the hands of its friends. “There are men in the country who are opposed to us,” he commented, “and my notion is that the quicker we tell them to go to hell and carry this matter to the country, the better off the Tariff Commission will be.”<sup>458</sup>

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<sup>456</sup> For a discussion of this early Commission research, see USTC, *Third Annual Report of the USTC, 1919* (Washington, DC: GPO, November 29, 1919), 10–12, and Oscar Ryder, “The United States Tariff Commission, : Its Background and History” (USITC Library: unpublished manuscript, 196?) 38–64.

<sup>457</sup> Taussig, “U.S. Tariff Commission,” 1926, 171.

<sup>458</sup> Frank Taussig, “The United States Tariff Commission and the Tariff,” *American Economic Review* (supplement) 16 (March 1926), 171–181. For Culbertson’s comments, see WSC, “Journal,” January 16, 1918, box 3, LC.

## Second Phase: Scientific Tariff-Making, 1922–34

If Taussig, the prudent economist, set the tone for Tariff Commission activities in the organizational phase, Culbertson, the ambitious progressive, inspired the second phase, a turbulent 12-year period lasting from 1922 to 1933. Culbertson himself resigned from the Commission in 1925 to take a diplomatic assignment, but his enthusiasm for “scientific tariff making” shaped provisions of the Fordney-McCumber Tariff Act (1922) and subsequent Commission efforts to apply its provisions. During this period the Commissioners battled over Culbertson's activist approach, and the Tariff Commission became for more than a decade an important administrative agency with broad authority to set the tariff rates, subject to presidential approval. It is worth remembering that during this period three presidents—Warren Harding, Calvin Coolidge, and Herbert Hoover—devoted substantial time and personal attention to the Tariff Commission and to tariff issues. They met with Commissioners, and thought carefully about appointments.

But, as Taussig understood, it was not possible for the new Commission to exercise such authority without itself incurring “bitter enmity” and becoming a “battle-ground for hostile partisans.” As a result, this first attempt at “scientific tariff making” produced public scandals, a full-scale Congressional investigation in 1926, and finally dismissal, by statute, of all sitting Commissioners in 1930.

This fractious phase in the Commission's history began with Culbertson's behind-the-scenes maneuvering to influence Harding administration trade policy and to write provisions of the Fordney-McCumber Act in 1922. Despite his background as a progressive Republican and a Woodrow Wilson Presidential appointee, Culbertson managed to curry favor with Republican presidential candidate Warren Harding during the 1920 campaign. Having provided speech material and other assistance to the nominee, he gained “entree to the White House and a friendly President.” Culbertson lobbied to become the Commission's next Chairman. He failed, but was named Vice Chairman. He took consolation from the fact that President Harding “talked with me oftener than he did with [Thomas] Marvin,” the Massachusetts protectionist designated as chairman.<sup>459</sup>

In October 1921, after the House of Representatives passed a tariff revision bill with higher duties based on the concept of American valuation, not foreign valuation as was common practice, Culbertson made his next move. Convinced that tariff-making could be made scientific,

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<sup>459</sup> WSC, “Ventures,” vol. 8, 3–5. Marvin was previously editor of *The Protectionist, A Monthly Magazine of Political Science and Industrial Progress*, published by the Home Market Club of Boston.

the young Kansan approached the White House with his flexible-tariff panacea. This proposal arrived at an opportune moment. The White House faced a dilemma. On the one hand, depreciating currencies abroad presented a threat to some American industries, but the House formulation threatened to antagonize this country's trading partners and to invite retaliation against U.S. exports. Thus, President Harding was looking for suggestions to remove the political teeth from the issue, when Culbertson appeared with his proposal for a flexible tariff. The draft called for giving the Tariff Commission extensive administrative powers to propose tariff adjustments based on differences in conditions of competition. It was presented as an alternative to general tariff revision, and as a way to provide relief to a domestic chemical industry fearful of intense post-war German competition.<sup>460</sup>

After conferring with the entire Tariff Commission and Senate leaders at a dinner meeting, which lasted until midnight, Harding presented the essence of Culbertson's proposal in his December 1921 message to Congress. Thereafter, the President, and, of course, Culbertson, worked closely with Senator Reed Smoot (R-UT), a tariff specialist on the Senate Finance Committee, to defeat House proposals and to effect the elastic tariff.<sup>461</sup>

One important technical change was made. At the insistence of progressives, particularly Senator Irvine Lenroot (R-WI), the new law called for adjusting the tariff according to differences in costs of production, not according to differences in conditions of competition. For Culbertson who had favored this formulation initially but yielded to the counsel of colleagues, the cost-of-production approach presented no obstacle to “scientific tariff making.” In his view Congress did not want detailed costs; instead, “a rough approximation of costs ... is sufficient to enable sound conclusions.”<sup>462</sup>

At the bill signing ceremony, Culbertson's spirits soared when President Harding told him the elastic provisions of this bill “will prove the greatest contribution toward progress in tariff

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<sup>460</sup> The “germ” of the flexible tariff idea may have originated with Senator Miles Poindexter (R-WA) who presented a speech on August 3, 1916, calling for a Tariff Commission clothed with rate-making authority similar to that of the Interstate Commerce Commission. *Congressional Record*, August 3, 1916, 12018–23.

<sup>461</sup> *New York Times*, “Harding Proposes Flexible Tariff and Labor Regulation,” December 7, 1921, 1.

<sup>462</sup> In effect, then, under the guise of “scientific tariff making,” the law transferred tariff setting authority from elected generalists in Congress to a panel of appointed tariff specialists subject to Presidential review. In both procedures individuals were obliged to make judgments on the basis of available information. Thomas Walker Page to President Herbert Hoover, October 14, 1929, Subject File, box 280, The Herbert Hoover Presidential Library (HH), West Branch, IA. Page resigned from the Commission in protest of the narrow comparative cost of production formulation. He later said the “flexible tariff does not deserve . . . serious attention . . . . It is a temporary distortion of tariff practice and may be regarded either as a lamentable mistake or a Gargantuan practical joke, according to your opinion of its original purpose.” He added: “It is a temporary excrescence on our commercial policy and was regarded as such when it was adopted.” Page, “Tariff Making,” 1926, 197.

<sup>462</sup> WSC to William Allen White, August 12, 1922, WSC, box 92, LC; Harding's comment in WSC, “Journal,” September 21, 1922, box 3, LC.



making in this century.” It is doubtful that the President fully understood that Culbertson and his progressive allies construed the provision as “the beginning of a system which should fix American tariffs on a judicial basis. From it I hope,” Culbertson added, “will ultimately come a system for adjusting tariff rates analogous to that which we now have for the adjustment of freight rates.”<sup>463</sup>

The Fordney-McCumber Act (Section 315) ceded to the President authority to adjust individual tariff rates in accordance with definite rules established by Congress. After an investigation and recommendation from the Tariff Commission, the President could increase or decrease any rate by 50 percent if necessary to equalize the differences in costs of production in the United States and the principal competing country.

The new act relieved members of Congress of the need to master burdensome tariff details and deal with the exactions of constituents and lobbyists. Nonetheless, many in Congress—both Republicans and Democrats—questioned the new procedure, noting that Congress had the constitutional responsibility to fix tariffs and that this duty could not be assigned to the executive branch. Senator Smoot persuaded his colleagues to go along with the President’s proposal.

The 1922 law made the Tariff Commission “one of the most important and powerful agencies” of the government, comparable to the Interstate Commerce Commission. To cope with the expanded mission, the Commission announced a reorganization which included: the office of chief investigator, the office of chief economist, the legal divisions, commodity divisions, and the secretary. In 1923 the Commission’s personnel expanded from 96 to 196, and the agency added an office in the New York Custom House as well as field headquarters for the conduct of foreign investigations in London, England; Berlin, Germany; and Paris, France. In 1925 the Commission would consolidate European field activities at the “Commission’s European headquarters” in Brussels, Belgium. The Commission also doubled its office space in the General Post Office Building, taking over the entire third floor, which included a hearing room in 1923. Interestingly, the Commission’s champion in the quest for more office space was the same Senator Smoot who attempted to eliminate the Tariff Commission’s appropriation in 1919. By March 1923, with President Harding in the White House and several high-tariff Republicans appointed to the Commission, Senator Smoot had warmed up to the agency. As

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<sup>463</sup> WSC to William Allen White, August 12, 1922, WSC, box 92, LC; Harding’s comment in WSC, “Journal,” September 21, 1922, box 3, LC.

chairman of the Public Buildings Commission, an independent agency of the executive branch, he arranged for the Tariff Commission to acquire the additional space.<sup>464</sup>

Emboldened with Harding's support for the elastic tariff, Culbertson, supported by the two other remaining Wilson appointees, Lewis and Costigan, voted to initiate an active program of tariff revision under Section 315, the flexible tariff. At a Commission meeting on March 2, 1923, they voted, with Harding's only two appointees Chairman Thomas O. Marvin and William Burgess opposing, to self-initiate more than 30 tariff adjustment investigations. From Culbertson's perspective, the debate over whether to self-initiate investigations, or to await the filing of applications from parties, was one between the "rigid tariff Republicanism of yesterday and the flexible tariff Republicanism of tomorrow." He wrote in his diary: "Within the Tariff Commission in Washington today there are the shadows of an impending tariff revolution in America. The majority of the members ... are keen to inquire into the costs of production—at home and abroad -- of all the chief commodities mentioned in the dutiable list . . . ."<sup>465</sup>

Not surprisingly, this initiative to take the "tariff out of politics" and place it on a "scientific basis" soon politicized the Tariff Commission. Culbertson believed that he had some Republican support for his activism, particularly from Secretary of Commerce Herbert Hoover. Hoover, Culbertson said, was "more of a rebel on the Tariff Commission controversy even than I am," thinking that "if a vigorous policy ... was not pursued by the President, the tariff controversy would be disastrous to the Republican Party in the next election."<sup>466</sup>

But, President Harding, under pressure from high-tariff domestic interests, took a different view. He personally telephoned Culbertson to urge that actions be postponed until he could meet with the entire Commission at the White House. Culbertson yielded, but insisted that Congress had mandated a new method of tariff-making based on the principle that rates should equalize the costs of production between the United States and competing foreign countries.<sup>467</sup>

That Culbertson and his Commission allies were out of step with the administration's thinking became obvious at the White House meeting on April 20. The President insisted that he be consulted before the Commission self-initiated investigations. This move, Oscar Ryder, a Tariff

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<sup>464</sup> *New York Times*, "Claims Wide Scope in Tariff Revision," October 13, 1922, 34; *Washington Post*, "May Investigate Need for Changes in Tariff," October 27, 1922, 4; USTC, *Seventh Annual Report of the USTC, 1923* (Washington, DC: GPO, December 3, 1923), 2–3, 44–45; USTC, *Ninth Annual Report of the USTC* (Washington, DC: GPO, December 8, 1925), 3–4; Senate Finance Committee, 69<sup>th</sup> Congress, 1st sess., *Minutes of Tariff Commission*, 24, 139–40; RS, Diary, January 20, 1923, BYU.

<sup>465</sup> Senate Finance Committee, 69<sup>th</sup> Congress, 1st sess., *Minutes of Tariff Commission*, 22–23; WSC, "Ventures," vol. 8, 21–22.

<sup>466</sup> Culbertson also claimed the support of Theodore Roosevelt, Secretary of State Charles Evans Hughes, and Secretary of Agriculture Henry Wallace. WSC, "Ventures," vol. 8, 22.

<sup>467</sup> Cited in Ryder, "U.S. Tariff Commission," 91.

Commission staff member and future Commissioner, interpreted as “a total defeat for the Culbertson faction's program for the broad use of section 315.” Culbertson’s behavior also angered Senator Smoot, who later intervened with President Coolidge in late 1923 to protest against Culbertson being named Chairman of the Commission.<sup>468</sup>

Controversy over administration of the flexible tariff continued, and intrigue intensified within the Commission. After the March 1923 confirmation of a third Harding nominee, Commissioner Henry Glassie, a Democratic lawyer with ties to the Louisiana sugar industry, Chairman Marvin used his working majority within the Tariff Commission to discourage use of section 315. Of some 600 applications, covering 300 commodities, the Commission initiated only 80 investigations, and over a seven-year period recommended 42 changes in duty—of which the President accepted 33. Of the last group, 29 involved increases in duties, and only four duty reductions. The most widely discussed duty reduction was on a relatively insignificant item, bobwhite quail. Most of the adjustments—up and down—concerned minor items, not controversial ones.

Over the Commission’s long history there have been several moments of passion and personal conflict among Commissioners, but none more intense than an episode that occurred in 1923 when the Commission was evenly divided over trade philosophy. At one meeting, Culbertson criticized a Glassie motion as a “smokescreen.” Glassie retorted that Culbertson was a “liar.” Then, Culbertson flung a tobacco pouch across the table hitting Glassie in the eye. Glassie removed his glasses and started around the table, but other Commissioners stepped between the two to avert fisticuffs.<sup>469</sup>

The most controversial investigation during this period –and indeed during the first half century of the Tariff Commission’s existence—involved sugar, a commodity that represented 17 percent by value of U.S. imports. It involved a number of politically-active interests—including New York refiners who relied on imports from Cuba and Louisiana cane producers. The best connected were domestic beet-sugar growers who could rely on Senator Smoot of Utah to look after their interests. Smoot, an apostle of the Church of Latter Day Saints, and others in the senior leadership of the Mormon Church had extensive sugar holdings. They were determined to maintain the high tariff on sugar enacted in 1922 at a time when Cuba’s producers sought greater access to the U.S. market.

It is not surprising then that the sugar investigation, requested by President Harding in March 1923, thrust the Tariff Commission, and its six Commissioners, into the limelight, and subjected

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<sup>468</sup> Senate Finance Committee, 69th Congress, 1st sess., *Minutes of Tariff Commission*, 49–50; WJC, “Ventures in Times and Space,” 8; Ryder, “U.S. Tariff Commission,” 89–94; RS, Diary, December 14, 1923, BYU.

<sup>469</sup> *Oakland Tribune*, “‘Liar’ Shouted Missile Hurling in Tariff Row,” June 14, 1926, 30.

the organization to intense scrutiny and political pressures. In early 1923 retail prices doubled, rising to as high as 12 cents per pound. President Harding asked the Tariff Commission to examine whether the higher sugar tariff rates established in the Fordney-McCumber Act (1.76 cents a pound on Cuban raw and 2.20 cents on other sugars) were responsible. The Underwood Tariff of 1913 had imposed a duty of one cent a pound on Cuban sugar, and a full duty of 1.25 cents on all other sugar imports. Harding also wanted the Commission to undertake an extensive inquiry into the costs of sugar production at home and abroad under terms of the flexible tariff provision.<sup>470</sup>

During the sugar investigations the competence of the Commission would be assailed, the lack of collegiality exposed, and the integrity of individual Commissioners impugned. One target was Henry Glassie, whose family held financial interests in Louisiana sugar. At the first public hearing on sugar in January 1924, Culbertson, Costigan, and Lewis challenged Glassie's eligibility to sit on the case, alleging a conflict of interest. Culbertson had raised the issue earlier with President Coolidge, but Coolidge merely informed Glassie that he should “do his duty as he sees it . . . .” Glassie chose to participate in the investigation, saying that he deemed it “nothing less than moral cowardice to refuse to sit in the case.” This matter created a bitter schism within the Commission, but Congress sided with Culbertson’s majority. It amended the Tariff Commission’s appropriations to bar salary payments to any Commissioner participating in a case in which any member of his family had a personal financial interest. His salary cut off, Glassie withdrew from the sugar case.<sup>471</sup>

Lobbyists who represented the domestic beet sugar industry then sought to disqualify Culbertson, who held the deciding vote. Calling attention to the provision that prohibited a Commissioner from engaging “actively in any other business function or employment,” they accused Culbertson of neglecting his official responsibilities when he taught one evening each week at Georgetown University.<sup>472</sup>

Anticipating that the Tariff Commission would recommend a reduction in the sugar tariff, Senator Smoot expressed concerns about the composition of the Commission and advised President Coolidge to delay the report until after the 1924 presidential election. According to Culbertson, the President's secretary (chief of staff), Bascom Slemp, requested that the Commission postpone the sugar report. “Intimations were conveyed to me by Mr. Slemp that I

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<sup>470</sup> USTC, *Seventh Annual Report* (1923), 55–65.

<sup>471</sup> Senate Finance Committee, 69th Congress, 1st sess., *Minutes of Tariff Commission*, 168–177, 189; *Boston Globe*, “Tariff Board Deadlocked,” January 16, 1924, 8; USTC, *Eighth Annual Report of the USTC, 1924* (Washington, DC: GPO, December 1, 1924), 41–42.

<sup>472</sup> Culbertson offers his interpretation in an untitled memorandum, August 5, 1935, WSC, box 15, LC.

might be given a foreign post and when this play upon my hopes failed, there was an attempt to play upon my fears.”<sup>473</sup>

Culbertson refused to delay the sugar report. Instead, on July 31, 1924, the Tariff Commission recommended a downward duty adjustment by a 3-to-2 vote. The Commission majority, composed of Wilson administration holdovers, concurred with the arguments of sugar importers, and favored reducing the duty on Cuban sugar from \$1.76 to \$1.23 per hundred pounds. So the contentious sugar case arrived on the President's desk in the middle of a presidential election campaign, precisely the situation that the White House sought to avoid. In this instance, the Commission's action not only failed to remove a hot issue from politics, it introduced the issue with a bang into the 1924 presidential campaign. While parties to the investigation lobbied furiously, Coolidge pleased domestic producers, and Senator Smoot, when he requested more information from the Commission and opted to delay releasing the report.<sup>474</sup>

A year later in July 1925, after sugar prices had fallen, Coolidge formally announced his decision to reject the Tariff Commission's report. On that occasion he recommended that farmers diversify production to improve their economic circumstances. In particular, he suggested that farmers grow less wheat and produce more sugar beets.<sup>475</sup>

The controversial sugar report, and the impasse within the Commission, impacted future appointments to the agency and sharpened public scrutiny. Determined to end personal disputes, Coolidge within a year replaced two of the Commissioners who had voted to reduce the duty on imported sugar. The first to go was David Lewis, one of the original Wilson appointees whose term expired in March 1925. With the backing of domestic sugar interests, Smoot worked to block his reappointment, but Senate Democrats strongly backed the Maryland Democrat. Coolidge wanted to appoint a Democrat loyal to the administration, but not Lewis, who had sought election to the Senate in Maryland while serving on the Tariff Commission in 1922. He reportedly offered Lewis the coveted renomination, but with a string

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<sup>473</sup> WSC, “Ventures,” vol. 8, 37-38. In May, 1926, Culbertson would testify to a Senate committee that President Coolidge had never tried to influence his actions, but to his surprise Senate investigators would produce a private letter from Culbertson to Costigan alleging that the Coolidge administration had sought to influence the sugar investigation. See *Washington Post*, “Culbertson Shown Critic of Coolidge in Private Letter,” May 20, 1926, 1.

<sup>474</sup> The three Wilson appointees—Costigan, Culbertson, and Lewis -- favored reducing the sugar tariff. The two participating Harding administration appointees—Chairman Thomas Marvin and William Burgess—dissented. Glassie did not vote. In accordance with Commission practice at that time, the report was not released publicly until the President issued permission. USTC, *Eighth Annual Report* (1924), 23-28.

<sup>475</sup> USTC, *Ninth Annual Report 1925*, 116-118; *New York Times*, “Coolidge Declines to Reduce Tariff on Sugar Imports,” June 15, 1925, 1.

attached: The Commissioner must first submit an open letter of resignation. As Lewis' friends tell the story, Lewis refused, and walked out of the White House, his head held high.<sup>476</sup>

The next Commissioner to leave in April 1925 was Culbertson, the leader of the flexible tariff activists. He was appointed minister to Romania. As his successor, Coolidge named Edgar Brossard, an agricultural economist from Utah, who had served on the Commission staff during the sugar investigation. Senator Smoot strongly urged Brossard's appointment to the President. Brossard's nomination aroused controversy within the Commission, as he had provided information to Commissioners opposed to reducing the sugar tariff. Later Culbertson would assert that President Coolidge had "rawly" rewarded Brossard for "playing with the sugar lobby."<sup>477</sup>

Dissatisfaction with the Tariff Commission led the Senate to undertake a special investigation of the agency in 1926. Senator Joseph Robinson (D-AR), the Democratic leader, demanded a full investigation, alleging that the agency did not function in a bipartisan manner and that in forcing Commissioner Lewis's resignation the Executive sought to subvert the usefulness of the Commission as a fact-finding agency. Robinson also attacked Commissioner Glassie as a "nominal Democrat favoring a high tariff" and held him "responsible for the breakdown of the Commission." Democrats also charged that a strong Chairman (Thomas Marvin), with the backing of other Commissioners, was administering the flexible tariff provision with a protectionist bias, thwarting the intent of Congress.<sup>478</sup>

In an unusual procedure Vice President Charles Dawes then appointed a special committee of five senators to conduct the investigation—James Wadsworth (R-NY), David Reed (R-PA), Robert La Follette, Jr. (R-WI), Joseph Robinson (D-AR), and William Bruce (D-MD). From March 1926 to February 1927 the Senate committee investigated the Commission, reviewed the contents of unpublished reports and minutes of meetings, and heard conflicting testimony from individual Commissioners in 41 sessions. The printed hearings ran 1,461 pages. But the committee did not publish a report or make recommendations.<sup>479</sup>

The Senate hearings exposed disagreements and conflicts among the Commissioners. Indeed, some of the sitting Commissioners suggested questions for members of the special committee

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<sup>476</sup> RS, Diary, November 8, 1924, BYU. For Lewis's perspective, see *Congressional Record*, January 13, 1931, 2047. Costigan refers to this episode, in *New York Times*, "Charges Coolidge with Tariff Plot," January 14, 1926, 1; *New York Times*, "Costigan Resigning, Hits Tariff Board," March 15, 1928, 1.

<sup>477</sup> RS, March 6, 1925, BYU; *New York Times*, "Coolidge Accused of Giving Office to Please Lobby," May 20, 1926, 1; USTC, *Eleventh Annual Report of the USTC, 1927* (Washington, DC: GPO, December 5, 1927), 112.

<sup>478</sup> *Washington Post*, "Senate Takes First Step to Investigate Tariff Commission," March 10, 1926, 4.

<sup>479</sup> *Boston Globe*, "Democrats Demand Limit on Tariff Commission," March 7, 1926, A13; *Washington Post*, "Senate Takes First Step to Investigate Tariff Commission," March 10, 1926, 4; USTC, *Eleventh Annual Report* (1927), 112–13.

to ask their colleagues. Commissioner Alfred Dennis, a Democrat, advised Senator Robinson that Chairman Marvin might attempt to “cloud” the issues with talk about a flawed statute and proposed questions to “pin him down.” Dennis blamed Chairman Marvin and Commissioner Glassie for making the Commission a debating society. They had adopted methods equivalent to discussion of whether an angel could dance on the point of a needle. Former Chairman Page told Senators that the fundamental problem with the Commission lies with the flexible provision which absorbed nearly all the funds and energies of the Commission. He recommended that Congress redraft the agency’s responsibilities to focus on research and tariff information. Page added that the present difficulties also resulted from the fact that “some of the members have been handicapped by personal antagonisms and by lack of experience in the kind of work that ought to be done.”<sup>480</sup>

The hearings produced many unbecoming headlines: “Tariff Commission Members Assailed by First Chairman,” “Coolidge Accused of Giving Office to Please Lobby,” and “Culbertson a Tariff Turncoat.” The last involved the release of private correspondence between Culbertson and Costigan alleging presidential interference with the sugar investigation, and claiming that Culbertson had “turned about face” and been guilty of “self-stultification.”<sup>481</sup>

Several Commission staff members testified, and others commented informally on the situation to members of the Senate committee. In correspondence with members of the Senate, L. B. Zapoleon, an agricultural specialist, complained that usually only two of the Commissioners did the bulk of the work. The rest rarely read reports— “a tedious and trying task . . . .” He added: “For elderly gentlemen who desire a dignified place in the official life of Washington; or for young men of mediocre ability and no great drive, a commissionership is an ideal assignment.” The term of office was 12 years; and he noted that there was no one who can control hours, or criticize them for lack of application, short of actual misbehavior.<sup>482</sup>

The hearings generated a number of negative editorial comments. *The New York Times* stated that the Senate investigation appeared to confirm that the Tariff Commission was “an ineffective and almost useless agency of the Government.” *The Washington Post* said simply “the Tariff Commission has no excuse for existence . . . it should be abolished.”<sup>483</sup>

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<sup>480</sup> Alfred Dennis to Robinson, March 26, 1926, Box 139, file 6, Joseph T. Robinson Papers (JTR), University of Arkansas (U-AR), Fayetteville, AR ; Page, February 4, 1925, letter to David I. Walsh, TWP, Box 1, UVA.

<sup>481</sup> *New York Times*, “Tariff Commission Members Assailed by First Chairman,” March 24, 1926, 4; *New York Times*, “Raps Tariff Commission,” April 7, 1926, 9; *New York Times*, “See in Culbertson a Tariff Turncoat,” June 2, 1926, 11.

<sup>482</sup> L. B. Zapoleon to Senator William King, April 7, 1926, Box 140, file 1, JTR, U-AR.

<sup>483</sup> *New York Times*, “A Discredited Commission,” April 2, 1926, 18; *Washington Post*, “The Tariff Commission,” March 12, 1926, 6.

President Coolidge and Senator Smoot viewed the Tariff Commission investigation as an effort by Senate Democrats and insurgent Republicans to revive the tariff issue for the next Presidential election. Indeed, Senator Robinson communicated to Coolidge that he would make no further fight on the Tariff Commission if the President would appoint Lewis and not reappoint Glassie. But, Coolidge told Senator Smoot that he would “prefer to resign as President than to appoint Lewis after his past actions” affecting the Commission. While it might appear that the hearings only exposed Tariff Commission problems to the light without bringing significant change, Commissioner Dennis had a different assessment. In January 1927 he congratulated Senator Robinson for an investigation that “accomplished the great good of ridding the Commission of two objectionable members and restoring it to the bi-partisan character contemplated by Congress.”<sup>484</sup>

Costigan’s criticisms of his Tariff Commission colleagues peaked in March 1928 when he, the last of President Wilson’s original appointees, resigned. On that occasion he lambasted both President Coolidge and his three Republican colleagues—Brossard, Marvin, and Sherman Lowell. Costigan claimed that Coolidge had refused to act on decisive evidence warranting lower tariff rates, thus helping “to wreck the commission’s usefulness.” He described Marvin “as a tireless and fanatical protectionist, known in Washington as a tariff lobbyist for New England protected interests.” He accused Brossard of bias and lacking a scientific or judicial mind. Costigan asserted that Lowell, a New York fruit grower and National Grange official, lacked “equipment or special qualifications” for serving as a Tariff Commissioner, and appeared to “vote prejudices rather than facts.” Despite a Congressional investigation, Costigan alleged that other public officials and private lobbying interests continued to manipulate the Commission. He urged Congress to postpone existing nominations and to withhold appropriations “until adequate assurances are given that the membership of the Tariff Commission will be safeguarded by law and will conform to the standards of disinterested public service . . . .”<sup>485</sup>

Other Commissioners responded to Costigan’s broadside. Chairman Marvin expressed the hope that Costigan would have “greater success and satisfaction in his new enterprises than he achieved as a member of the Commission.” Brossard retorted that Costigan’s comments were a swan song in his efforts to rule or ruin the Commission. Having failed to sustain his charges before the Senate investigating committee, Costigan found himself “more or less isolated and the subject of ridicule for having made, in public, misleading, unsupported, and unsupportable charges . . . .”<sup>486</sup>

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<sup>484</sup> RS, December 8, 1926, BYU; Dennis to Robinson, January 27, 1927, JTR, box 140, file 1, U-AR.

<sup>485</sup> *Boston Globe*, “Tariff Board is Assailed,” March 15, 1928, 1; Costigan, “Tariff Making,” 1926, 198–202.

<sup>486</sup> *Washington Post*, “Tariff Board Answers,” March 16, 1928, 5.



As the personal tensions and conflicts suggest, the bipartisan Tariff Commission faltered during the 1920s as it tried to administer the flexible tariff. No wonder that former Vice President Thomas Marshall (1913–21) quipped in 1925 that “a tariff commission is just about as valuable as a letter written by an inmate of an insane hospital.” He added: “To pretend to organize a commission that will tell the difference in the cost of production at home and abroad, is no more possible than it is for a one-legged man to dance a hornpipe.” Another member of President Wilson's Cabinet, David Houston, who served first as Secretary of Agriculture and later as Secretary of the Treasury, also criticized the elastic clause in the mid-1920s. He said that it changed the Tariff Commission “from a fact-finding body to a piece of political machinery. It puts the whole body into politics. The flexible provision is a futile conception.”<sup>487</sup>

While many Democrats roundly criticized “scientific tariff making,” Commissioner Brossard, the Republican agricultural economist, defended the process. He argued that the unique provision “should be permitted a longer time for trial before it is radically changed.” He explained that nothing like the “scientific tariff” had been tried before in the world, and as a result “there were no precedents to guide the Congress in framing the statute nor to guide the Tariff Commission in . . . administering its provisions.” Technicians needed training, new procedures evolved by trial and error. To speed up the Commission’s work, he proposed to double the number of Commissioners from six to twelve, like the Interstate Commerce Commission. This would allow the Commission to divide up the work. To encourage unanimous, rather than divided, reports from the Tariff Commission, he requested that Congress provide more specific guidelines for conducting investigations, and for it to indicate as definitely as possible what part of domestic industry Congress wanted to protect.

As Brossard and others knew, part of the problem involved the difficulty of defining individual terms in the law such as “costs of production.” What were these costs? Did they include costs of transportation? If included, how should they be calculated? In calculating production costs in the United States and abroad, did Congress want the Commission to use weighted average costs? Long-term costs, or short-term? Over what period of time should the Commission seek to make comparisons? Should it compare the costs for marginal producers? In what time period should the Commission seek to “equalize” these costs? These and many other questions, he indicated, required answers before the Commission could implement the law.<sup>488</sup>

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<sup>487</sup> Thomas R. Marshall, *Recollections of Thomas R. Marshall: A Hoosier Salad* (Indianapolis: Bobbs-Merill, 1925), 241–43; David F. Houston, *Eight Years with Wilson's Cabinet* (New York: Doubleday, 1926), vol. 2, 187.

<sup>488</sup> Brossard served on the Commission staff from September 1923 to July 1925, then succeeded Culbertson. Brossard served on the Tariff Commission for 33 years and 6 months to April 1959. Brossard's Comments on Section 315 of the Tariff Act of 1922, undated memorandum [1929?], Edgar Brossard Papers (EB), Utah State University (UTU), Logan, UT.

There were other fundamental problems, involving a costly quest for precise comparisons. Commissioner Dennis, a Democrat who had once worked as Hoover's assistant in the Commerce Department, told his friend the President that the flexible provision had not been able to "escape from its swaddling clothes." The law has confined the Commission's analysis to a meaningless "mathematical formula." Observed Dennis, "Two grains of wheat in two bushels of chaff which when found are not worth the seeking."<sup>489</sup>

In addition, implementation of the law put the Commission squarely in the diplomatic crosshairs. France, and other European countries, objected to cost of production inquiries and obstructed efforts by Commission staff to collect data.<sup>490</sup>

This second chapter in the Commission's history ended with a consensus in Congress to dismiss and reconstitute the entire Commission during the next general tariff revision.

## The Tariff Act of 1930

In writing the Tariff Act of 1930, better known as the Smoot-Hawley Tariff, Congress initially displayed little enthusiasm for extending the flexible tariff provision. The bill that emerged from the House of Representatives omitted the provision. But President Herbert Hoover, still devoted to the scientific principle, threatened to veto any tariff bill that lacked a flexible tariff provision. A conference committee eventually acceded to Hoover's wishes. For the President the flexible tariff provision remained a progressive advance, and the most appealing feature of the Smoot-Hawley Tariff. He described it as a "long step" toward a "more scientific and business-like method of tariff revision." In time he thought the flexible provision could "remedy inequalities" and take the "tariff away from politics, lobbying, and log rolling. . . ."<sup>491</sup>

At Hoover's insistence the revised flexible tariff provision contained several important technical changes, intended to make it more effective. But, the changes seemed less significant than Hoover's statement suggested. For instance, lawmakers retained in conference the hard-to-administer "cost of production" formula. They also declined to establish time limitations on Presidential review of Tariff Commission recommendations.<sup>492</sup>

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<sup>489</sup> Alfred Dennis to President Hoover, undated memorandum, President's Subject File, box 296, HH, West Branch, Iowa.

<sup>490</sup> USTC, *Ninth Annual Report* (1925), 18–20. French protest mentioned in Tariff Commission meeting, July 1, 1924. See, U.S. Senate, Committee on Finance (Senate Finance), *Minutes of the Meeting of the United States Tariff Commission*, 69th Cong., 1st sess., Document no. 83, 1926, 312.

<sup>491</sup> Hoover consistently supported the principle during the 1929–30 tariff revision. Hoover, *Public Papers of the Presidents: 1929* (Washington, DC: GPO, 1929), items 38, 215, 216, 267, 295; Statement on the Tariff Bill, June 16, 1930, in Hoover, *Public Papers: 1930*, 230–5.

<sup>492</sup> Ryder, "U.S. Tariff Commission," 115–117.

The Tariff Act of 1930, which in modified form remains the basic U.S. tariff law, also reorganized the Tariff Commission and modified some of its functions. The new Commission, like the old, would have six members, not more than three of whom could be members of the same political party. The terms would be six years, not 12 as originally provided, and the salary raised to \$11,000 per year from \$7,500. Moreover, the 1930 Act added the language that “No person shall be eligible for appointment as a commissioner unless he is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite for developing expert knowledge of tariff problems and efficiency in administering the provisions. . . .” As previously, the President would designate a Chairman and Vice Chairman annually.<sup>493</sup>

The 1930 statute reiterated with only minor changes the Commission's broad fact-finding authority, now redesignated Section 332. Two provisions of future importance, which had been included in the 1922 Fordney-McCumber Act, were redesignated Sections 337 and 338. The first, concerning unfair practices in import trade, would evolve over time into a powerful instrument used against infringement of U.S. intellectual property rights. Under the 1922 Act the President was authorized, but not required, to impose increased duties on offending goods. Alternatively the President might exclude them from entry. In 1930, Congress eliminated the penalty duty and authorized only an exclusion order “whenever the existence of any such unfair method or act shall be established to the satisfaction of the President . . . .”<sup>494</sup>

Section 338 related to foreign discrimination against U.S. commerce. Unlike the more recent Section 301, a provision authorizing retaliation against unjustifiable and unreasonable foreign import restrictions, Section 338 pertained to foreign discrimination invalidating unconditional most-favored-nation treatment.<sup>495</sup>

## Reappointing the Tariff Commission

Eager to prove that this second experiment with “scientific tariff making” could succeed, President Hoover searched for qualified individuals willing to serve on the Commission. A number of talented people turned him down, apparently fearful of the Senate confirmation process. He succeeded in persuading a longtime friend and former diplomat, Henry Fletcher of Pennsylvania, to chair the Commission. Fletcher had no tariff expertise but he had extensive diplomatic experience in economic matters, including tours as Ambassador to Chile, Mexico,

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<sup>493</sup> USTC, *Fifteenth Annual Report of the USTC, 1931* (Washington, DC: GPO, November 30, 1931), 115.

<sup>494</sup> USTC, *Fifteenth Annual Report* (1931), 122–23; USTC, *Sixth Annual Report of the USTC, 1922* (Washington, DC: GPO, December 4, 1922), 61.

<sup>495</sup> USTC, *Fifteenth Annual Report* (1931), 124–25.

Belgium and Italy, as well as Under Secretary of State. This appointment kindled hope in Europe that Fletcher and Hoover would use the flexible provision to roll back high-tariff rates.<sup>496</sup>

In addition, President Hoover re-nominated three other commissioners: Alfred Dennis (D-MD), his former deputy; Lincoln Dixon (D-IN), a former congressman who had served on the Ways and Means Committee; and Edgar Brossard (R-UT), Senator Smoot's friend. He also nominated Thomas Walker Page (D-VA), a former commissioner and chairman, and John Lee Coulter (R-ND), the Commission's chief economist. This reconstituted Commission exhibited geographical, political, and philosophical balance, as well as considerable experience. President Hoover noted that four of the nominees (Brossard, Coulter, Dennis, and Page) were former college professors with economics backgrounds who also had served at the Tariff Commission.

Establishing a precedent, the Senate Finance Committee voted, against the wishes of Chairman Smoot, to hold public hearings on the nominations. Despite vigorous questioning of Fletcher and the others, only Brossard faced serious opposition. Senators Joe Robinson (D-AR) and Pat Harrison (D-MS) concentrated their fire on Brossard, describing him as "the special advocate of the sugar interests ... and the greatest source of friction within the Commission." They held Brossard partly responsible for the "disrepute" of the old Tariff Commission. Edward Costigan, who had been elected to the Senate but had not yet taken office, urged his new colleagues to reject Brossard, his former Tariff Commission colleague. Brossard had a "biased mind and subserviency to outside interests . . . ." Nonetheless, Brossard was confirmed 45 to 36 with eight Democrats from sugar producing states voting for the nominee.<sup>497</sup>

For four years after passage of the 1930 Act, the flexible tariff continued to drive the Commission's agenda. Under Fletcher's leadership, the Commission expedited the tariff adjustment process. In slightly more than a year, it completed 39 flexible-tariff investigations, recommending no change in 17 instances, reductions in 15, and increases in six. Another involved both a decrease and an increase. While this work was impressive when measured against the 44 reports issued in seven years under the 1922 Act, critics claimed that the Commission was moving hastily with inadequate accounting procedures and sloppy analysis.<sup>498</sup>

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<sup>496</sup> *Washington Post*, "Fletcher is Appointed Head of Tariff Board," August 23, 1930, 1; *New York Times*, "Naming of Fletcher Gives Europe Hope," August 25, 1930, 1.

<sup>497</sup> *New York Times*, "Hoover Adds Three to Tariff Board," September 17, 1930, 3; *Washington Post*, "Senate Fights Over Brossard for Tariff Job," January 13, 1931, 1; *New York Times*, "Confirms Brossard to Tariff Board," January 14, 1931, 12; *Congressional Record*, January 13, 1931, 2050.

<sup>498</sup> Fletcher resigned in November 1931, and then the pace slowed under his successor Chairman Robert O'Brien. Altogether, the Commission had completed 69 investigations from 1930 to the end of 1934. Of these, 31 recommended no duty change, 21 favored decreases, 12 recommended increases, and 5 contained both increases and decreases. Many of the recommendations for no change rested not on cost of production comparisons but on foreign exchange problems or lack of comparability between imports and domestic production. Ryder, "U.S. Tariff Commission," 121–124.

## Third Phase: Struggling for Independence, 1934–74

Passage of the Reciprocal Trade Agreements Act in 1934 signaled a quiet revolution in U.S. trade policy, and inaugurated for the Tariff Commission a third distinct, but less visible, phase in its history. While Congress would continue to rely on the Commission for impartial technical work and tariff information, the executive branch would involve the Commission staff and Commissioners in trade negotiations and policy decisions that sometimes appeared to conflict with the agency's role as an impartial factfinder. Overwhelmed with the problems of promoting recovery from a global depression, Congress initially acquiesced to this arrangement. But after World War II Congress would challenge the Tariff Commission's participation in trade policy and negotiations. Growing constituent dissatisfaction with the trade liberalization process would produce more fundamental changes in the 1974 Trade Act. For the Tariff Commission, the Act brought a name change to better reflect its responsibilities—the U.S. International Trade Commission—and provisions to help establish the agency's independence from what Congress perceived as executive branch domination.

The 1934 Reciprocal Trade Agreements Act initiated a remarkable new phase in U.S. tariff history—one focused on executive-branch tariff-making. From 1789 to 1922, Congress had written the tariff, and in the legislative environment, domestic interests often succeeded in their efforts to promote upward tariff revisions. Congress found that it could not adjust duties selectively without succumbing to pressures for sweeping adjustments. Experience with “scientific tariff making” in the 1920s also seemed to demonstrate that a bipartisan Tariff Commission was no more capable than Congress in separating tariff issues from politics, and in effecting timely, selective tariff adjustments. As a result, Congress and the Executive were unable to resist constituent pressures for undertaking another general revision after the 1928 elections. And, this 18-month tariff-writing exercise, led by Senator Reed Smoot and Congressman Willis Hawley, proved divisive and disruptive, highlighting once again the difficulty that the legislative branch encountered institutionally in overhauling the tariff in a responsible way.<sup>499</sup>

Reflecting the general mood, the Democratic Platform in 1932 called for major changes to trade and tariff policy. It recommended “a competitive tariff for revenue with a fact-finding tariff commission free from executive interference, reciprocal tariff agreements with other nations,

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<sup>499</sup> For a classic study of Congressional tariff-making, see Elmer Eric Schattschneider, *Politics, Pressures and the Tariff* (New York: Prentice-Hall, 1935).

and an international economic conference designed to restore international trade and facilitate exchange” (emphasis added).<sup>500</sup>

In 1933 the new Secretary of State, Cordell Hull, opted to take the lead in fashioning a new trade policy. Hull was a veteran of many Congressional tariff battles including the Underwood Tariff of 1913 and the Smoot-Hawley Tariff of 1930. He had served 18 years on the Ways and Means Committee, and two on the Senate Finance Committee before becoming Secretary of State in March 1933. He had observed and criticized the dysfunctional tariff process. As Secretary of State he persuaded President Franklin D. Roosevelt to seek, and Congress to authorize as an emergency measure, a delegation of authority to the Executive to raise or lower tariffs in bilateral agreements by up to 50 percent for three years.

In administering this trade liberalization program, the State Department retained overall control. President Roosevelt authorized establishment of the Executive Committee on Commercial Policy in 1934. It was an interagency group composed of representatives at the assistant secretary level and chaired by the State Department, for the purpose of developing and coordinating U.S. trade policies. Three Tariff Commissioners participated in the work of the Executive Committee on Commercial Policy. Responsibility for trade negotiations was lodged in the Committee on Trade Agreements, a group of technicians from the State Department and other agencies who coordinated strategy and supervised negotiations. A Tariff Commissioner sympathetic to the trade liberalization program served as a voting member of the policy-making, interagency trade agreements committee. Individual Commission staff members served on subordinate, interagency committees and assisted in actual negotiations with foreign representatives. In particular, the Tariff Commission staff had the key supporting role in assembling statistical data and in providing product specific information for members of the interagency committees involved with trade decisions. As in Congressional tariff making, decision-makers relied on the Tariff Commission as an authoritative source of comprehensive and impartial information.<sup>501</sup>

Finally, another member of the Tariff Commission, deemed supportive of Hull’s reciprocal trade program, chaired a third important committee, the Committee on Reciprocity Information. This group held public hearings and heard from interested persons about possible tariff concessions in trade negotiations. Commissioner Page, the Vice Chairman of the Commission, served in that capacity until his death in 1937. Commissioner Henry Grady, a former State Department

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<sup>500</sup> <http://www.presidency.ucsb.edu/platforms.php>.

<sup>501</sup> Commissioner Brossard, a Utah agricultural economist, complained that the interagency process was controlled by “New-Deal partisan negotiators on the Trade Agreements Committee [who] have not wanted the findings of the bipartisan scientific fact-finding Tariff Commission to in any way control and thus to limit in any way the reductions in rates they may have desired to make in any agreement.” See Brossard’s undated memo on Extension of RTAP-HR 6556 [1948], Box 24, Brossard Papers, USU.

economist in charge of the trade agreements division, then succeeded him as committee chairman. When Grady returned to the State Department in 1939 to replace Sayre as assistant secretary of state, his position as chairman of the Committee for Reciprocity Information was taken by Commission Vice Chairman Oscar Ryder, himself an economist and participant in the interagency trade liberalization process.<sup>502</sup>

## The Tariff Commission during the 1930s

Passage of the Trade Agreements Act in June 1934 transformed the Tariff Commission's workload. In preparation for bilateral negotiations the Senate Finance Committee asked the Commission to collect and analyze statistics on U.S. import and export trade with 39 countries, accounting for 92 percent of U.S. total trade. By 1934 the Tariff Commission was so immersed in the trade negotiations process that it prepared more than 1,000 reports for interdepartmental committees. The Agricultural Adjustment Act, approved in 1935, added another responsibility. Whenever the President had reason to believe that articles were being imported so as to render ineffective or materially interfere with government agricultural programs, the Commission was required to conduct an immediate investigation to determine the facts.<sup>503</sup>

The Commission's staff expanded about 10 percent in 1934 and 1935 to accommodate this increased workload. The Executive Committee on Commercial Policy, chaired by the State Department to develop and integrate procedures, closely monitored the Tariff Commission's work. "Practically all the important finished work of the Tariff Commission . . . so far as it affects changes in our foreign commercial relations" was referred to this committee "for consideration and for advice to the President . . ." <sup>504</sup>

Not only did Tariff Commission technical specialists participate in trade agreement negotiations, but after completion of each agreement the Commission usually issued a report explaining the agreement and providing digests of information regarding products on which concessions had been made. The Canadian agreement was summarized and analyzed in four volumes; the 1938 agreement with the United Kingdom in eight volumes.<sup>505</sup>

Allocation of Commission resources to support Hull's program of reciprocal negotiations displaced and crowded out the Commission's attention to some other tariff matters. For

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<sup>502</sup> Francis Sayre to Henry Grady, January 6, 1937, Francis Sayre Papers, Box 4, FDR Library; Cordell Hull to President Roosevelt, May 21, 1942, Official File 60, FDR; USTC, *Eighteenth Annual Report of the USTC, 1934* (Washington, DC: GPO, January 2, 1935), 10–13.

<sup>503</sup> USTC, *Nineteenth Annual Report of the USTC, 1935* (Washington, DC: GPO, January 3, 1936), 18–19.

<sup>504</sup> USTC, *Eighteenth Annual Report (1934)*, 11–12.

<sup>505</sup> USTC, *Twenty-Third Annual Report of the USTC, 1939* (Washington, DC: GPO, December 1, 1939), 4.

example, effective administration of the flexible tariff provision ceased with passage of the reciprocal trade program. The 1934 Act stipulated that Section 336 (the flexible tariff) did not apply to products included in trade agreements.<sup>506</sup>

Also, the Tariff Commission gave little attention to intellectual property issues. Initial efforts to enforce Section 316 of the 1922 Act and its successor Section 337 of the Tariff Act of 1930, relating to unfair acts of competition and unfair acts in import trade, resulted in little activity. From 1930 to 1968 this intellectual property infringement provision was seldom utilized. There were both judicial and policy impediments. In the *Amtorg* case (1935), the Court of Customs and Patent Appeals had reversed a Tariff Commission recommendation for an order excluding phosphate rock from the Soviet Union on the grounds that process patents were not protected under Section 337. Uncomfortable with unfair trade cases, the Commission requested that Congress transfer authority to the courts and the Federal Trade Commission, so that it could focus on its “primary functions,” described as collecting “complete and scientific information concerning tariffs and the effect thereof upon the industry and revenue of the United States for the purpose of aiding the President and Congress.” The Commission’s annual report observed that “neither the members of the Commission nor its staff is selected for the purpose of dealing with such technical legal questions.” From 1935 to 1968 the Commission received 66 complaints, but made only three affirmative determinations.<sup>507</sup>

In 1933 President Hoover had nominated Robert Lincoln O’Brien (R-MA), a prominent Boston journalist, to succeed Fletcher as Commission chairman. As a young man O’Brien had served as President Grover Cleveland’s personal secretary, and thus acquired considerable knowledge of the government process. As it turned out, O’Brien was no high-tariff Republican. Indeed, he worked well with Roosevelt and Hull, and would be reappointed as Chairman of the agency annually until his retirement in 1937. As an advocate, O’Brien provided significant, bipartisan backing for the trade liberalization program, testifying and making speeches in support of Hull’s program. In 1936, he even tried to persuade the Republican National Convention to endorse the reciprocal trade program, but was dismissed as a turncoat and Roosevelt henchman.<sup>508</sup>

On matters of concern to the Roosevelt administration, O’Brien sought and received guidance from the Executive Committee on the timing of investigations and publication of results. In May

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<sup>506</sup> USTC, *Eighteenth Annual Report* (1934), 61. The last section 336 report, according to former Commissioner Bruce Clubb, involved brooms made of broom corn. Bruce Clubb, *United States Foreign Trade Law* (Boston: Little, Brown & Co., 1991), vol. I, 109. See also, USTC, *Forty-Sixth Annual Report of the USTC, 1962*, TC Publication 77 (Washington, DC: GPO, January 1963), 29–30.

<sup>507</sup> *In Re Amtorg Trading Corp.*, 22 C.C.P.A. 558; 75 F.2d 826 (1935); USTC, *Nineteenth Annual Report* (1935), 12–14. Clubb, *United States Foreign Trade Law*, 1:615–712.

<sup>508</sup> *Washington Post*, “U.S. to Regain Its World Trade, Hull Promises,” March 24, 1935, 2; *Washington Post*, “President Picks O’Brien Again for Tariff Job,” May 31, 1936, M15; *New York Times*, “Republican Shift on Tariff Is Urged,” April 11, 1936, 6; *New York Times*, “Republicans and the Tariff,” April 13, 1936, 16.



1934, for example, he agreed to postpone reports on chocolate and cocoa imports until after Congress had completed action on the trade agreements bill. Where Commission investigations touched delicate foreign policy issues, the Executive Committee did not hesitate to intervene. In June 1935, for instance, the committee insisted that the Tariff Commission not publish its recommendations for import restraints on Japanese pottery and sun goggles.<sup>509</sup>

Similarly, the Executive Committee blocked a proposed Section 338 investigation in December 1933. When Vice Chairman Page brought up “the important consideration of the discrimination against American trade resulting from British imperial preference,” the group made reference to “serious practical objections to ... retaliation.” It quickly became evident that the Commission’s approach to this provision was subject to the approval of the Executive Committee on Commercial Policy. In effect, the executive branch would decide when to consider retaliation against foreign discriminations incompatible with unconditional most-favored-nation treatment.<sup>510</sup>

Operating behind the scenes, the State Department also sought to influence the administration's selection of Commissioners. A key factor was the prospective nominee’s support for the reciprocal trade program. The archival record shows that the Roosevelt administration evaluated potential nominees with control of the Commission in mind. For instance, in January 1937, when Assistant Secretary of State Francis B. Sayre, the policy-maker directly responsible for the trade agreements program, learned about a prospective vacancy on the Commission resulting from the mortal illness of a Commissioner, he contacted a former State Department economist, Henry Grady, then in California, and recruited him for the post.

I need not point out to you how vitally important the work of the Tariff Commission is to the success of our trade agreements program. As you well know, a Tariff Commission which did not see eye to eye with us, or which should swing away from our program, would be fatal to the success of our undertaking.

Grady received the nomination, and would replace Thomas Page as chairman of the important Committee on Reciprocity Information.<sup>511</sup>

The Roosevelt administration, required by terms of the 1930 law to appoint no more than three Democrats to the six-member Commission, sought supportive Republicans like Chairman Robert O’Brien. It explored the idea of appointing only four of the six commissioners so as to

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<sup>509</sup> Executive Committee on Commercial Policy (ECCP) meetings, May 12, 1934, June 27, 1934, and December 12, 1934, 611.0031 Exec Comm 799, Record Group (RG) 57, National Archives and Records Administration (NARA), Washington, DC; USTC, *Nineteenth Annual Report* (1935), 30–34.

<sup>510</sup> ECCP meeting, December 12, 1934, 611.0031 Ex Com/799, RG 57, NA.

<sup>511</sup> Sayre to Grady, January 6, 1937, Francis Sayre Papers (FS), Box 4, Franklin D. Roosevelt Library (FDR) Hyde Park, NY.

save money and assure a favorable balance. Thus, when the term of protectionist agricultural economist John Coulter expired in June 1934, the administration left the seat open for some 18 months until December 1935 when Roosevelt nominated Dana Durand, an economist and former head of the U.S. Census Bureau. Durand, a Republican who supported the Hull trade liberalization program, served as the Tariff Commission's chief economist from 1930 to 1935. He was strongly recommended to the White House by Democrats on the Tariff Commission who considered Durand a sound economist who would "not obstruct" the administration's trade policies. Indeed, in 1936 when Commissioner Page, who chaired the Committee on Reciprocity Information, became ill, Durand was asked to preside over the hearings. The administration did not want the long-serving Commissioner Brossard to chair the hearings, because the Republican was considered "an extreme protectionist and hostile to the Hull program."<sup>512</sup>

On occasions Secretary Hull personally pressed the Commission candidacies of others known to favor the Trade Agreements program. He sought appointments for Oscar Ryder, a participant in the interagency trade network, and Lynn Edminster, one of Hull's personal staff aides. He wrote Roosevelt in May 1942:

Mr. Ryder has been cooperating well with the State Department, especially as it relates to carrying forward our commercial policy and trade agreement undertakings. We have some extreme high tariff people in the Commission. It becomes important . . . to avoid . . . domination from that source.

Edminster he praised as having "exactly our views and mine with respect to commercial policy, and has supported them quite effectively."<sup>513</sup>

During World War II the Tariff Commission functioned for much of the period with only four commissioners. The Chairman (Raymond Stevens in 1941, Oscar Ryder in 1942–45) sat on the Executive Committee on Commercial Policy and the Committee on Trade Agreements. The Vice Chairman (Ryder in 1941, Lynn R. Edminster in 1942–45) presided over the Committee on Reciprocity Information and also sat on the Committee on Trade Agreements. They actively supported the Hull reciprocity program. The two Republican members (Edgar Brossard and Dana Durand) filled positions on less-sensitive committees, such as one involving cooperation with the American Republics and another with the coordination of statistics. George McGill, a

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<sup>512</sup> Roosevelt to Hull, December 2, 1935, Official File 60A, FDR Library; Raymond Stevens to Roosevelt, March 3, 1937, Official File 2628, FDR Library.

<sup>513</sup> Hull to Roosevelt, May 21, 1942, Official File 60, FDR Library.

former Democratic Senator from Kansas, joined the Commission in August 1944, and spent some of his time contemplating a return to the Senate.<sup>514</sup>

During the military conflict the Commission provided extensive assistance to war agencies such as the War Production Board, the Office of Economic Warfare, the Office of Price Administration and the War Department. Annual reports for the period indicate that the amount of work provided to various interdepartmental committees by Commissioners and staff was “very substantial.”<sup>515</sup>

By 1944 postwar economic and trade issues had become a major emphasis of Congress and the administration. From December 1944 to April 1945 “the entire available staff” worked on a major report to the Senate Finance Committee on probable U.S. import trade in the postwar period. Later in 1945 the Commission focused on providing technical information for the next series of reciprocal trade negotiations.<sup>516</sup>

As attention turned to postwar planning and renewal of the tariff reduction program in the postwar period, circumstances compelled the Roosevelt and Truman administrations to give renewed attention to Tariff Commission appointments. Control of the Commission remained critical to the State Department’s goal of creating an international trade organization and cutting tariffs world-wide to construct the foundation for a stable and durable peace.

Problems emerged in 1945 when reciprocal trade was up for renewal in Congress. As the price for a two-year extension President Truman pledged not to “trade out” U.S. industry and he agreed to cut tariffs selectively only after careful study had shown that the reduction would not cause serious injury to any essential domestic industry. But, many in Congress did not trust the interdepartmental Committee on Trade Agreements to implement the pledge. The legislators had more confidence in the independent, bipartisan Tariff Commission, an agency with considerable experience assessing trade problems. Moreover, its six commissioners were Presidential appointees subject to Senate confirmation, not obscure civil servants beyond the direct reach of Congress.<sup>517</sup>

In the 1946 Congressional elections Republicans won control of both houses of Congress. During subsequent hearings to extend the reciprocal trade program in 1947, Congress complained that the executive branch was subordinating the domestic economy to “extraneous, and perhaps overvalued, diplomatic objectives.” To address Congressional

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<sup>514</sup> McGill, who had little prior experience with tariff issues, ran unsuccessfully for re-election to the Senate in 1948 and 1954.

<sup>515</sup> USTC, *Twenty-Seventh Annual Report of the USTC, 1943* (Washington, DC: GPO, January 1, 1944), 17.

<sup>516</sup> USTC, *Twenty-Ninth Annual Report of the USTC, 1945* (Washington, DC: GPO, January 3, 1946), 2.

<sup>517</sup> John Leddy note, June 30, 1945, Record Group 43, NARA; Arthur Vandenberg-Eugene Millikin joint statement, February 7, 1947, Brossard Papers, USU; Senate Finance Committee, 80<sup>th</sup> Congress, 2<sup>nd</sup> sess., Report 1558, 3–4.

complaints that the State Department and its interagency committees were blocking efforts of domestic industries to invoke escape clauses in reciprocal trade agreements from previous tariff concessions, President Truman agreed to issue Executive Order 9832 on February 25, 1947. It directed the Tariff Commission to investigate complaints either on its own motion or at the request of the President and make appropriate recommendations.<sup>518</sup>

In 1948 Congress also required that the Tariff Commission calculate peril points (the lowest tariffs necessary to avoid serious injury to domestic industry) on prospective concessions, so that future tariff reductions would not cause or threaten serious injury to domestic industries. Congress also stipulated that the Tariff Commission restrict its activities to fact-finding, and it prohibited Commissioners and staff from “participating in any policy decisions of the executive branch, or in the negotiation of trade agreements.” Tariff Commission employees would no longer be eligible for membership on interdepartmental committees. The Commission was, according to the Senate Finance Committee report, “a legislative agency.” The Commission’s annual report in 1949 used somewhat different terminology, calling the Tariff Commission an “independent agency . . . .”<sup>519</sup>

Officials at the State Department responsible for trade negotiations continued to fear that they might lose influence at the Commission. As a result of the compromises with Congress described above to win extension of the reciprocal trade program in 1947 and 1948, the State Department considered it critically important for the executive branch to appoint Commissioners supportive of trade liberalization. “Effective operation of the trade-agreements program,” said Winthrop Brown, director of the Office of International Trade Policy, “requires the recess appointment, as soon as possible, of a strong and independent supporter of the program . . . .” Without the appointment of an individual “who would act vigorously in the interests of trade-barrier reduction and independently of future reappointment possibilities,” State feared that doubts about “the lowest advisable [tariff] rate will be resolved by fixing rates which contain too much margin of safety. . . .”<sup>520</sup>

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<sup>518</sup> USTC, *Thirty-First Annual Report of the USTC, 1947* (Washington, DC: GPO, January 2, 1948), 11–12. Beginning with the 1935 bilateral trade agreement with Belgium, the administration had included a circuit-breaker mechanism, the escape clause, to prevent third countries, such as Japan, with low labor costs from reaping the principal benefits of reciprocal trade agreements. Domestic industries complained to Congress about ineffective enforcement of this provision. See, Alfred E. Eckes, Jr., *Opening America’s Market*, for a detailed discussion, 220–27.

<sup>519</sup> Senate Finance Committee, 80<sup>th</sup> Congress, 2<sup>nd</sup> sess., Report 1558, 5; USTC, *Thirty-Second Annual Report of the USTC, 1948* (Washington, DC: GPO, January 3, 1949), 1–3; USTC, *Thirty-Third Annual Report of the USTC, 1949* (Washington, DC: GPO, January 3, 1950), 1. For the extent of Tariff Commission involvement with interdepartmental committees prior to July 1948, including trade negotiations in Geneva, see USTC, *Thirty-First Annual Report* (1947), 3–17.

<sup>520</sup> Winthrop Brown to Undersecretary Robert Lovett, July 20, 1948, International Trade, Box 59, RG 43, NA.

State Department fears of a runaway, protectionist Commission proved unfounded. From 1945 to 1951, when Congress amended the trade act [Trade Agreements Extension Act of 1951] to limit the Commission's discretion in escape clause proceedings, the Tariff Commission routinely dismissed petitions for relief. It rejected fourteen of twenty-one petitions without initiating an investigation and without offering the complainants a formal hearing or written explanation. And when the Commission did conduct a full investigation, it frequently made negative findings. The Commissioners who combined regularly to reject complaints or render negative determinations all had been active in the trade agreements program—namely, Commissioners Ryder, Edminster, and Durand. The one Commissioner who frequently dissented from the majority position was Brossard, who criticized the majority's disposition to prejudge in secret without a public hearing. When the Tariff Commission did recommend relief to domestic industries, the State Department usually advised the President against extending relief. Eugene Stewart, who represented dozens of domestic industries before the Commission over a career that extended some four decades, observed: "So strong was the influence of the State Department throughout the entire history of the Commission that an affirmative determination and recommendation for relief by the Commission had but a slight chance to [take] effect."<sup>521</sup>

The history of Commission involvement with the escape clause and injury findings in anti-dumping cases (beginning in 1954) has been discussed elsewhere. However, for all post-World War II administrations the increasing use of the escape clause by import-sensitive industries appeared to present a distinct challenge to trade-liberalizing, foreign economic policies, and so increased the significance of Tariff Commission nominations. Nonetheless, the Commission generally avoided the limelight and negative press coverage that it had generated in the 1920s. Syndicated columnist Marquis Childs would write: "The Tariff Commission is like a fly preserved in amber, defying time and the elements; kept perfectly intact through the passage of the years."<sup>522</sup>

In 1953 the Eisenhower administration inherited the trade liberalization program, and soon had to deal with House Republicans who wanted to reorganize the Commission and add a seventh Commissioner. The Senate balked at this partisan effort to pack the Commission and substituted a tie-breaking provision as a compromise. In future escape clause decisions, when the Commission was equally divided, the President might regard the findings and

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<sup>521</sup> USITC, *Thirty-Fifth Annual Report of the USITC, 1951* (Washington, DC: GPO, January 8, 1952), 11–13; Alfred E. Eckes, Jr., *Opening America's Market: U.S. Foreign Trade Policy since 1776* (Chapel Hill: University of North Carolina Press, 1995), 225–27; Eugene L. Stewart, oral history interview, September 18, 1996, for ITC Historical Society, Alfred E. Eckes, interviewer, 9.

<sup>522</sup> On Commission injury assessments in escape clause and antidumping cases, see Eckes, *Opening America's Market* (1995), 219–77; Eugene L. Stewart, "Notes of an Historical Overview of the United States Tariff Commission," unpublished manuscript, March 20, 1996, 10–70; *Washington Post*, "Pressures on the Tariff Commission," September 9, 1953, 12.

recommendations of either group of Commissioners as the findings and recommendations of the Commission. To further assuage opponents of trade liberalization, President Eisenhower named Brossard, the longest serving Commissioner, as Chairman, and made two high-tariff appointments—former Connecticut Congressman Joseph Talbot and Walter Schreiber, an agricultural “nut” specialist.<sup>523</sup>

Having restored some balance on the Commission between those who favored trade liberalization and those who desired greater protection for domestic industry, the White House began to worry that a protectionist Tariff Commission might undercut the President's liberal trade philosophy. A critical appointment came in the spring of 1954 as the Eisenhower administration contemplated negotiations with Japan. Eager to extend tariff concessions to Japan in order to facilitate its economic recuperation and to bind it to the “free world,” the White House staff expressed concern that the resignation of one low-tariff Democrat would soon give high-tariff advocates, led by Chairman Brossard, a majority on the Commission. This might produce “peril point findings . . . so restrictive that negotiation may be next to impossible.” To address the problem, the President nominated Glenn Sutton, a University of Georgia economist, and the Senate Finance Committee, chaired by Senator Walter George, of Georgia, a supporter of the reciprocal trade program, promptly confirmed him.<sup>524</sup>

The White House was not disappointed. In peril point votes involving proposed concessions to Japan, the high-tariff advocates on the Commission lacked a majority, and the Commission split 3-to-3 on 64 statistical classes. On 44 of these items, the Trade Agreements Committee then voted to offer lower rates of duty than recommended by the high-tariff Republicans. Lower duties were offered the Japanese on chinaware, power transmission chains, cutlery, wood screws, tuna packed in oil, crab meat, cotton towels, wool blankets, imitation pearls, cork tiles, cigarette lighters, footwear, and fishing tackle—all import-sensitive items. On many of these items domestic industries subsequently sought escape-clause relief from increased imports, or filed dumping complaints, often without success. As Noel Hemmendinger, who frequently represented Japanese respondents in trade cases, observed: “My general recollection is that

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<sup>523</sup> *Washington Post*, “GOP Seen Dropping Tariff Control Plan,” August 1, 1953, 2; USTC, *Thirty-Seventh Annual Report of the USTC, 1953* (Washington, DC: GPO, January 6, 1954), 1–2.

<sup>524</sup> Joseph B. Phillips to C. D. Jackson, June 19, 1953, DDRS; Robert Macy to Gabriel Hauge, April 27, 1954, White House Central File, Official File, box 241, Dwight D. Eisenhower Papers (DDE), DDE Library.

none of that [Japanese] trade was badly hurt by whatever remedies, if any, the President adopted.”<sup>525</sup>

The Kennedy and Johnson administrations also worked to maintain executive influence over the Commission and to prevent it from becoming a protectionist, or Republican opposition, outpost. Although the Kennedy administration would set the decade's trade agenda with its call for multilateral GATT negotiations to continue the tariff liberalization process, Kennedy himself was more sensitive to the problems of declining and noncompetitive industries than some of his predecessors. As a member of Congress from Massachusetts, he had frequently supported restraints on textile imports and other products. And, as President he approved several Tariff Commission recommendations for escape clause relief from domestic producers of carpets and rugs, sheet glass, and cotton typewriter-ribbon cloth. But, these were exceptions—perhaps intended to appease high-tariff supporters in Congress.

President Lyndon Johnson was devoted to tariff reduction and freer trade. In 1967 his administration had responsibility for concluding the Kennedy Round of multilateral trade negotiations at a time of rising Congressional dissatisfaction with import competition. Johnson and his advisers recognized that success in the Kennedy Round negotiations, and their ability to implement agreements made, depended on having a Tariff Commission sympathetic to the trade expansion program.

In their Tariff Commission appointments, Kennedy and Johnson adhered to the pattern established in the Roosevelt and Truman presidencies. Insofar as possible, they avoided known protectionists, and high-tariff Republicans, while designating perceived free-traders and administration loyalists as Chairman and Vice Chairman. Like other Presidents before him, Kennedy also found the Commission a useful place to station friends and supporters—such as Dan Fenn, a White House staff member and friend from Boston, and James W. Culliton, a former Harvard University professor. Both served effectively on the Commission.<sup>526</sup>

In their appointments both Kennedy and Johnson avoided Republicans with ties to Congress. Instead, they named “independents” to satisfy the statutory requirement for balanced

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<sup>525</sup> Carl D. Corse, Chairman, Interdepartmental Committee on Trade Agreements, to President Eisenhower, February 15, 1955, WHCF, Official File, Confidential, Box 91, DDE Library; U.S. Department of State (USDOS), *General Agreement on Tariffs and Trade Analysis of Protocol (including Schedules for Accession of Japan)* (Washington, DC: USDOS, 1955); Noel Hemmendinger, oral history interview, March 20, 1996, for the ITC Historical Society, Bruce E. Clubb, interviewer, 4. In a 1958 report, the U.S. Tariff Commission noted an increasing number of protests from domestic producers about Japanese imports. USTC, *Postwar Developments in Japan's Foreign Trade* (Washington, DC: GPO, March 1958). The report did not address any connection between increased imports and U.S. tariff concessions.

<sup>526</sup> *Washington Post*, “Senate Confirms Bullitt Nomination,” February 22, 1963, A2; *Washington Post*, “Kennedy to Name Fenn to Tariff Commission,” August 25, 1963, A5.

appointments. Kennedy replaced Allen Overton, an Eisenhower Republican, with Culliton, a political independent and dean of the University of Notre Dame's College of Business Administration. Johnson also appointed independents, or simply left vacancies unfilled. In place of Schreiber, the "nut expert," he nominated the first woman commissioner, Penelope Hartland Thunberg, a political independent and free-trade-oriented economist. To succeed Talbot, a former Republican Congressman, who died in office in 1966, he selected Bruce Clubb, a young attorney of Native American ancestry from Blackduck, Minnesota. Clubb, although a registered Republican, had no Congressional ties. He had been active in Johnson's 1964 re-election campaign. It is significant to observe that for all but five months of President Johnson's 62 months in office, the Tariff Commission operated without a full component of commissioners.<sup>527</sup>

To chair the Tariff Commission, the Kennedy and Johnson administrations selected free-traders whose support for the trade liberalization program had been repeatedly proven. Two of these were former Commission staff members, Ben Dorfman and Paul Kaplowitz. Both had strong ties to the State Department trade liberalization network. Dorfman, the Commission's chief economist, had undertaken a number of international assignments, and participated as a member of the U.S. delegation in four rounds of GATT negotiations. In choosing Dorfman, Kennedy ignored the senior Democrat on the Tariff Commission, Glenn Sutton, an Eisenhower appointee, strongly backed by Senator Eugene Talmadge (D-GA), a member of the Senate Finance Committee. Perhaps for this reason, Congress declined to act on the nomination in 1961, and Kennedy chose to make a recess appointment for Dorfman and then named him chairman.<sup>528</sup>

As his successor, Dorfman recommended Kaplowitz to the White House. Kaplowitz, previously the Commission's General Counsel, also had impeccable internationalist credentials, having

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<sup>527</sup> Former Kennedy aide Ralph A. Dungan explained to President Johnson that no Vice Chairman had been designated for the Tariff Commission since 1961 "principally because the eligible commissioners during this period have been either Republicans and/or protectionists whose views on tariffs and foreign trade would be out of line with administration policy." Dungan to President Johnson, White House Official File, FG 297A, September 15, 1964, Lyndon B. Johnson Papers (LBJ), LBJ Library, Austin, TX. The Johnson White House was troubled when Clubb joined with Culliton and Sutton to criticize the anti-dumping code negotiated in the Kennedy Round, while only Metzger and Thunberg defended it. Senate Finance Committee, 90th Cong., 2nd sess., *International Antidumping Code*, 96–120. To win easy Senate confirmation of the free-trade Thunberg for a Republican slot, it is significant that Johnson first renominated the high-tariff Talbot, a former Republican Congressman.

<sup>528</sup> *New York Times*, "Senate Stalling on Tariff Choice," September 8, 1961, 4; *New York Times*, "Senate Clash Has 2 Casualties," September 29, 1961, 21; and *New York Times*, "Dorfman to Head Tariff Commission," November 1, 1961, 25.



served as chief draftsman of the General Agreement on Tariffs and Trade in 1947, and then having participated in several subsequent rounds of multilateral trade negotiations.<sup>529</sup>

Kaplowitz in turn picked his successor, suggesting another insider and proponent of trade liberalization, Stanley Metzger, a former State Department legal advisor and professor of law at Georgetown University. “It is important,” Kaplowitz told the Johnson administration, “to have a knowledgeable and capable person in the chairmanship at this time, and Metzger is someone who would command respect and exercise control. He is a free trader.” But, Metzger, who was bright, abrasive, and a onetime member of the National Lawyers Guild, had his share of critics. Organized labor was hostile to Metzger's trade philosophy, and at a stormy confirmation hearing, Senator Vance Hartke (D-IN) grilled Metzger on the recently negotiated Kennedy Round antidumping code. However, the law professor was confirmed.<sup>530</sup>

Soon, Metzger had the White House battling with the Finance Committee. He complained to the White House that the Tariff Commission was a “floating crap game.” The new Chairman claimed that he lacked a working majority, and he urged the White House to nominate economist Bernard Norwood, previously chairman of the interagency Trade Staff Committee and an independent. Metzger assured the White House that Norwood was “absolutely dependable.” Then, when a majority of the Tariff Commission—but not Johnson appointees Metzger and Thunberg -- voted to criticize the proposed international Antidumping Code as conflicting with domestic law, White House aides prevailed upon Johnson to rush the nomination forward. Said White House aide De Vier Pierson to Johnson, “we could head off adverse decisions on the Antidumping Code by filling . . . slots with [Tariff] Commissioners who have a liberal trade philosophy. I believe it is in our interest to do so.”<sup>531</sup>

Senate Finance Committee Chairman Senator Russell Long (D-LA), who had succeeded the more supportive Harry Flood Byrd (D-VA) in January 1966, surmised that Metzger was maneuvering to stack the Commission with free trade enthusiasts. “It was a case of the Executive usurping

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<sup>529</sup> *Washington Post*, “Kaplowitz to Head Tariff Commission,” December 19, 1965, A6; Paul Kaplowitz file, in John W. Macy personnel files, LBJ Library; biographical information from USITC, *Commissioners of the United States Tariff Commission and United States International Trade Commission*, Office of the Secretary (Washington, DC: USITC, November 1988).

<sup>530</sup> Stanley Metzger file, in John W. Macy Papers (JWM), LBJ Library. House Ways and Means Committee Chairman Wilbur Mills (D-AR) had suggested and endorsed the nomination of Stanley Metzger to the Commission. Paul Kaplowitz also commented on Mills’ “high regard for Metzger, presumably because he often testified before Mills’ committee.” Mills to Lawrence F. O’Brien, October 1, 1965; Joseph Califano to John Macy, October 11, 1965; James Marsh memo of Kaplowitz comments, June 2, 1967, all in Metzger File, JWM, LBJ Library.

<sup>531</sup> Metzger also sought to recruit fellow law professor John H. Jackson from the University of Michigan, but he declined. Jackson to Metzger, April 29, 1968, Metzger file, JWM, LBJ Library. Senate Finance Committee, 90th Cong., 2nd sess., *International Antidumping Code*, 96–120; John W. Macy, Jr., to President, February 16, 1968, Metzger File, JWM; and DeVier Pierson to Johnson, March 4, 1968, White House Central File, Legislation/TA6, box 155, both in LBJ Library.

the functions of the Congress,” Long complained, and he blocked Norwood's appointment, refusing even to hold a Finance Committee hearing on the nomination. In time his old Senate friend and colleague, President Johnson, personally negotiated a compromise. Long agreed to confirm another administration nominee, Hershel Newsom, master of the National Grange and a loyal supporter of the trade expansion program, for a second Commission vacancy. In return, Norwood withdrew, and the President nominated Bill Leonard, one of Long's aides on the Finance Committee staff. Long's nominee, Leonard, served nearly nine years, while Johnson's candidate, Newsom, died in office 19 months after taking his oath.<sup>532</sup>

Metzger continued to make controversial suggestions until his resignation in July 1969. Early in the Nixon administration, the departing Chairman told reporters the Tariff Commission has “not enough to do. There's not enough of a job here for a chairman—let alone five other commissioners.” Indicating that two hours of concentrated work daily would be sufficient to perform his duties, the Chairman complained: “There's not enough to do. And it's not mind-stretching. It's basically dull.” The agency was engaged in little more than a “garbage function.” Staff members spend time “polishing the brass.” He proposed that the Commission shed its quasi-judicial functions—involving antidumping injury determinations and other unfair trade cases—and that Congress eliminate five of the six commissioners. Instead, he suggested the Tariff Commission focus on fact-finding and research, becoming “the foreign trade counterpart of the Bureau of Labor Statistics.” The White House took note of Metzger's recommendation, but concluded that “it is almost certain to provoke congressional resistance” from Senate Finance Committee Chairman Long and others.<sup>533</sup>

The war for control of the Tariff Commission between Congress and the Executive did not end with Commissioner Metzger's departure. It is arguable that this fascinating, third phase of executive branch efforts to influence the agency came to a close some five years later in 1974 with enactment of the Trade Act of 1974.

After the Kennedy Round of multilateral negotiations concluded in 1967, resistance grew in Congress to additional trade negotiating authority. The steel, textile, and footwear industries, among others, experienced rising import competition, and Congress considered legislation imposing import quotas. In its report on the Trade Act of 1970, the Senate Finance Committee reiterated its view that the Tariff Commission was a “permanent independent nonpartisan body” for providing technical and fact-finding assistance to Congress and the President for use in determining trade policies. While observing that trade and problems involving trade were at

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<sup>532</sup> Senate Finance Committee, “Nominations of Will E. Leonard, Jr., and Herschel D. Newsom,” hearings, 90th Cong., 2nd sess., October 9, 1968, 9.

<sup>533</sup> *Business Abroad*, “Digging Up More Trade Facts and Forget Policy,” *Business Abroad*, February 1969, 23–24; *Life*, February 7, 1969, 28, described Metzger as “a hero among bureaucrats;” Peter M. Flanigan to H.R. Haldeman, July 22, 1969, DDRS.

a historic high point, the Finance Committee noted that the Commission's staff had declined from 278 to 200 since conclusion of the Kennedy Round, and that staff was well below the average of 315 in the five-year period 1931–35 when imports were lowest. Noting that the Bureau of the Budget was severely cutting back on the Commission's budgetary requests, the committee believed that:

The only way to preserve the strict 'independence' of the Commission from unwarranted interference or influence by the executive branch is to place its budget directly under the control of the Congress.<sup>534</sup>

The 1970 Trade Act died on the floor when Congress adjourned. But, the Nixon administration would seek new trade negotiating authority for another multilateral round to deal with non-tariff barriers and unfair trade practices. The administration, weakened from the Watergate revelations, obtained much-coveted fast-track authority, which would avoid the problem of Congressional amendments to a negotiated pact. But the agreement came at some cost to the executive branch. It had to involve Congress in the negotiating process from beginning to end in return for the much sought up-or-down vote soon after submission of the pact.

The Senate Finance Committee used these negotiations to strengthen the independence of the Tariff Commission, which all agreed should be renamed the U.S. International Trade Commission in light of the growing importance of non-tariff barriers. But, in executive mark-up the Finance Committee also demanded, and achieved, budgetary independence for the Commission, and authority to represent itself in legal proceedings. Previously, it was required that the Department of Justice represent the Commission. These provisions gave the U.S. International Trade Commission a unique amount of independence within the government framework, limiting the ways that outside parties could dominate the Commission's fact-finding and investigations. Senate Finance Committee Chairman Long had insisted on these changes; he considered the Commission an "arm of Congress."

The committee's overall analysis of the circumstances that produced this outcome is told in the Senate Finance Committee's report. It emphasized:

"The Tariff Commission . . . is a permanent, independent, nonpartisan agency whose principal function is to provide technical and fact-finding assistance to the Congress and the President upon the basis of which trade policies may be determined. The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch. For this reason, many of

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<sup>534</sup> Senate Finance Committee, *Social Security Amendments of 1970*, to accompany H.R. 17550, 91st Cong., 2d sess., Report No. 91-1431, (1970), 281–282.

the amendments offered in this bill with regard to the Commission are directed at strengthening its independence.”<sup>535</sup>

The 1974 Act also lengthened the terms of Commissioners from six years to nine. In 1978, the 95th Congress changed the procedure for designating the Chairman and Vice Chairman. Previously, the Chairmanship had rotated every 18 months. Now Chairmen and Vice Chairmen would serve for two-year terms (each from a different party), and they must be succeeded by a person from a different party. This legislation vested strong administrative authority in the Commission’s Chairman.

The statutory changes of 1974 were important milestones in the agency’s history. As the Tariff Commission metamorphosed into the U.S. International Trade Commission during the 1970s, it increasingly became a quasi-judicial agency subject to court review. The agency also retained fact-finding duties that had evolved significantly from its conception in 1917. Future historians would be in the best position to assess whether the statutory changes, enacted in 1974, had succeeded in strengthening the agency’s independence and in protecting the integrity of its investigations from pernicious influences.

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<sup>535</sup> Senate Finance Committee, *Trade Reform Act of 1974*, 115–18.

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# Part IV

## Investigations



## Chapter 9

# Antidumping and Countervailing Duty Investigations



**Photo:** Former Commissioners Deanna Tanner Okun and Charlotte Lane and attorney Paul Rosenthal examining exhibits in an investigation involving pineapples.

**Lynn Featherstone and James M. Lyons**<sup>536</sup>

This chapter provides a brief history of the law concerning antidumping and countervailing duty investigations<sup>537</sup> and addresses the Commission's role in conducting such investigations, including its practices and procedures in doing so. More detailed information can be found in the Commission's Rules of Practice and Procedure,<sup>538</sup> as well as many documents, such as the Antidumping and Countervailing Duty Handbook, generic questionnaires, and statutory timetables, on its website (<http://www.usitc.gov>).

## Antidumping Investigations

When foreign merchandise is sold in the United States at less than fair value it can be found (by the U.S. Department of Commerce (Commerce)) to be dumped,<sup>539</sup> and when a U.S. industry is materially injured, or threatened with material injury, or the establishment of an industry is materially retarded by reason of imports or sales for importation of such merchandise (as determined by the Commission), antidumping duties can be imposed on such imports to offset the dumping.

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<sup>536</sup>Mr. Featherstone is a former Director of the Commission's Office of Investigations. Mr. Lyons was General Counsel.

<sup>537</sup>Including some information also presented in *Overview and Compilation of U.S. Trade Statutes*, Committee on Ways and Means, U.S. House of Representatives, 111th Congress, 2nd sess., 2010 Edition, December 2010.

<sup>538</sup>19 C.F.R. pts. 201, 207 (2016).

<sup>539</sup>Dumping is defined in section 771(34) of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1677(34)) as "the sale or likely sale of goods at less than fair value." More specifically, it is defined as selling an imported product in the United States at a price which is lower than the price for which it is sold in the home market (the "normal value"), after adjustments for differences in the merchandise, quantities purchased, and circumstances of sale. In the absence of sufficient home-market sales, the price for which the product is sold in a surrogate "third country" may be used. Finally, in the absence of sufficient home-market and third-country sales, or if sales have been at less than the cost of production, "constructed value," which uses a cost-plus-profit approach to arrive at normal value, may be used.

There has been at least some concern about dumping in the United States since the 1800's, but the first U.S. legislation to address it was section 801 of the Revenue Act of 1916,<sup>540</sup> which also established the Commission in section 700. However, the Commission played no role in its antidumping provisions.<sup>541</sup>

The first statute with provisions for administrative determinations was the Antidumping Act of 1921.<sup>542</sup> The Department of the Treasury (Treasury) was responsible for making all determinations until 1954, when an amendment tasked the Commission with making injury determinations.<sup>543</sup> From 1954 through 1979, when the 1921 Act was repealed,<sup>544</sup> the Commission conducted 223 investigations under it, making 101 (45 percent) affirmative determinations and 117 (53 percent) negative (five cases (2 percent) were terminated without a determination).<sup>545</sup> These investigations were generally conducted by an investigative team including an accountant, attorney, commodity-industry analyst, economist, and supervisory investigator.

With repeal of the 1921 Act in 1979, Congress established new procedures for conducting antidumping investigations<sup>546</sup> to conform with provisions of the recently completed Tokyo Round of Multilateral Trade Negotiations (Tokyo Round), and transferred Treasury's role in determining whether dumping exists to Commerce.<sup>547</sup>

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<sup>540</sup> Revenue Act of 1916, Pub. L. No. 64-271, § 801, 39 Stat. 756, 798, 799 (1916).

<sup>541</sup> The antidumping provisions of the 1916 Act were repealed in section 2006 of the Miscellaneous Trade and Technical Corrections Act of 2004 (Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597). They had provided for significant penalties (including treble damages plus costs), but the threshold for relief was also high, requiring the imported products to be sold "at a price substantially less than the actual market value or wholesale price of such articles" and that "such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

<sup>542</sup> Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11 (amended in the Antidumping Act of 1958, Pub. L. No. 85-630, 72 Stat. 583).

<sup>543</sup> Customs Simplification Act of 1954, Pub. L. No. 83-768, § 301, 68 Stat. 1136, 1138.

<sup>544</sup> Trade Agreements Act of 1979, 19 U.S.C. § 2501 (repealing the Antidumping Act of 1921).

<sup>545</sup> Two early investigations were identified with a single number but covered more than one country (AA1921-2, involving West Germany and France, and AA1921-6, involving East Germany and Czechoslovakia). Accordingly, on the basis of countries cited, there were 225 cases, 101 (45 percent) of which were affirmative, 119 (53 percent) of which were negative, and five (two percent) of which were terminated.

<sup>546</sup> The new provisions were added as Title VII of the Tariff Act of 1930 (Title VII) (19 U.S.C. §§ 1671-1677), also by the Trade Agreements Act of 1979 (see note 544).

<sup>547</sup> Reorganization Plan No. 3 of 1979, 93 Stat. 1381, 1383, § 5(a)(1)(C); 19 U.S.C. §§ 1617, 1677(a); and Exec. Order No. 12188, 45 Fed. Reg. 989 (January 2, 1980).

## Countervailing Duty Investigations

When the production or exportation of foreign merchandise sold in the United States receives a countervailable subsidy (as determined by Commerce)<sup>548</sup> and a U.S. industry is materially injured, or threatened with material injury, or the establishment of an industry is materially retarded by reason of imports or sales for importation of such merchandise from a Subsidies Agreement country<sup>549</sup> (as determined by the Commission), countervailing duties can be imposed on such imports to offset the subsidization.

The first U.S. legislation that addressed subsidization practices was the Tariff Act of 1890,<sup>550</sup> but that statute addressed only imports of sugar. The Tariff Act of 1897 extended coverage to all dutiable imports.<sup>551</sup> From then until 1974 the law required Treasury to assess countervailing duties on imported dutiable goods benefitting from the payment or bestowal of an export “bounty or grant”<sup>552</sup> and did not require an injury test. The Trade Act of 1974<sup>553</sup> extended the application of the countervailing duty law to duty-free imports, subject to a showing of injury by the Commission.<sup>554</sup>

In 1979, responsibility for the subsidies determination, as with that for the dumping determination, was transferred from Treasury to Commerce, and provisions of the GATT Subsidies Code were incorporated into Title VII. The new provisions required an injury test in all countervailing duty cases involving imports from “countries under the Agreement.”<sup>555</sup> The provisions of the preexisting section 303 of the Tariff Act of 1930 were retained to cover cases involving imports from countries that were not “countries under the Agreement” (that is, they

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<sup>548</sup> Countervailable subsidies are defined in Title VII as those in which a government of a country or any public entity within the territory of the country authority provides a financial contribution, provides any form of income or price support within the meaning of the Subsidies Code of the General Agreement on Tariffs and Trade (GATT), or makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is thereby conferred (19 U.S.C. § 1677(5)).

<sup>549</sup> Subsidies Agreement countries are defined in 19 U.S.C. § 1671(b).

<sup>550</sup> Tariff Act of 1890, 26 Stat. 567, 583 (1890).

<sup>551</sup> Tariff Act of 1897, 30 Stat. 151, 205 (1897).

<sup>552</sup> Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858 (amending the law to cover bounties or grants on manufacture or production as well as on exportation).

<sup>553</sup> Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).

<sup>554</sup> These investigations were conducted under provisions of section 303 of the Tariff Act of 1930 in much the same way as antidumping investigations of the time. The Commission conducted 12 of them based on this provision from 1974 to 1980, making one affirmative determination (8 percent) and nine negative (75 percent) (two cases (17 percent) were terminated).

<sup>555</sup> “Countries under the Agreement” were countries that either were signatories to the Subsidies Code or had assumed substantially equivalent obligations to those under the Code.



were not entitled to an injury test unless the imports entered duty-free).<sup>556</sup> In 1995, to conform with provisions of the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round), section 303 was repealed, thus eliminating the requirement for an injury test in all countervailing duty cases involving non-Subsidies Agreement countries, even if they enter duty-free.<sup>557</sup>

## Conduct of Antidumping and Countervailing Duty Investigations by the Commission

The overall investigation process for antidumping and countervailing duty cases can be divided into five stages, each ending with a determination by either Commerce or the Commission: (1) initiation of the investigation by Commerce, (2) the preliminary phase of the Commission's investigation, (3) the preliminary phase of Commerce's investigation, (4) the final phase of Commerce's investigation, and (5) the final phase of the Commission's investigation. With the exception of Commerce's preliminary determination (stage 3), a negative determination by either Commerce or the Commission results in a termination of proceedings at both agencies.

Statutory deadlines apply to the five stages, although Commerce can extend (for a specified amount of time) or suspend an investigation when certain conditions are met (see, for example, sections 734(f) and 735(a)(2) of Title VII). In most cases, antidumping investigations must be completed within 390 days of the filing of a petition, and countervailing duty investigations must be completed within 370 days. Title VII also requires that information obtained by both agencies, including business proprietary information (BPI), be released to certain interested parties under administrative protective orders (APOs), and makes determinations by both Commerce and the Commission subject to judicial review (see the following section on litigation). In addition, following the Uruguay Round, amendments were made to Title VII that require reviews of all orders after they have been in place for five years.

The Commission's caseload expanded sharply after Title VII was passed in late 1979 as many more new cases were filed,<sup>558</sup> and it saw the need for a more structured organization to handle it. The Office of Investigations was expanded; standardized questionnaires, notices, and report outlines were developed; and team members from the various offices were given specific

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<sup>556</sup> The Commission conducted 13 of these investigations between 1980 and 1995, making four (31 percent) affirmative determinations and four (31 percent) negative (five cases (38 percent) were terminated).

<sup>557</sup> Uruguay Round Agreements Act, 1994, Pub. L. No. 103-465, § 261, 108 Stat. 4809, 4908–10.

<sup>558</sup> For example, a total of 92 antidumping and countervailing duty cases were filed in the five fiscal years preceding 1980, while 432 were filed in the five fiscal years from 1980 to 1984. Cases (i.e., petitions) filed is a useful statistic, but not necessarily the best for measuring workload since cases are often filed on the same product from several countries and both antidumping and countervailing duty cases are sometimes filed on the same product and country. Such cases would be conducted together at the Commission.

responsibilities.<sup>559</sup> The Commission delegated responsibility to the staff for conducting (but not making determinations in) investigations prior to the preliminary determination. Unlike in the process used in final-phase investigations, a staff conference was held, rather than a full Commission hearing.

Title VII also required that the Commission establish a Trade Remedy Assistance Office to provide information to the public upon request and, to the extent feasible, provide assistance and advice to interested parties in prospective and active investigations.<sup>560</sup>

The Uruguay Round Agreements Act also had an effect on Commission caseload since it required reviews of all existing Title VII orders and all new orders five years after they were issued. However, the new requirement for review investigations was offset to some extent by a decline in the number of new Title VII petitions filed.<sup>561</sup>

## Petition

A petition<sup>562</sup> alleging dumping and/or subsidization and injury, filed simultaneously with Commerce and the Commission, is normally the first step in antidumping and countervailing duty investigations.<sup>563</sup> Commerce, as the administering authority, must decide within 20 calendar days whether to initiate an investigation. The Commission, however, must begin its

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<sup>559</sup> For a brief period in the late seventies/early eighties a different model was employed—the single investigator. As a result of its organizational change, the Office of Investigations, which up to that time contained only a small number of supervisory investigators, was expanded to include investigators. These investigators, drawn both from the ranks of then current Commission staff as well as outside hires, were given sole responsibility for the conduct of import-injury investigations, with assistance from other offices only at their request. This approach to investigations only lasted a short time as the weight of the workload proved too much for an individual, and the team concept was restored.

<sup>560</sup> 19 U.S.C. § 1339.

<sup>561</sup> For example, a total of 339 antidumping and countervailing duty cases were filed in the five fiscal years preceding 1995, while 174 were filed in the five fiscal years from 1995 to 1999.

<sup>562</sup> Petitions may only be filed by an interested party on behalf of an industry. For petition purposes, interested parties include a manufacturer, producer, or wholesaler in the United States of a domestic like product; a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product; a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States; an association, a majority of whose members is composed of interested parties described above; and, generally, in any investigation involving an industry engaged in producing a processed agricultural product, a coalition or trade association which is representative of either processors, processors and producers, or processors and growers (19 U.S.C. §§ 1677(9)(C)–(E)).

<sup>563</sup> Commerce also has the authority to self-initiate an investigation when circumstances warrant (19 U.S.C. §§ 1671(a), 1673(a)).

investigation immediately since it only has 45 calendar days to make its preliminary injury determination.<sup>564</sup>

## Institution Activities

In general, a team of staff members is first assigned to conduct the investigation, under supervision of a supervisory investigator. The team includes an investigator, economist, industry analyst, accountant/financial analyst, attorney, and statistician. They prepare a Notice of Institution for publication in the *Federal Register* after approval by the Director of Operations<sup>565</sup> and the Secretary's office assigns a number to the investigation.<sup>566</sup> The Notice includes information on the investigation's schedule, including dates for the staff conference or Commission hearing and due dates for all submissions to the Commission. It also contains instructions for persons wishing to become parties to the investigation and/or appear at the Commission's conference or hearing, and for those authorized applicants representing interested parties who are parties to the investigation to request inclusion in the APO issued by the Commission in the investigation.<sup>567</sup> <sup>568</sup> Responsibilities for report sections are also assigned during this time.

## Questionnaires and Verification

Next, the team drafts questionnaires for review and approval by the Commission. Questionnaires are similar in both preliminary and final investigations<sup>569</sup> and request

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<sup>564</sup> Both agencies work closely with petitioner (and each other) during this time (and preferably before the filing) to ensure that the petition is adequate to begin an investigation.

<sup>565</sup> Like essentially all investigative documents, the Notice is also posted on the Commission's website, <http://www.usitc.gov>.

<sup>566</sup> Investigation numbers are assigned sequentially and separately for antidumping and countervailing duty investigations, by product and country. A parenthetical following the number indicates the stage of the investigation. For example, the preliminary stage of an antidumping investigation could be numbered 731-TA-2016 (Preliminary): PRODUCT from COUNTRY. "731" refers to the Title VII antidumping provisions and "TA" refers to the Tariff Act of 1930. Similarly, a 1<sup>st</sup> review of a countervailing duty investigation could be numbered 701-TA-2016 (1<sup>st</sup> Review): PRODUCT from COUNTRY, where "701" refers to the Title VII countervailing duty provisions and "TA" again refers to the Tariff Act of 1930.

<sup>567</sup> For these and all other references to "interested parties" other than those that can file a petition (see note 562), it also includes a foreign manufacturer, producer, or exporter, or the U.S. importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise; and the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported (19 U.S.C. §§ 1677(9)(A)–(B)).

<sup>568</sup> The Secretary to the Commission prepares separate service lists for parties to an investigation and those included in its APO. All public filings must be served on the former, while filings containing BPI must be served only on the latter. The Commission is very protective of all BPI it obtains during investigations and ensures that participants are equally protected through use of an APO, which includes harsh penalties for violation.

<sup>569</sup> Except that those used in final phase investigations typically address more issues (especially issues identified in the preliminary determination) and are sent to more market participants.

information to address the statutory factors the Commission is to consider in making its required determination(s).<sup>570</sup> Once approved by the Commission, they are e-mailed to all identified market participants, or a sample thereof in the case of highly fragmented industries.<sup>571</sup>

Responses are mandatory and the Commission has subpoena authority to compel responses if necessary. The team verifies that information submitted in questionnaires is complete and reasonable for inclusion in the investigation. Attempts are made to correct deficiencies by direct contact with respondents and, as time permits, on-site verifications, with a focus on financial data submitted, by at least the assigned accountant, and often other assigned team members as well. Verification visits include a detailed review of internal company documentation to support the information submitted and, especially for producers, generally include a plant tour. Some verifications occur in the offices of counsel for the respondent.

## Fieldwork

Fieldwork is frequently conducted by the team<sup>572</sup> in investigations. The purpose of fieldwork is to further the Commission's knowledge of the subject product and its production techniques, uses, channels of distribution, pricing, etc., in addition to verification of information submitted in questionnaires. In preliminaries, it is limited because of time constraints but would normally include a visit to at least the petitioner's plant. In finals and reviews, importers and purchasers are also often visited and, rarely, foreign producers or exporters. Team participants usually include the investigator, industry analyst, and economist, as well as the accountant if a verification is to be conducted. Sometimes the supervisory investigator and attorney also participate.

## Hearings and Conferences<sup>573</sup>

The hearing held in connection with Title VII investigations provides the Commission an opportunity to further gather information for the investigative record and facilitate its eventual determination on the petition. The hearing also gives market participants and those with an interest in the market the opportunity to interact directly with Commissioners, and vice-versa.

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<sup>570</sup> Pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35), questionnaires are vetted by the Office of Management and Budget. Both generic questionnaires and those used in every Commission investigation are posted on its website. The factors they are designed to address are those specified in Title VII.

<sup>571</sup> Commission statisticians assist in developing statistically valid samples, as well as in compiling data submitted.

<sup>572</sup> Commissioners may, of course, also participate in fieldwork if they wish to.

<sup>573</sup> Most of the process information in this section is addressed in detail in the Commission's *Rules*, as well as the *Guidelines for Hearings* posted on the website. Information may also be obtained from the Hearings Coordinator in the Office of the Secretary.

All participants are strongly encouraged to file a prehearing brief containing the information they intend to submit and the arguments they intend to make at the hearing,<sup>574</sup> and must participate in a prehearing conference with the team, generally by phone, where time allocations are given and the hearing organized for optimal effectiveness. Each side is generally allotted one hour for presentations, not including time spent answering questions from Commissioners. Petitioner and those in support of the petition generally go first. Hearings are relatively formal, with witnesses sworn, a verbatim transcript prepared, and time allocations strictly enforced. Commissioner questioning generally begins after each one-hour presentation and is rotated among Commissioners with each Commissioner typically allotted 10 minutes per round. Other hearing participants, including the team, can also ask questions of speakers, but briefly. Hearings are open to the public unless portions are closed to allow the discussion of BPI.

Conferences held during the preliminary phase of investigations are similar to hearings but are conducted by the team and are somewhat less formal. For example, witnesses are not sworn<sup>575</sup> and there are no provisions for a preconference brief. They are generally chaired by the Director of Investigations in the Commission's Hearing Room. The Commissioner's dais is empty, although Commissioners are welcome to attend if they wish.<sup>576</sup> Time limits for presentations are similar to those in hearings and they are also strictly enforced. Likewise, a verbatim transcript is prepared.

## Submissions to the Commission

In addition to the petition, questionnaires, and hearing, most information from parties and interested parties in Title VII investigations is provided to the Commission in written submissions. In preliminary phase investigations that submission is the postconference brief.<sup>577</sup> In final phase investigations there are several opportunities for submissions. First, parties are given the opportunity to comment on draft questionnaires before they are submitted to the Commission for approval. Next is the prehearing brief, which is intended to be each party's primary vehicle for making its arguments. It has no page limitation and is due five business days before the hearing.<sup>578</sup> Witness testimony may also be (but is not required to be) submitted prior to the hearing. The posthearing brief, including answers to questions asked of the party

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<sup>574</sup> Witness testimony may also be submitted (19 U.S.C. § 1677f(7)).

<sup>575</sup> Witnesses are reminded of the applicability of 18 U.S.C. § 1001 to false or misleading statements, and of the fact that the record of the proceeding may be subject to judicial scrutiny if there is an appeal.

<sup>576</sup> As with hearings, conferences are also broadcast within the Commission on closed-circuit television.

<sup>577</sup> Nonparties may submit a brief written statement of information pertinent to the investigation within the same time frame.

<sup>578</sup> As with preliminary phase investigations, nonparties may also submit a brief written statement of information pertinent to the investigation within this time frame.

during the hearing, follows, and then parties may file final comments on any information released to them by the Commission after posthearing briefs are filed.

## Staff Reports and Memoranda

Reports<sup>579</sup> produced by the assigned team (i.e., “staff reports”) are the primary means by which information collected by the team during a Title VII investigation is made available to Commissioners (and parties to an investigation). The staff report is an objective, factual document written by the assigned staff. It consists of a presentation and analysis of the statistical data<sup>580</sup> and other information collected or submitted during the investigation. It also addresses various factual issues that are relevant to the investigation, including issues raised by the parties at the conference or hearing, and in briefs. The staff report does not contain any recommendations regarding determinations that the Commission ultimately must make. After review by the supervisory investigator, and subsequent review by personnel in various offices throughout the Commission, the staff report is transmitted to the Commission and released to parties (BPI version to APO parties, public version to others).

### Abbreviated Staff Report Outline

**Part I:** Introduction (case background, summary of data presented in the report, nature and extent of dumping and/or subsidies, detailed information on the subject product, domestic like product and domestic industry issues, etc.)

**Part II:** Conditions of competition in the U.S. market (U.S. market characteristics, supply and demand considerations, substitutability issues, etc.)

**Part III:** U.S. producers’ production, shipments, and employment

**Part IV:** U.S. imports, apparent U.S. consumption, and market shares

**Part V:** Pricing data (factors affecting prices, pricing practices, price data, lost sales and revenues, etc.)

**Part VI:** Financial experience of U.S. producers (operations on the subject product, capital expenditures, research and development expenses, assets and return on assets, capital and investment, etc.)

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<sup>579</sup> An abbreviated staff report outline is presented below.

<sup>580</sup> Statistical data are generally presented in aggregate form, although disaggregated data may be presented where appropriate.

**Part VII:** Threat considerations and information on nonsubject countries (the industry in the subject country(ies), U.S. inventories of imported merchandise, information on nonsubject countries, etc.)

**Appendices** (*Federal Register* notices, hearing witnesses, summary data, etc.)

In preliminary phase investigations there is one staff report, which is usually submitted about five weeks into the investigation (or four business days before the scheduled vote). In final phase investigations and full 5-year reviews there are two, one submitted before the hearing and one before the vote.

The General Counsel also provides the Commission with a legal-issues memorandum in all investigations, written by the assigned staff attorney, that identifies the relevant legal issues in the investigation, summarizes the arguments on both sides of the issues, and provides pertinent legal advice. This memorandum is transmitted a few days after the final staff report and is not released outside the Commission because of attorney-client privilege. Unlike the staff report, recommendations are made in this memorandum on legal issues in the investigation, such as identification of the domestic like product and the industry involved.

Other memoranda in response to requests by specific Commissioners may be transmitted to the Commission at any time prior to the vote, and Commissioners may also request briefings by the assigned team.

## Commission Determination

The Commission must determine<sup>581</sup> whether an industry in the United States<sup>582</sup> is materially injured,<sup>583</sup> or is threatened with material injury,<sup>584</sup> or the establishment of an industry in the United States is materially retarded,<sup>585</sup> by reason of imports of the subject merchandise (the

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<sup>581</sup> A tie vote is an affirmative vote (19 U.S.C. § 1677(11)).

<sup>582</sup> “Industry” means 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 producers. There are also provisions to examine a regional industry and/or to enable the Commission to exclude producers from the analysis if they are related to an exporter or importer of the subject merchandise, or are also importers of the subject merchandise, as well as numerous other provisions (19 U.S.C. § 1677(4)). The “domestic like product” is a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation (19 U.S.C. § 1677(10)).

<sup>583</sup> “Material injury” means harm which is not inconsequential, immaterial, or unimportant (19 U.S.C. § 1677(7)(A)).

<sup>584</sup> Factors to be considered are specified in 19 U.S.C. § 1677(7)(F).

<sup>585</sup> The statute does not define “material retardation” and there have been very few cases where it was an issue.

merchandise identified in Commerce’s initiation notice), and that imports of that merchandise are not negligible.<sup>586</sup>

In making material injury determinations the Commission is to consider the volume of imports of the subject merchandise, the effect of imports of that merchandise on prices in the United States for like products, and the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States, and may consider such other economic factors as are relevant to the determination.<sup>587</sup> The Commission is to cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which petitions were filed and investigations were initiated on the same day if such imports compete with each other and with domestic like products in the U.S. market.<sup>588</sup>

Commissioners typically announce their determinations (i.e., vote) in a public meeting, where they also approve the staff report, thus making it the Commission’s report. “Statements of reasons,” often referred to as “opinions,” are prepared for all determinations, with the assigned attorney generally drafting majority statements, and assisting with others as requested. Opinions have generally grown longer over time, in part due to reviewing courts asking for more detail. A public version of the determination, statements of reasons, and report are then combined, transmitted to Commerce on or before the statutory deadline, and published. A business proprietary version is also prepared, placed in the record, and released to parties on the APO service list. The determination is also published in the *Federal Register*.

During FY 1980–2014 a total of 1,802 new Title VII cases were filed (1,257 antidumping and 545 countervailing duty). The Commission made affirmative determinations in 738 (40.9 percent) of these and negative determinations in 686 (38.1 percent) (378 cases (21.0 percent) were terminated or suspended). Cases covering the largest volumes of subject imports included those on many steel products, software lumber, minivans, shrimp, and wooden bedroom furniture. An additional 64 cases were filed in FY 2015. As of December 2015, there were a total of 328 Title VII orders in place (265 antidumping and 63 countervailing duty).

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<sup>586</sup> The preliminary determination addresses whether there is a reasonable indication of such injury. Imports are “negligible” if they account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes the filing of the petition or initiation of the investigation, or less than 7 percent of the volume of all such merchandise imported into the United States during that period if cumulation (see below) is appropriate (19 U.S.C. § 1677(24)).

<sup>587</sup> 19 U.S.C. § 1677(7)(B).

<sup>588</sup> Section 612 of the Trade and Tariff Act 1984 amended Title VII to make cumulation mandatory in analysis of current material injury by reason of subject imports by adding the provision now codified at 19 USC § 1677(7)(G). Pub. L. No. 98-573, § 612, 98 Stat. 2948 (1984). Prior to that cumulation was discretionary. The 1984 amendment did not address cumulation in the circumstance of threat of material injury, which continued to be discretionary. The Uruguay Round Agreements Act added the provision now codified at 19 U.S.C. § 1677(7)(H) to the statute, which expressly states that cumulation is discretionary in threat analysis.



## Review Investigations

Review investigations are conducted five years after an antidumping or countervailing order is issued.<sup>589</sup> They are conducted in essentially the same way as original investigations, but the Commission’s determination is whether or not “revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>590</sup>

During FY 1980–2014 a total of 994 Title VII review investigations were conducted, including many 2nd, 3rd, and some 4th reviews. The orders were not revoked in 629 (63.3 percent) of these, while the Commission made a determination to revoke the order in 127 (12.8 percent) and Commerce suspended or terminated the case in 238 (23.9 percent). An additional 57 cases were instituted in FY 2015.<sup>591</sup>

## Litigation

### Judicial Review

Determinations made by the Commission in antidumping and countervailing duty proceedings are generally subject to judicial review. The Trade Agreements Act of 1979<sup>592</sup> established the fundamental aspects of such review, and applicable law has changed relatively little since then. Jurisdiction over challenges to Commission determinations was granted to the U.S. Court

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<sup>589</sup> 19 U.S.C. § 1675(c). In addition, an interested party may request that the Commission conduct a review investigation based on “changed circumstances” after an antidumping or countervailing duty order (or suspension agreement) has been in place at least 24 months (19 U.S.C. § 1675(b)). The Commission has conducted 29 changed circumstances reviews since 1980. It made determinations to not revoke the order in nine (31 percent) and to revoke the order in 10 (34 percent) (10 cases (34 percent) were terminated).

<sup>590</sup> 19 U.S.C. § 1675a(a).

<sup>591</sup> Section 104 of the Trade Agreements Act of 1979 (Trade Agreements Act of 1979, Pub. L. No. 96-39, § 104, 93 Stat. 144, 190–93) and section 753 of Title VII (Title VII of the Tariff Act of 1930, § 753 (codified as amended at 19 U.S.C. § 1675b)) made separate provisions to review countervailing duty orders for which there had been no injury determination. The Commission conducted 26 section 104 investigations, making determinations to not revoke the order in four (15 percent) and revoke the order in 18 (70 percent) (four cases (15 percent) were terminated). It conducted 35 section 753 investigations, making a determination to revoke the order in all of them.

<sup>592</sup> Pub. L. No. 96-39, title X, § 1001(a), July 26, 1979, 93 Stat. 300.

of International Trade,<sup>593</sup> with jurisdiction for appeals from final Court of International Trade decisions established in the U.S. Court of Appeals for the Federal Circuit.<sup>594</sup>

In establishing the right to judicial review of certain enumerated Commission determinations, Congress gave standing to those interested parties to an investigation, as defined by statute, that participated in the specific agency proceeding for which they are seeking review.<sup>595</sup> For this purpose, interested parties are statutorily defined to include: a foreign manufacturer, producer or exporter or the United States importer of subject merchandise; the government in which such merchandise is produced or from which such merchandise is exported; a manufacturer, producer or wholesaler in the United States of a domestic like product;<sup>596</sup> a certified union or recognized union or group of workers which is representative of an industry engaged in the production, manufacture, or wholesale of a domestic like product; or a trade or business association participating in these same activities.

Generally speaking, Commission determinations that bring a proceeding to a close are subject to judicial review. For example, final Commission determinations under section 1671d(b) and 1673d(b) concluding countervailing duty and antidumping duty investigations, respectively, may be challenged in the Court of International Trade.<sup>597</sup> Similarly, final Commission determinations pursuant to section 1675 (c) in five-year administrative reviews are subject to judicial review.<sup>598</sup> Negative injury determinations in preliminary antidumping and countervailing duty investigations are also appealable because they have the effect of terminating a proceeding.<sup>599</sup>

The courts will uphold a Commission final determination if it is based on substantial evidence on the record and is otherwise in accordance with law.<sup>600</sup> However, the standard of review is slightly different in appeals of negative preliminary injury determinations. There the Court will

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<sup>593</sup> See 28 U.S.C. § 1581(c).

<sup>594</sup> See 28 U.S.C. § 1295(a)(5). The predecessor of the Court of International Trade was the U.S. Customs Court. Pub. L. No. 96-417, § 601(7), 94 Stat. 1727, 1744 (1980) redesignated the U.S. Customs Court as the United States Court of International Trade. Separate legislation established the U.S. Court of Appeals for the Federal Circuit. Appellate review had previously been assigned primarily to the Court of Customs and Patent Appeals (the “CCPA”). See, Pub. L. No. 97-164, 96 Stat. 25 (1982).

<sup>595</sup> See 19 U.S.C. § 1516a(d); 19 U.S.C. 1677(9) (defining “interested party”).

<sup>596</sup> The statute defines domestic like product as being a “product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an [AD/CVD] investigation . . .” 19 U.S.C. §1677(10).

<sup>597</sup> 19 U.S.C. § 1516a(a)(2)(B).

<sup>598</sup> 19 U.S.C. § 1516a(a)(2)(B)(iii).

<sup>599</sup> 19 U.S.C. § 1516a(a)(1)(C).

<sup>600</sup> 19 U.S.C. § 1516a(b)(1)(B).

uphold the determination if it is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>601</sup>

In cases involving products from either Canada or Mexico special rules established in the North American Free Trade Agreements Implementation Act<sup>602</sup> and incorporated into U.S. law allow litigants to seek review before a binational panel rather than to pursue the litigation in U.S. courts. The procedural rules and processes for NAFTA dispute settlement under Chapter 19 of the Agreement are beyond the scope of discussion here.

The Commission's determinations that result in imposition of duties are also subject to the Dispute Resolution Procedures of the World Trade Organization (WTO).<sup>603</sup> However, disputes before the WTO are brought by member states of the WTO, not by private litigants. Consequently, only a foreign government can seek to invoke WTO dispute resolution procedures.<sup>604</sup> <sup>605</sup> No Commission determinations in countervailing duty or antidumping proceedings have been challenged in U.S. courts on the basis of an adverse WTO dispute settlement report.<sup>606</sup>

## Significant Court Decisions Involving Commission Proceedings

An exhaustive treatment of the court cases that have considered Commission determinations in antidumping and countervailing duty proceedings is beyond the scope of this chapter. Instead, a general overview is presented of how the reviewing courts have examined some key issues arising in Commission proceedings. Two recurring subjects involve the interpretation of statutory language, including the contours of the authority and discretion granted to the Commission by Congress, and the scope of judicial review.

As a starting point, the Commission is a creation of Congress and possesses only those powers assigned or delegated to it through legislation. Its authority and powers are limited by the

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<sup>601</sup> 19 U.S.C. § 1516a(b)(1)(A).

<sup>602</sup> Pub. L. No. 103-182, 107 Stat. 2057 (1993); 19 U.S.C. § 1516a(g)(2); see NAFTA Article 1904.

<sup>603</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>604</sup> 19 U.S.C. § 3512(c)(1).

<sup>605</sup> *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *rehearing denied, certiorari denied* 543 U.S. 976 (2003). See also 19 U.S.C. § 3512(c)(1); S. Rep. No. 103-412, at 13, 16 (1994); H. Rep. No. 103-826, at 25–26 (1994).

<sup>606</sup> There are procedures under U.S. law for the executive branch to ask a federal agency to consider whether a practice or determination found inconsistent with WTO Agreements by a WTO dispute settlement body can be brought into conformity under U.S. law. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 129, 108 Stat. 4809, 4836; 19 U.S.C. § 3538. The Commission was asked to conduct such an analysis in connection with its Wheat Gluten global safeguard determination. See *Wheat Gluten*, Investigation No. TA-201-67 (Consistency Determination), USITC Publication 3423 (May 2001).

empowering statutes that created it.<sup>607</sup> The statutes giving it authority to conduct antidumping and countervailing duty investigations are in many respects very precise in identifying the determinations that the Commission must make, the timelines for its investigations, and the factors that it must consider in making its determinations. In other regards, however, the governing statutes have left considerable discretion to the Commission in exactly how it conducts its investigations. In yet other respects, the statutory language is silent or ambiguous allowing the Commission to provide its own reasonable interpretation of the statutory language in applying it to specific situations.

Not surprisingly, much of the litigation surrounding the application of the antidumping and countervailing duty laws in determinations by the Commission followed soon after the enactment of the Trade Agreements Act of 1979<sup>608</sup> and the Uruguay Round Agreements Act.<sup>609</sup> These acts added substantially to the existing statutory provisions relating to antidumping and countervailing duty investigations and determinations. Many new procedures and requirements were established. As a result whether the agency's implementation of the statute was consistent with the statutory language and its purpose frequently was contested by parties affected by those agency decisions. In the years following passage of the new statutory provisions, parties to those proceedings often sought review by the Court of International Trade. The enhanced remedy provided by the new statutory provisions also contributed to an increase in the number of petitions filed by domestic parties requesting that investigations be conducted.<sup>610</sup> A concomitant increase in the amount of litigation was only to be expected.

## Review of Analytical Methodologies Used by Commissioners

Early litigation involving the Commission considered the scope of the Commission's latitude in choosing precisely how to conduct its investigations. Questions arose regarding such issues as the period of investigation that the agency would choose to examine for purposes of

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<sup>607</sup> The Commission's organic statute is found in 19 U.S.C. §§ 1330–41, and the statutes governing its countervailing duty and antidumping proceedings are generally set forth in 19 U.S.C. 1671 *et seq.* and 1673 *et seq.*

<sup>608</sup> Pub. L. No. 96-39, 93 Stat. 144 (1979).

<sup>609</sup> Pub. L. No. 103-465, 108 Stat. 4838 (1994).

<sup>610</sup> Based on statistics on the USITC website for the period between 1980–2008, the Commission made a total of 1,632 determinations. *USITC Import Injury Investigations*, Case Statistics (FY 1980-2008), table 1 (2010). Approximately, 550 of those determinations, or fully one-third, were made in the first six years (1980–85) of that period shortly after the effective date of the 1979 Trade Agreements Act. In contrast, only 223 antidumping determinations were made prior to 1980. See Table 10, Case Statistics.

collecting economic data and analysis.<sup>611</sup> Other cases raised questions as to whether the Commission could introduce factors into its analysis which were not specifically enumerated in the statute.<sup>612</sup> In other instances, legal disputes were pursued pertaining to how the Commission implemented such concepts as the cumulation of imports from countries subject to investigation for purposes of making its determination whether “subject imports” caused injury to the domestic industry.<sup>613</sup> The issue of causation findings itself has spawned a large amount of litigation as parties fought over whether a sufficient nexus existed between the subject imports and any material injury to the domestic industry.<sup>614</sup> Indeed, the existence of non-subject imports, i.e., imports from countries not under investigation, and whether they contributed to the material injury, or were the explanation for such injury, has been frequently examined both by the Commission and its reviewing courts.<sup>615</sup>

As mentioned above, while the statutes authorizing the Commission to conduct investigations specify in some detail the factors that it is to consider in making its injury determination,<sup>616</sup> the factors listed are not exhaustive. However, the Commission must address all of the primary factors relating to the volume and price of the subject imports as well as any resultant impact, regardless of the analytical methodology that any Commissioner may use. Thus, in *Angus Chemical Co. v. United States*,<sup>617</sup> the Federal Circuit held that while Commissioners were free to use a so called “bifurcated” analytical approach where they separately examined the question of economic harm or injury to the domestic industry from issues such as causation, they were statutorily required to consider all of the factors enumerated in the statute in making a determination.<sup>618</sup>

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<sup>611</sup> See *Altx, Inc. v. United States*, 370 F.3d 1108 (Fed. Cir. 2004) (ITC could reasonably rely on annual rather than potentially inaccurate semi-annual data); *Nucor Corp. v. United States*, 414 F.3d 1331, 1337 (Fed. Cir. 2005) (“the Commission has broad discretion with respect to the period of investigation that it selects for purposes of making a material injury determination.”).

<sup>612</sup> See *Kern-Liebers USA v. United States*, 19 CIT 87 (1995); 19 U.S.C. § 1677(7)(F)(1).

<sup>613</sup> See, e.g., *Nucor Corp. v. United States*, 601 F.3d 1291 (Fed. Cir. 2010) (ITC consideration of likely differing conditions of competition permissible in deciding whether to cumulate).

<sup>614</sup> *Nippon Steel Corp. v. United States*, 350 F. Supp. 2d 1186, *opinion after remand*, 29 CIT 338 (2005), *reversed, rehearing en banc denied*, 458 F.3d 1345 (Fed. Cir. 2006).

<sup>615</sup> *NSK Corp. v. United States*, 637 F. Supp.2d 1311 (Ct. Int’l Trade 2009), *reversed*, 716 F.3d 1352 (Fed. Cir. 2013); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008); *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006), *rehearing, en banc, denied, on remand* 533 F. Supp. 2d 1348 (Ct. Int’l Trade 2008).

<sup>616</sup> See, e.g., 19 U.S.C. § 1677(7).

<sup>617</sup> 140 F.3d 1478, 1484–85 (Fed. Cir. 1998).

<sup>618</sup> *Angus Chemical Co.*, 140 F.3d at 1483-86. However, no Commissioner has chosen to employ a bifurcated analysis since the mid-1990s.

But the statutory scheme does not require any particular analytical approach.<sup>619</sup> In *U.S. Steel Group*,<sup>620</sup> the Court succinctly stated its conclusion:

In the end, of course, the factual conclusions of each Commissioner will drive the legal conclusion he or she reaches, namely whether the requisite injury has been shown. The invitation to employ such diversity in methodologies is inherent in the statutes themselves, given the variety of the considerations to be undertaken and the lack of any congressionally mandated procedure or methodology for assessment of the statutory tests.<sup>621 622</sup>

Furthermore, in the *U.S. Steel Group* decision referenced above, the Federal Circuit also rejected litigants' argument that the Commission was required to give weight to post period data (i.e., data outside the Commission's traditional period of investigation, comprising three full calendar years, and partial years where available).<sup>623</sup> In *Torrington Co. v. United States*, the Court of International Trade also acknowledged that the statute does not specify how volume of imports or domestic production is to be evaluated and it is permissible to rely on value as a basis of evaluating volumes when circumstances warrant.<sup>624</sup>

## The "Reasonable Indication" of Injury Requirement in Preliminary Determinations

Another important issue arose soon after the passage of the 1979 Trade Agreements Act, which for the first time required the Commission to conduct preliminary investigations and make preliminary determinations in virtually all of its original investigations under Title VII of the Act.<sup>625</sup> Domestic parties challenged Commission negative material injury determinations in

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<sup>619</sup> See *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997) (noting that prior Federal Circuit precedent did not endorse any specific methodology); *United States Steel Group v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996) (neither the "one-step" (unitary) nor "two-step" (bifurcated) analysis is mandated by the statute; Commissioners may use either).

<sup>620</sup> *United States Steel Group v. United States*, 96 F.3d 1352 (Fed. Cir. 1996).

<sup>621</sup> *Ibid.* at 1362. The court emphasized that the judiciary's role in this respect is quite limited: "This court has no independent authority to tell the Commission how to do its job. We can only direct the Commission to follow the dictates of its statutory mandate. So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary or capricious, the Commission may perform its duties in the way it believes most suitable." *Ibid.* at 1362.

<sup>622</sup> See *Copperweld Corp. v. United States*, 682 F. Supp. 552 (Ct Int'l Trade 1988).

<sup>623</sup> *United States Steel Group*, 96 F.3d at 1357-58.

<sup>624</sup> 790 F. Supp. 1161, 1172–73 (Ct. Int'l Trade 1992), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991).

<sup>625</sup> Prior to the Customs Simplification Act of 1954 Pub. L. No. 83-768, 68 Stat. 1138, the Secretary of the Treasury Department made injury determinations in connection with countervailing duty and antidumping investigations. 89 Treas. Dec. 242, T.D. 53599; See *City Lumber Co. v. United States*, 311 F. Supp. 340 (Customs Ct. 1st Div. 1970). While the Commission was responsible for material injury determinations before 1979, preliminary injury investigations were the exception and were still conducted by the Treasury Department until 1979.

several cases, arguing that the agency was prohibited from weighing evidence at this stage in a proceeding. In essence, they argued that the Commission was required to make its preliminary determination largely on the basis of the facts presented by the domestic industry in its petition. The Court of International Trade, in a series of decisions arising from these challenges, ruled in favor of the domestic industry and remanded the cases to the Commission for new decisions consistent with the Court's ruling.<sup>626</sup> The Commission appealed each of these lower court decisions to the U.S. Court of Appeals for the Federal Circuit and prevailed in a decision rendered in *American Lamb Co. v. United States*.<sup>627</sup>

In that decision, the Federal Circuit found that the Commission's long-standing interpretation of the "reasonable indication of material injury" standard was entitled to Chevron deference and was a reasonable interpretation of the statute.<sup>628</sup> The Court sustained the Commission's two-part test that looked to whether: (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of material injury to a domestic industry, and (2) no likelihood exists that contrary evidence will arise in a final investigation.<sup>629</sup> The Court of Appeals found that the Commission's approach provides fully adequate protection against unwarranted terminations and is consistent with both the statutory language and its purpose.<sup>630</sup> But for the *American Lamb* decision, both the Commission and the Commerce Department otherwise would be required to conduct full investigations despite the fact that the record in a preliminary investigation before the Commission failed to support a reasonable basis for proceeding to a full investigation.<sup>631</sup>

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<sup>626</sup> See *Republic Steel Corp. v. United States*, 591 F. Supp. 640 (Ct Int'l Trade 1984); *Jeannette Sheet Glass Corp. v. United States*, 607 F. Supp.123 (Ct Int'l Trade 1985); *American Lamb Co. v. United States*, 611 F. Supp. 979 (Ct Int'l Trade 1985). In the CIT's view: "The object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination." *Republic Steel*, 591 F. Supp. at 650 (emphasis in original).

<sup>627</sup> 785 F.2d 994 (Fed. Cir. 1986).

<sup>628</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, courts first consider "whether Congress has spoken to the precise question at issue." *Ibid.* at 842. "If the intent of Congress is clear, that is the end of the matter." *Ibid.* Otherwise, courts must address "whether the agency's [interpretation] is based on a permissible construction of the statute." *Ibid.* at 843. The Federal Circuit has said that courts "must accord substantial weight to an agency's interpretation of a statute it administers." *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978)).

<sup>629</sup> *Am. Lamb Co.*, 758 F.2d at 1001.

<sup>630</sup> *Ibid.* at 1001-02.

<sup>631</sup> The relative importance of the *American Lamb* decision is best revealed by the percentage of preliminary investigations that have resulted in negative material injury determinations. Historically, until 2009 approximately 20 percent of all preliminary investigations were terminated based on a determination of no reasonable indication of material injury or threat of material injury. See, USITC website, Import Injury Investigations, Case Statistics (FY 1980-2008), Table 3. However, since 2009, only one preliminary investigation was terminated with a negative determination of material injury. A number of others were terminated based on negligible imports.

## The Commission's Subpoena Power

One aspect of the Commission's statutory authority that is unique in trade law investigations is the fact that the Commission possesses subpoena power that is enforceable in federal district courts in aid of its investigative functions. The Commission is permitted "for purposes of carrying out its functions and duties in connection with any investigation authorized by law" to obtain access to information in the possession of persons engaged in the production, importation, or distribution of any article under investigation and to seek the attendance and testimony of witnesses.<sup>632</sup> The Commission in general seeks information through the routine investigative processes discussed previously in this chapter, for example, by issuing questionnaires and conducting field visits to producers, manufacturers, and importers. When confronted by uncooperative or unwilling respondents to its information requests, it can issue administrative subpoenas to collect the information it deems necessary to its investigations.<sup>633</sup> Absent voluntary compliance with its subpoenas, the Commission may seek enforcement of such subpoenas by bringing an action "in any district or territorial court of the United States."<sup>634</sup>

In *United States International Trade Commission v. E. & J. Gallo Winery*,<sup>635</sup> the scope of the Commission's power to enforce its subpoenas was put to the test when the largest single producer of table wine refused to respond with business confidential information to ITC questionnaires issued in a preliminary antidumping investigation. The U.S. District Court for the District of Columbia rejected Gallo's arguments and found that because the Commission's request for information was "reasonably relevant" to its investigations and did not "unreasonably or unduly burden" the domestic producer, they were enforceable and Gallo was required to produce the subpoenaed information.<sup>636</sup> The Court concluded by stating that: "In short, the burden of showing that an agency subpoena is unduly broad or burdensome rests with Gallo, and Gallo has failed to meet its burden."<sup>637</sup>

The subject matter of the Commission's subpoena power was further discussed by the U.S. District Court for the District of Columbia in a 2004 case. Although that action arose from a Commission investigation conducted under Section 337 of the Tariff Act of 1930, it is relevant for purposes of Title VII investigations as well because the Commission invokes and has available to it the same statutory authority, 19 U.S.C. 1333, whenever it acts to enforce a

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<sup>632</sup> 19 U.S.C. §§1333(a), (b), and (d).

<sup>633</sup> 19 C.F.R. §§ 201.9, 207.8, 210.32 (2016).

<sup>634</sup> 19 U.S.C. §1333(b).

<sup>635</sup> 637 F. Supp. 1262 (D.D.C. 1985)).

<sup>636</sup> *Ibid.* at 1267, 1272–73.

<sup>637</sup> *Ibid.* at 1272.



subpoena.<sup>638</sup> In this later case, a witness living in California asserted that the Commission did not have jurisdiction over him for purposes of requiring him to testify and produce subpoenaed documents. The Court importantly rejected this argument, holding that: “Because the Tariff Act authorizes extraterritorial service of process, and Washington, DC, is the jurisdiction in which the ITC’s inquiry is being conducted, this Court has personal jurisdiction over ASAT, Inc.”<sup>639</sup> Absent the vindication of the ITC’s broad subpoena power, its ability to develop information essential to its investigations could have been seriously compromised. For example, if the Commission were to have been compelled to enforce its subpoenas throughout the country in each district where witnesses and documents were located, the Commission would have been seriously impeded in obtaining such information solely by budgetary and personnel resource limitations.

## Variations on a Theme: Evolving Interpretations of the Causation Requirement

Under applicable law, the Commission determines whether an industry in the United States is materially injured “by reason of the imports under investigation.”<sup>640</sup> Thus, an affirmative determination requires a finding that material injury is caused by the subject imports. Although the causal link is not specifically defined in the statute, its legislative history does state that the Commission must find a sufficient causal link between the subject imports and the material injury in light of all the information presented.<sup>641</sup> Imports need not be the principal or a substantial cause of material injury.<sup>642</sup> The Commission is not to weigh relative causes of injury.<sup>643</sup> The Commission will also consider other known factors that may be causing injury to the industry, often as conditions of competition.<sup>644</sup> The subject imports must be more than a “tangential” or “minimal” cause of material injury.<sup>645</sup> However, “[a]s long as its effects are not merely incidental, tangential, or trivial, the foreign product sold at less than fair value meets the causation requirement.”<sup>646</sup>

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<sup>638</sup> 19 U.S.C. § 1337. The Commission’s statutory subpoena authority found in 19 U.S.C. § 1333 is the same for all of its investigations.

<sup>639</sup> *United States International Trade Commission v. ASAT, Inc.*, 411 F.3d 245 (D.C. Cir.2005).

<sup>640</sup> 19 U.S.C. § 1671d(b); 19 U.S.C. § 1673d(b).

<sup>641</sup> S. Rep. No. 96-249, *reprinted in* 1979 U.S.C.C.A.N. 381, 444.

<sup>642</sup> 1979 U.S.C.C.A.N. at 443.

<sup>643</sup> *Ibid.*

<sup>644</sup> Statements of Administrative Action, H.R. 5110 (H.R. Doc. No. 103-316) at 851–52 (1994) (SAA), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200.

<sup>645</sup> *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), *rehearing and re hearing en banc denied* (Fed. Cir. 1998).

<sup>646</sup> *Nippon Steel Corp. v. USITC*, 345 F.3d 1379, 1384 (Fed. Cir. 2003).

Given that the question of causation is one of the issues central to a Commission injury determination, it has been frequently litigated. At the same time, the Commission's legal conclusion that imports under investigation are causing or threatening to cause material injury is specifically predicated on its factual findings to which the reviewing courts have largely deferred, consistent with the applicable standard of review under the substantial evidence test as discussed below.

There is one scenario, however, where both the Court of International Trade and the Court of Appeals for the Federal Circuit often have struggled in reviewing the Commission's causation analysis. This has been most pronounced when imports that are not subject to investigation, or that are fairly traded, are similar to the imports under investigation and are equal to or greater in quantity than the investigated imports. One of the more noteworthy cases to squarely present this issue was decided by the Federal Circuit in *Gerald Metals, Inc. v. United States*.<sup>647</sup> In that case, there were both fairly traded imports of pure magnesium and unfairly traded subject imports present in the U.S. market from the same country, Russia (a consequence of a Commerce determination finding one importer to be making sales at less than fair value and the other one not despite the fact that they were purchasing from the same Russian suppliers). The fairly traded imports were smaller in volume at the outset, but by the end of the investigation had surpassed the quantity of unfairly traded imports. In light of what the court described as "unique facts," it held that the Commission could not find a causal connection because in the court's view there was no more than a temporal connection between the subject imports and the injury to the domestic industry where the fairly traded imports could fully replace the subject imports without benefit to the domestic industry.<sup>648</sup>

The reasoning of the *Gerald Metals* Court reappeared in similar circumstances in *Bratsk Aluminum Smelter v. United States*.<sup>649</sup> Once again, the imports in question, this time silicon metal, were from Russia. As in *Gerald Metals*, the subject merchandise was a commodity product with competition focused primarily on price. Although the Commission specifically found that subject imports undersold both non-subject imports and the domestic product and also increased in volume, the Federal Circuit found that the Commission's explanation was inadequate in light of the particular facts<sup>650</sup> and that the Court of International Trade had erred

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<sup>647</sup> 132 F.3d 716 (Fed. Cir. 1997).

<sup>648</sup> *Ibid.* at 719–20 (citing *United States Steel Group v. United States*, 96 F.3d 1352, 1358 (Fed. Cir. 1996)).

<sup>649</sup> *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006); see also *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (Fed. Cir. 2006).

<sup>650</sup> *Bratsk*, 444 F.3d at 1371–72.

in affirming the Commission’s determination.<sup>651</sup> The Federal Circuit summarized the causation requirement as follows:

Thus under *Gerald Metals*, the increase in volume of subject imports priced below domestic products and the decline in domestic market share are not in and of themselves sufficient to establish causation. *Gerald Metals* did not, of course, establish a per se rule barring a finding of causation where the product is a commodity product and there are fairly traded imports priced below the domestic product. However, under *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers.<sup>652 653</sup>

Both the Commission and its reviewing courts remained unable to extract themselves from this causation thicket and were soon again struggling to reach a common understanding as to the exact meaning of the *Bratsk* decision. In *Mittal Steel*,<sup>654</sup> the Federal Circuit attempted to rectify some of the confusion engendered by its earlier decisions.<sup>655</sup> It explained that the “replacement” language in its *Gerald Metals* and *Bratsk* decisions was not intended to require the Commission to determine the potential effectiveness of an order in removing unfairly traded imports from the U.S. market, but instead designed to introduce a “but-for” causal analysis—“the inquiry is a hypothetical one that sheds light on whether the injury to the domestic industry can reasonably be attributed to the subject imports.”<sup>656</sup> The court also reiterated that it had not created a presumption of no injury in a situation in which there were non-subject imports that could replace the subject imports.<sup>657</sup>

While it remains unclear whether the nature of the causation analysis required in the type of circumstances presented in *Gerald Metals*, *Bratsk*, and *Mittal* has been put to rest, there may be reason for optimism. In a decision issued by the Federal Circuit in *NSK Corp., v. United States*

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<sup>651</sup> The Court of International Trade also had affirmed the Commission’s determinations in the matter appealed in *Gerald Metals*. While this by itself does not demonstrate that the Federal Circuit had introduced a new requirement in that case, it does at a minimum suggest that it had introduced a statutory construction that was not anticipated by either the Commission or the lower court. *Bratsk*, 444 F.3d at 1376.

<sup>652</sup> *Bratsk*, 444 F.3d at 1374–75.

<sup>653</sup> Judge Archer dissented from his colleagues on the *Bratsk* panel and stated that he would have affirmed the Commission’s determination because of its fully adequate explanation of its decision, including its causation analysis.

<sup>654</sup> *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008).

<sup>655</sup> 542 F.3d 867 (Fed. Cir. 2008). The *Mittal* decision arose after the Commission changed its affirmative determination to a negative determination based on its understandings of the Federal Circuit’s remand instructions in *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (Fed. Cir. 2006).

<sup>656</sup> *Mittal Steel*, 542 F.3d at 875–77.

<sup>657</sup> *Ibid.* at 877–79.

*International Trade Commission*,<sup>658</sup> the court reversed a Court of International Trade judge who had relied heavily on the appellate court's earlier *Bratsk* opinion to find that the ITC's determination was not supported by substantial evidence because it failed to adequately explain why non-subject imports would not replace subject imports without benefit to the domestic industry.<sup>659</sup> The Federal Circuit disagreed with the lower court's view of both the adequacy of the evidence supporting the Commission's determinations and the reasonableness of the Commission's factual and legal conclusions:

Because we agree with Appellants that the Commission's Second Remand Determination was supported by substantial evidence and the Court of International Trade erred repeatedly in remanding the case, we: (1) reverse the Court of International Trade's decisions in *NSK V* and *VI* and judgment affirming the Commission's negative determinations . . . (2) vacate the Court of International Trade's decision in *NSK IV* . . . and (4) order the Court of International Trade to reinstate the Commission's affirmative material injury determinations reached in the Second Remand Determination.<sup>660</sup>

By this decision, the Federal Circuit hopefully has made it clear that the role of the reviewing courts does not somehow change simply because there are commodity-like non-subject imports competitive with subject imports in the market. As in every other case, it is incumbent for the Commission to consider and examine all relevant known factors operating in the U.S. market for the product in question and causing injury to a domestic industry.<sup>661</sup> And in reviewing the Commission's determinations, the courts are to consider both the evidence in support of the determination and that which detracts from its conclusion. But at the end of the day, as discussed below, the Commission determination is to be sustained if supported by substantial evidence regardless of whether the court would have reached the same conclusion on its own.

## Application of the Substantial Evidence Standard of Review

Another frequently litigated question involves the scope of judicial review, including to what extent can the reviewing court, which is almost always the Court of International Trade in the first instance, second guess the Commission's factual determinations. As previously stated, the

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<sup>658</sup> *NSK Corp. v. USITC*, 716 F.3d 1352 (Fed. Cir. 2013), *certiorari denied*, 134 S.Ct. 2719 (2014).

<sup>659</sup> *Ibid.* at 1369.

<sup>660</sup> *Ibid.* at 1355.

<sup>661</sup> See *Swiff-Train Co. v. United States*, 792 F.3d 1355 (Fed. Cir. 2015). In this relatively recent case the court sustained the lower court's decision that the Commission's remand decision comported with the guidance in *Mittal Steel*. Both the Court of International Trade and the appellate court rejected appellants' arguments that a counter-factual analysis was an essential part of any non-attribution causation analysis. *Ibid.* at 1361.

function of the Court of International Trade on factual issues is to determine whether the Commission's determinations are supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>662</sup> The possibility of reaching more than one conclusion from consideration of the same set of facts does not mean that there is not substantial evidence for a conclusion.<sup>663</sup>

On appeal, the Federal Circuit will review the Court of International Trade's "evaluation of Commission factual determinations by stepping into the shoes of the Court and duplicating its review, evaluating whether Commission determinations are unsupported by substantial evidence or otherwise not in accordance with law."<sup>664</sup> Although the Federal Circuit has observed that such review is in essence duplicative, it does not ignore the informed opinion of the Court of International Trade.<sup>665</sup>

While the standard of review is thus clear, its application has not always been without difficulty. In *Nippon Steel Corp. v. International Trade Commission*,<sup>666</sup> the Court of International Trade issued a number of remands to the ITC directing it to explain determinations that in the court's view were not supported by record evidence. Given the final remand instructions from the court, the ITC issued a negative determination of present material injury as ordered by the court and a negative threat of injury determination as it believed it was compelled to do by the same court order. It then brought an appeal.

Upon appeal, the Federal Circuit found that the lower court had exceeded the bounds of its review authority.<sup>667</sup> In so holding, the Federal Circuit concluded:

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<sup>662</sup> See *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951)

<sup>663</sup> *Cleo Inc. v. United States*, 501 F.3d 1291 (Fed. Cir. 2007); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (quoting *Am. Silicon Techs. v. United States*, 261 F.3d 1371–76 (Fed. Cir. 2001)).

<sup>664</sup> *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1369 (Fed. Cir. 2002) (citing *Taiwan Semiconductor Indus. Ass'n v. USITC*, 266 F.3d 1339, 1343–44 (Fed. Cir. 2001)).

<sup>665</sup> *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994).

<sup>666</sup> The Court of International Trade issued four separate opinions over the course of this proceeding with remands to the Commission. In two instances, the lower court found that there was no substantial evidence to support an affirmative injury determination and ordered the Commission to enter a negative determination of material injury. See *Nippon Steel Corp. v. United States*, 223 F. Supp. 2d 1349 (Ct. Int'l Trade 2002) (*Nippon II*) and 350 F. Supp. 2d 1186, 1222 (Ct. Int'l Trade 2004) (*Nippon IV*) (" . . . the court concludes that because the Commission is unable to obtain new evidence to significantly supplement the record . . . further investigation or reconsideration in this matter is futile. The Commission's Second Remand Determination is remanded with instructions to issue a negative material injury determination."). *Nippon Steel Corp. v. United States*, 29 CIT 338 (2005); see also *Nippon Steel Corp. v. United States*, 28 CIT 1738 (2004); *Nippon Steel Corp. v. United States*, 25 CIT 1415 (2001).

<sup>667</sup> *Nippon Steel Corp. v. USITC*, 345 F.3d 1379 (Fed. Cir. 2003).

Under the statute, only the Commission may find the facts and determine causation and ultimately material injury—subject, of course, to Court of International Trade review under the substantial-evidence standard. The Court of International Trade despite its very fine opinions and analysis went beyond its statutorily-assigned role to ‘review.’ Despite its express dissatisfaction with the fact-finding underlying the Commission’s remand decisions, the Court of International Trade abused its discretion by not returning the case to the Commission for further consideration.<sup>668</sup>

A more recent Federal Circuit opinion again found that a Court of International Trade judge had misapplied the standard of review, erroneously substituting her evaluation of the evidence for that of the agency, and improperly directing the ITC to change its five-year review determination to one that would result in the revocation of several antidumping duty orders.<sup>669</sup> After remands in which the ITC re-opened the record and offered both additional fact-finding and explanation,<sup>670</sup> the ITC concluded that the lower court judge’s orders compelled it to alter its legal determination from a finding in favor of continuation of the outstanding antidumping orders to one which would result in their revocation.<sup>671</sup> The Commission then appealed the several aspects of the Court of International Trade’s decisions that it believed were contrary to the substantial evidence standard of review. Once again the Federal Circuit admonished the lower court judge for interposing her analysis of the facts for the determination of the Commission, which the appellate court found to be supported by substantial evidence in all respects: “As this court has noted in the past, ‘it is the role of the Commissioners—to decide which side’s evidence to believe.’”<sup>672</sup>

The relationship between the Court of International Trade and the Court of Appeals for the Federal Circuit has itself been a subject of some discussion. How much deference should the appellate court show to the “trial court”? The Federal Circuit, as we have discussed, has

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<sup>668</sup> *Nippon Steel Corp. v. USITC*, 345 F.3d 1379, 1381–82 (2003). The Court went on to say: “Thus, to the extent the Court of International Trade engaged in re-finding the facts (*e.g.*, by determining witness credibility), or interposing its own determinations on causation and material injury itself, the Court of International Trade, we hold, exceeded its authority.” *Ibid.* at 1381. See also *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006). After a second appeal, the Federal Circuit ruled that the Court of International Trade had again exceeded its authority by rejecting the agency’s findings and substituting its own. The Appeals Court ordered the lower court to vacate its order sustaining the negative injury determination made under protest by the Commission and to reinstate the Commission’s final affirmative injury determination. *Nippon Steel*, 345 F.3d at 1381.

<sup>669</sup> *NSK Corp. v. USITC*, 716 F.3d 1352 (Fed. Cir. 2013).

<sup>670</sup> *NSK Corp. v. United States*, 577 F. Supp. 2d 1322 (Ct. Int’ Trade 2008); 593 F. Supp.2d 1355 (2008) (denying motions for rehearing based on intervening law); 637 F. Supp. 2d 1311 (2009) (remanding affirmative determination re UK imports); 712 F. Supp. 2d 1356 (2010); 774 F. Supp. 2d 1359 (2010); 774 F. Supp. 1296 (2011).

<sup>671</sup> Views of the Commission on Remand, Investigation Nos. 731-TA-394-A, 731-TA-399-A (March 2011) (Fourth Remand Determination).

<sup>672</sup> Citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

addressed this subject directly and repeatedly.<sup>673</sup> Nonetheless, some Court of International Trade judges and some members of the bar have suggested that a more deferential approach to the lower court's decisions would be appropriate and that perhaps the appellate court should not repeat the review performed by the Court of International Trade judges.<sup>674</sup> Indeed, legislation was at least once proposed that would have limited the scope of review by the Federal Circuit to one where a lower court decision might be reversed only if it constituted an abuse of discretion or was otherwise inconsistent with applicable law.<sup>675</sup> No such legislative proposal has ever been adopted.<sup>676</sup>

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<sup>673</sup> While almost all the Federal Circuit judges have expressed a common view of the standard of review and its application, a small minority favored a more deferential approach. See *Zenith Elecs. Corp. v. United States*, 99 F.3d 1576, 1579 (Fed. Cir. 1996) (concurring opinion of Judge Plager). See also Judge Rader's concurring opinion in the same decision at 1583 where he expressed the view that "this court's replication of the record review already performed effectively renders the Court of International Trade's review superfluous" and that "the Atlantic Sugar standard undercuts the benefits this court derives from the experience and expertise of the Court of International Trade." (citations omitted).

<sup>674</sup> See Mark E. Wojcik & Lawrence Friedman Setting Standards: "Should the Federal Circuit Give Greater Deference to Decisions of the U.S. Court of International Trade in International Trade Cases?," 36 *J. Marshall L. Rev.* 721 (2003) (discussing Remarks of Chief Judge Gregory W. Carman).

<sup>675</sup> The proposal was made in by the Customs and International Trade Bar Association in June 2009 and may be viewed and downloaded from <http://citba.org/CITJurisdictionLegislation.php>.

<sup>676</sup> Based on annual data contained on the Circuit's website regarding rates of reversal, the Court of International Trade was reversed roughly twice as often as the Circuit's jurisdiction-wide experience between 2005–15. Whereas the average case reaching the Court of Appeals had a one in eight chance of being reversed, decisions from the Court of International Trade had a rate of reversal approximating 25% on average. In some years, the reversal rate was as high as 39%; it was over 30% in 4 out of 11 years during that period. It was below 14% in only one year: 2015.





# Chapter 10

## Safeguards



**Photo:** Practitioner and former Chairman Will E. Leonard delivering document boxes to former Secretary Donna R. Koehnke.

**Kara Reynolds**<sup>677</sup>

## Introduction

Since the late 1940s, the U.S. International Trade Commission (Commission) has played a vital role in the process through which U.S. industries have been able to obtain safeguard (or escape clause) protection. Safeguards essentially serve as a safety net for U.S. industries that are struggling in the face of increased import competition by providing a period of temporary protection that can be used by industries to adjust to the global marketplace. Evidence suggests, however, that the hurdles for obtaining safeguard protection are notably higher, both legally and administratively, than those for obtaining other forms of trade remedy relief such as antidumping and countervailing duties.

Current U.S. safeguard law is spelled out in section 201 et seq. of the Trade Act of 1974 (as amended).<sup>678</sup> Under this law, entities which are representative of an industry may file a petition with the Commission requesting import relief; if the Commission finds that the petition meets the requisite basis for instituting an investigation, the Commission must institute an investigation. The Commission is also required to institute an investigation upon receipt of a request from the President or the U.S. Trade Representative (USTR), or upon receipt of a resolution from either the House Committee on Ways and Means or the Senate Committee on Finance. Over the course of the investigation, which, under current law, must be completed within 180 days, the Commission obtains information through public hearings, questionnaires, and other sources with the goal of determining whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury (or threat thereof) to the domestic industry. If the Commission makes an affirmative injury determination, it must then recommend to the President the type and amount of import relief

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<sup>677</sup> Professor Reynolds is a Professor in the Department of Economics at American University. Her publications include “Innovation through Protection: Does Safeguard Protection Increase Investment in Research and Development?” (with Benjamin Liebman), *Southern Economic Journal*, 2013, 80(1): 205–25.

<sup>678</sup> USITC, “Understanding Safeguard Investigations,” [https://www.usitc.gov/press\\_room/us\\_safeguard.htm](https://www.usitc.gov/press_room/us_safeguard.htm) (accessed March 14, 2016). Although several provisions of the 1974 Act deal with safeguards, proceedings are commonly referred to as “section 201” investigations.

that would remedy the serious injury or threat and facilitate the efforts of the domestic industry to adjust to import competition.

An affirmative Commission injury determination in a safeguard investigation does not guarantee relief. Instead, the Commission makes a recommendation to the President, who has the final say in whether and how much import relief to provide to the industry.

The safeguard law in place in the United States has evolved considerably since the late 1940s. This chapter will review the major changes in the safeguard law since that time, and how these changes relate to the safeguard provisions of multilateral trade agreements. The chapter will then provide a brief history of Commission safeguard determinations over the years, finally concluding with case studies of three industries that have received safeguard protection: footwear, motorcycles, and steel.

## Evolution of U.S. Safeguard Laws

The modern concept of safeguard provisions in trade agreements and U.S. law arose during the 1930s in the context of the Trade Agreements Act of 1934, which allowed the President to enter into negotiations with foreign trade partners to reduce duties on goods on a reciprocal basis.<sup>679</sup> The concept of an escape provision, the forerunner of today's safeguard law, arose from the concern that duty reductions would place industries at risk with no possibility of relief if there was a surge in imports. Most agreements concluded after 1940 under the auspices of the Trade Agreement Act of 1934 included some form of escape clause in which countries could modify or terminate the agreement on short notice if either country experienced an undue amount of imports that might injure a major domestic industry.

The escape provision in the 1942 bilateral trade agreement with Mexico was the most recent of these escape provisions at the time of the General Agreement on Tariffs and Trade (GATT) negotiations and was the model for the U.S. draft provision submitted to the negotiating group that drafted the GATT in 1947. The bilateral agreement included language that allowed either government to withdraw trade concessions for individual products if increased imports were causing "serious injury" to domestic producers.<sup>680</sup> Although there were no formal procedures set out for invoking this provision, in practice it is likely that the U.S. Committee for Reciprocity Information (CRI) would have considered any requests for withdrawal of concessions.<sup>681</sup> At the time, the CRI was an inter-departmental committee, chaired by the Chairman of the U.S. Tariff Commission—the Commission's predecessor.

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<sup>679</sup> See Alfred Eckes, *Opening America's Market* (Chapel Hill: North Carolina Press, 1995), Chapter 7 for an extensive review of the origins of U.S. escape clause provisions.

<sup>680</sup> Judith Goldstein, *Ideas, Interests, and American Trade Policy* (Ithaca: Cornell University Press, 1993), 186.

<sup>681</sup> George Bronz, "The Tariff Commission as a Regulatory Agency," *Columbia Law Review* 61, 1961, 468.

In February 1947, President Harry S. Truman signed Executive Order 9832 requiring that all future trade agreements negotiated under the authority of the Trade Agreements Act of 1934 include a safeguard provision. Executive Order 9832 set out criteria and procedures relating to the conduct of safeguard investigations and designated the Tariff Commission as the agency that would conduct investigations, make injury determinations, and make remedy recommendations to the President.<sup>682</sup> In his statement issuing the executive order, President Truman made clear that this order simply made mandatory the trade agreement procedures that were already in place to “make . . . doubly sure that American interests will be properly safeguarded.”<sup>683</sup> The President further modified the safeguard criteria and procedures in Executive Orders 10004 and 10082 in October 1948 and October 1949, respectively.

The safeguard criteria and procedures in the Executive Orders were codified and further defined in section 7 of the Trade Agreements Extension Act of 1951. Specifically, the law required the Commission to institute a safeguard investigation at the request of the President, either House of Congress, the House Committee on Ways and Means, the Senate Committee on Finance, an application from an interested party (typically the domestic industry), or upon its own motion. The Commission was charged with determining whether increased imports of a product that had been granted tariff concessions had caused or threatened to cause serious injury to the domestic industry. The new law set out a list of factors that the Commission consider in its investigation: “a downward trend of production, employment, prices, profits, or wages in the domestic industry concerned, or a decline in sales, an increase in imports, either actual or relative to domestic production, a higher or growing inventory, or a decline in the proportion of the domestic market supplied by domestic producers.”<sup>684</sup>

If the Commission made an affirmative injury determination, it was required to recommend a remedy to the President. The remedy could be either through an adjustment in the rate of duty or through the establishment of an import quota.<sup>685</sup> The President could reject or accept (either in whole or in part) the Commission recommendation. Should the President reject the recommendation, he was required to report to the House Committee on Ways and Means and the Senate Committee on Finance as to why.

Section 7 of the 1951 Act was amended in 1953 and 1958. In a 1953 amendment, Congress reduced the time given to the Commission for completing investigations from 1 year to 9 months, and the 1958 amendment Congress further reduced the time to 6 months. The 1958

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<sup>682</sup> Exec. Order No. 9832, 3 C.F.R. 126 (Supp. 1947); Gary Hufbauer and Howard Rosen, *Trade Policy for Troubled Industries* (Washington, DC: Institute for International Economics, 1986), 10.

<sup>683</sup> Remarks announcing Exec. Order No. 9832, February 25, 1947, <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=2207> (accessed July 15, 2016).

<sup>684</sup> *Ibid.*

<sup>685</sup> 1951 Act § 7(a), 65 Stat. 74.

amendments also provided that groups of employees could file petitions for safeguard relief with the Commission, and provided a legislative procedure under which a two-thirds majority of each House of Congress could direct the President to proclaim the remedy action recommended by the Commission.<sup>686</sup>

By the early 1960s, many observers noted that U.S. safeguard provisions limited the authority of U.S. trade negotiators, and bred mistrust among the foreign trade partners of the United States.<sup>687</sup> In this climate, several provisions of the U.S. safeguard law were revised in section 301 of the Trade Expansion Act of 1962 (TEA) that limited the ability of the United States to award safeguard protection.<sup>688</sup>

As Stanley Metzger—later a Commissioner—explained, under the 1951 law the Commission presumed a connection between an increase in imports that caused injury and the trade agreement concession that preceded the increase. In contrast, the TEA required the Commission to determine whether the increase in imports resulted “in major part” from trade agreement concessions.<sup>689</sup> The 1951 law allowed the Commission to make an affirmative determination when the increase in imports was “either actual or relative to domestic production.” In other words, the Commission could make an affirmative determination even when imports were declining in actual terms but were increasing relative to domestic production. The TEA eliminated the phrase “relative to domestic production,” thus only an absolute growth in imports would be considered for potential safeguard relief. The TEA also changed the language from requiring that imports “contributed substantially” towards causing or threatening serious injury to a requirement that the increase in imports must be a “major factor” in causing or threatening to cause serious injury.

The new law modified the list of factors that the Commission was to consider in determining whether an industry was seriously injured or threatened with serious injury. The TEA specified that the Commission was to “take into account all economic factors which it considers relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, and unemployment or underemployment.”<sup>690</sup>

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<sup>686</sup> Stanley Metzger, “The Trade Expansion Act of 1962,” *Georgetown Law Journal* 51 (1962), 442; William K. Ris, Jr., “Escape Clause Relief under the Trade Act of 1974,” *Columbia Journal of Transnational Law* 16 (1977), 301. In practice, Congress has never voted to enact safeguard relief after the President has opted not to impose the Commission’s recommendations.

<sup>687</sup> Ris, “Escape Clause Relief,” 1977, 301.

<sup>688</sup> The Trade Expansion Act, Pub. L. No. 87-794, 76 Stat. 872 (1962). The TEA also included new trade adjustment assistance provisions that supplemented the tariff and quota relief available under the escape clause.

<sup>689</sup> Metzger, “The Trade Expansion Act of 1962” (1962), 444.

<sup>690</sup> *Ibid.*

Another important change in the TEA limited the length of time that safeguard protection could be in place.<sup>691</sup> Under the 1951 law, safeguard protection could essentially be in place for an unlimited amount of time, although the Commission was directed to review the need for the protection on an annual basis after the protection had been put in place for two years. The TEA set a four-year time limit on the initial period of relief, and a four-year time limit on any extensions of that relief.

As will be discussed in the next section, the President awarded very few industries safeguard protection under the TEA. Of the 29 industry investigations the Commission undertook between 1962 and 1974, only 5 resulted in temporary withdrawal of concessions. As Ris (1977) points out, “in the depressed economic climate of the early 1970s such stringent requirements became politically unacceptable.”<sup>692</sup> Changes to legislation passed in the Trade Act of 1974 were designed to make it easier to obtain safeguard protection. Indeed, the Senate Finance Committee stated in its report on the bill that “the provisions of the Trade Expansion Act of 1962 for invoking the escape clause. . . have proven to be an inadequate mechanism for providing relief to domestic industries injured by import competition.”<sup>693</sup>

Although there have been amendments to the law since 1974, safeguard investigations today are still conducted under the Trade Act of 1974.<sup>694</sup> A major change in the 1974 legislation was the elimination of the requirement that the increase in imports be tied to tariff concessions made by the United States. The second major change was the reinstatement in modified form of the causation test in the legislation that preceded the TEA. Instead of the “major” cause specified in the TEA, the 1974 legislation required the increased imports to be a “substantial” cause of injury or threat of injury; the 1974 Act defined “substantial cause” as “a cause which is important and not less than any other cause.”<sup>695</sup> The 1974 law also once again allowed the Commission to calculate increases in imports as those increases relative to domestic production rather than absolute increases.

As enacted in the Trade Act of 1974, section 201 required the Commission to take into account “all economic factors which it considers relevant,” including, with respect to serious injury, “the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry” when determining “serious injury,” and with respect to

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<sup>691</sup> The 1962 law also amended the provision by allowing Congress to direct the President to impose the remedy recommended by the Commission by a simple majority vote in both chambers, as opposed to a two-thirds majority.

<sup>692</sup> Ris, “Escape Clause Relief,” 1977, 304.

<sup>693</sup> Senate Finance Committee, *Trade Reform Act of 1974: Report of the Committee on Finance . . . on H.R. 10710*, S. Rept. 93-1298 (1974) at 119.

<sup>694</sup> Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).

<sup>695</sup> *Ibid.*

the threat of serious injury, “a decline in sales, a higher and growing inventory, and a downward trend in production, profits, wages, or employment.”<sup>696</sup>

Section 201 specified four forms of import relief could result from a safeguard investigation: (1) tariff increases; (2) tariff rate quotas; (3) quotas; or (4) orderly marketing agreements. Tariff increases were limited to 50 percent above the tariff levels at the time of the President’s proclamation. Finally, Congress limited the duration of import relief to 5 years, with provision for a one-time extension of up to 3 years.

The Omnibus Trade and Competitiveness Act of 1988 (OTCA) amended section 201 in several important ways.<sup>697</sup> First, in OTCA, Congress sought to address controversial determinations that had resulted from application of the “substantial” cause standard. As set out in the original and current version of section 201, the Commission needs to determine whether imports are at least as great as any other cause of injury to the domestic industry. In 1980, a three-Commissioner majority had applied this test leading to a negative injury determination based on the finding that the economic recession was a far greater cause of injury to the automobile industry than were imports.<sup>698</sup> One amendment adopted in 1988 directed the Commission to consider the condition of the domestic industry over the course of the business cycle. Intuitively, the Commission could still consider the effects of a recession, but as a set of distinct causal factors rather than as a single factor. The House report on the bill specifically stated that if the decline in industry production is “much more pronounced than would normally occur in a cyclical downturn, the industry may be suffering serious injury because of imports.”<sup>699</sup>

The 1988 amendments also changed the duration of investigations. Under the 1988 amendments, the Commission must make an injury determination within 120 days of the filing of a petition; the Commission must also make a critical circumstances determination at this time if requested by the industry.<sup>700</sup> The Commission’s final report must be sent to the President within 180 days of the filing of the petition. With an affirmative critical circumstances determination, the President would have only seven days to make a provisional relief determination.

Finally, the 1988 amendments direct the Commission to use a new standard for remedy recommendations and monitoring. Recall that the 1974 version of the law required the

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<sup>696</sup> *Ibid.*

<sup>697</sup> Omnibus Foreign Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

<sup>698</sup> Warren Maruyama, “The Evolution of the Escape Clause—Section 201 of the Trade Act of 1974 as Amended by the Omnibus Trade and Competitiveness Act of 1988,” *Brigham Young University Law Review* (1989), 407.

<sup>699</sup> 55 H.R. Doc. No. 33, 100th Cong., 1st sess. (1987).

<sup>700</sup> Critical circumstances occur when there has been a “substantial” increase in imports over a short period of time that could impair the effectiveness of import relief; the introduction of critical circumstances was intended to prevent trading partners from flooding the U.S. market during the safeguard investigation.

Commission to determine the level of import relief that would “prevent or remedy” serious injury. In contrast, the 1988 amendments emphasize the need for industries to make positive adjustments, requiring that the Commission recommend the level of import relief that would facilitate the ability of the domestic industry to compete successfully with imports after the relief is lifted. The Commission is directed to monitor developments in industries benefitting from safeguard relief to ensure that such “positive adjustment” is taking place.

## U.S. Safeguard Law and the General Agreement on Tariffs and Trade

When Executive Order 9832 was issued in 1947, the drafting of the GATT was already well underway and the criteria in the Executive Order for making injury determinations were virtually the same as those proposed by the United States in the negotiations and later included in Article XIX.<sup>701</sup> As explained by Jackson, Article XIX of the GATT “was the result of United States desires.”<sup>702</sup> Article XIX of the original GATT reads:

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 in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and 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 or modify the concession.<sup>703</sup>

The GATT language essentially stated that in order to invoke Article XIX, countries had to show imports in such increased quantities as to cause serious injury or threaten serious injury. These increased imports had to be a result of both concessions made under the GATT and “unforeseen developments.”

While Article XIX set out a standard to be applied in invoking Article XIX, it did not include detailed rules and procedures regarding the conduct of investigations, notification of affected

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<sup>701</sup> There were some minor exceptions. For example, “like or similar” in the Executive Order was “like or directly competitive” in Article XIX because the English words for “like” and “similar” both translated into “similaire” in French.

<sup>702</sup> John Jackson, *World Trade and the Law of GATT* (Charlottesville: Michie Company, 1969), 553. See chapter 23 of Jackson’s book for an overview of developments leading to the drafting and early interpretations of the Article XIX text.

<sup>703</sup> General Agreement on Tariffs and Trade (GATT), October 30, 1947, 61 Stat. A3 (1947), T.I.A.S. 1700 (effective January 1, 1948).



exporting countries, and international consultations. The Trade Act of 1974 set out steps to be taken toward GATT revision, including “the revision of article XIX of the GATT into a truly international safeguard procedure.”<sup>704</sup> Although a group of countries (the Group of 7), including the United States, attempted to draft a new safeguard code under the Tokyo Round of trade negotiations between 1974 and 1979, countries were unable to reach an agreement.<sup>705</sup>

The Omnibus Trade and Competitiveness Act of 1988 also identified safeguards as among the principal negotiating objectives of the United States for what became known as the Uruguay Round of trade negotiations. The GATT Contracting Parties this time reached agreement, and the Agreement on Safeguards, which was applicable to all members of the new World Trade Organization, was part of the Uruguay Round Agreements that became effective on January 1, 1995. Among other things, the Agreement on Safeguards set out the conditions for applying a measure; requirements regarding the conduct of investigations, including notice of proceedings and opportunity for participation; definitions for the terms “serious injury,” “threat of serious injury,” and “domestic industry;” a list of factors to be considered in determining whether increased imports are causing or threatening serious injury; a provision allowing members to apply a measure on a provisional basis pending completion of a full investigation when critical circumstances are found to exist; rules relating to the application of measures, including to developing country members; the duration and review of measures; rules relating to notification and consultation; and surveillance by a Committee on Safeguards.<sup>706</sup>

To implement the Uruguay Round Agreements, the United States made some modifications to its safeguard statute, including adding the Agreement’s definition for such terms as “serious injury,” and revising the allowable duration of a safeguard measure. Between 1995, the year the Uruguay Round Agreements entered into force, and 2015, the President imposed safeguard measures on imports of six products or groups of products: broom corn brooms, wheat gluten, lamb meat, steel wire rod, circular welded quality line pipe, and certain steel products. U.S. trading partners filed complaints with the World Trade Organization’s Dispute Settlement Body challenging each of these measures, although complaints associated with the safeguard protection awarded to broom corn brooms and steel wire rod never proceeded to a panel determination. In four of the disputes, WTO panels and the WTO Appellate Body found that the

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<sup>704</sup> Section 121(a)(2) of the Trade Act of 1974 (88 Stat. 1986).

<sup>705</sup> Jorge F. Perez-Lopez, “GATT Safeguards: A Critical Review of Article XIX and Its Implementation in Selected Countries,” *Case Western Reserve Journal of International Law* 23, no. 3 (1991), 534–38.

<sup>706</sup> World Trade Organization (WTO), Agreement on Safeguards, [https://www.wto.org/english/tratop\\_e/safeg\\_e/safeint.htm](https://www.wto.org/english/tratop_e/safeg_e/safeint.htm) (accessed March 11, 2016).

United States had acted inconsistent with its obligations.<sup>707</sup> All six safeguard measures were eventually terminated.

One of the key issues challenged in these disputes was the way in which the United States treated its preferential trade agreement (PTA) partners under the safeguard actions. As explained in Pauwelyn (2004), under the Safeguards Agreement WTO members evaluating the degree to which imports are causing serious injury can either (1) consider all imports or (2) consider just those coming from third parties, thereby potentially excluding imports from PTA partners in making the injury determination. At the same time, Article 2.2 of the Agreement states that if a WTO Member wants to apply safeguard measures, it must apply them to all imports (including those from PTA partners), while Article 5.1 of the Agreement limits the application of safeguard measures to that which would remedy the serious injury. A WTO dispute settlement panel on Argentinian safeguard measures seemingly reconciled these potentially contradictory Articles when they defined the concept of parallelism as “imports included in the [injury] determination made under Articles 2.1 and 4.1 should correspond to the imports included in the application of the measure under Article 2.2.”<sup>708</sup> In other words, if the WTO member excludes imports from PTA partners when making their injury determination, these countries can later be excluded from the application of the safeguard measure. If the WTO members makes its injury determination using imports from all members, then the safeguard measure must be applied to all trading partners.

Dispute panels associated with U.S. safeguard measures on wheat gluten, lamb, line pipe and steel each found that the United States violated the Agreement on Safeguards when it made its injury determination using global imports but later excluded its PTA partners, including Mexico and Canada, from the resulting safeguard actions. In each of these rulings however, the Appellate Body stated that a gap between the imports considered during the investigation and the imports covered by the resulting safeguard measures can be justified if the WTO member can establish that only the imports from the countries covered by the measure cause or threaten to cause serious injury.<sup>709</sup>

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<sup>707</sup> WTO panels and the WTO Appellate Body have not, as of this writing, fully upheld any of the global safeguard measures challenged under the WTO’s dispute settlement procedures, and have upheld only one safeguard-like measure applied by a WTO Member. See Dispute DS399, United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China, downloaded from [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds399\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds399_e.htm), (accessed January 18, 2017).

<sup>708</sup> WTO, “Argentina Safeguard Measures on Imports of Footwear,” —AB-1999-7—Report of the Appellate Body, WT/DS121/AB/R, adopted January 12, 2000.

<sup>709</sup> Jooste Pauwelyn, “The Puzzle of WTO Safeguards and Regional Trade Agreements,” *Journal of International Economics Law* 7 (2004), 120.

## Commission Investigations

As illustrated in Figure 10.1, the number of petitions filed at the Commission has varied considerably over the years. While the Commission initiated a large number of safeguard investigations prior to 1962, nearly 10 per year, remedies rarely followed these investigations.<sup>710</sup> Of the 135 petitions, the Commission recommended action in 33 cases and the President chose to impose safeguard protection in just 15, an eleven percent success rate.<sup>711</sup> Examples of products awarded safeguard protection during this time period include fur hats, figs, watch parts, bicycles, clothespins, and sheet glass.

Only 28 industry petitions were filed during the 12 years in which the safeguard provisions in the Trade Expansion Act of 1962 were in effect. Of these 28 investigations, only five resulted in some form of safeguard measures, on products including pianos, earthenware, sheet glass (2 investigations), and ball bearings.

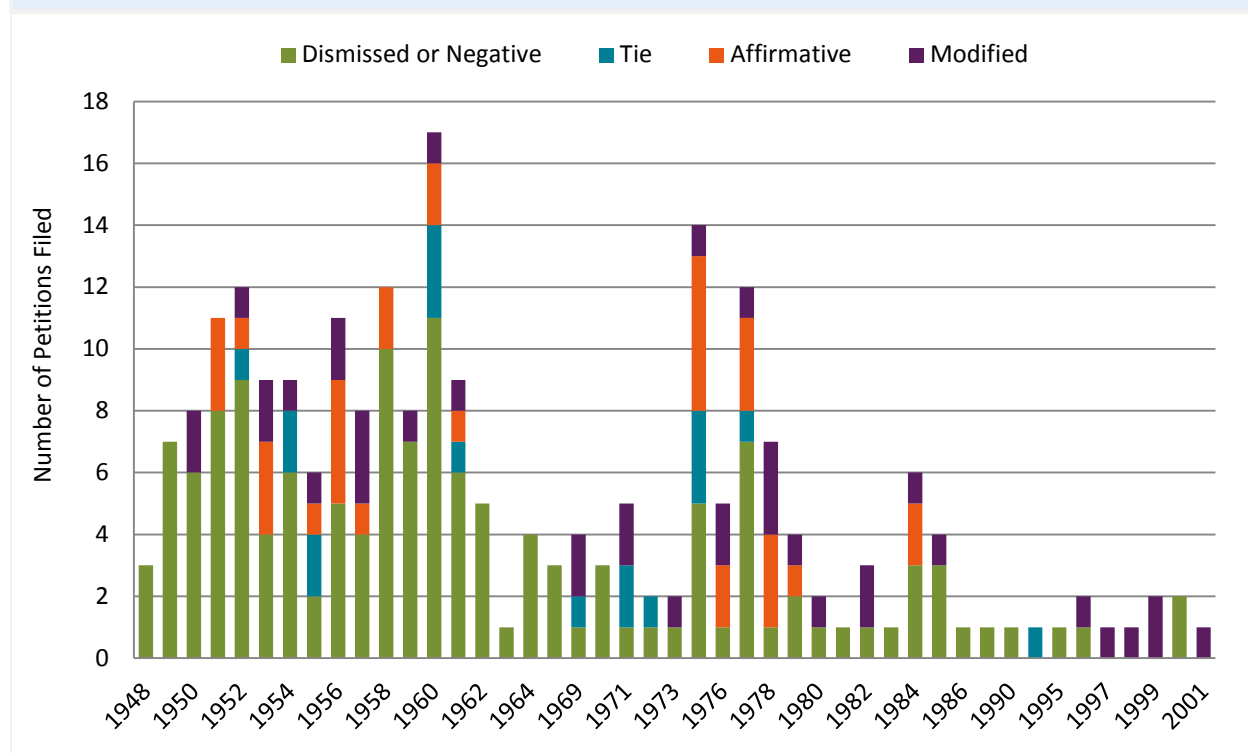
The number of safeguard petitions filed temporarily increased under the Trade Act of 1974, but then declined after 1980. Relatively few petitions resulted in the imposition of safeguard actions. A notable example was a 1980 case on certain motor vehicles, chassis, and bodies, in which the Commission made a negative determination; this was one of the biggest cases in terms of product value in the Commission's history, and one of the most publicized. In fact, the imposition of safeguard relief is rare in the United States, particularly when compared to the number of countervailing duty and antidumping duty orders. The Commission conducted 73 global safeguard investigations between 1975 and 2015, with 44 of the 77 investigations completed between 1975 and the end of 1980. The President imposed relief in only 19 cases during this time.<sup>712</sup> The President last imposed a safeguard remedy, on a large number of steel products in 2001. Each investigation that resulted in protection since the 1974 Trade Act is listed in Table 10.2.

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<sup>710</sup> Note that this average includes all "preliminary investigations" that resulted in the Commission dismissing the petition without instituting a formal investigation because there failed to be a "good and sufficient reason" to do so. USITC, *Investigations Under the Escape Clause of Trade Agreements*, 1963, 2.

<sup>711</sup> The Commission was equally divided in its determination in nine other investigations. In those instances, the President was authorized under section 330(d) of the Tariff Act of 1930 (19 U.S.C. 1330(d)) to impose a safeguard measure if he considered the determination of the Commissioners voting in the affirmative to be the determination of the Commission. The President has only rarely imposed a safeguard measure under such circumstances.

<sup>712</sup> This includes a 1995 safeguard investigation on imports of fresh winter tomatoes that was terminated by the Commission at the request of the petitioner following a negative preliminary determination by the Commission and before the Commission made a determination in a full investigation.

**Figure 10.1:** U.S. safeguard investigations, 1948–2016

Source: Compiled by the author from: (1) U.S. Tariff Commission, “Investigations Under the Escape Clause of Trade Agreements,” TC Publication 116, 1963; (2) U.S. Tariff Commission, “Investigations Under section 301 of the Trade Expansion Act of 1962,” TC Publication 472, 1972; and (3) USITC, *Annual Report*, various volumes.

**Table 10.1:** Safeguard protection, 1975–2016

Case No.	Product	Initiation	Termination	Years of Protection	Form of Protection
201-005	Stainless steel and alloy tool steel	6/14/1976	2/13/1980	3.7	Quota, OMA
201-018	Footwear	7/28/1977	6/30/1981	3.9	OMA
201-019	Television receivers	7/1/1977	6/30/1982	5.0	OMA
201-029	CB radio receivers	3/27/1978	4/11/1981	3.0	Tariff
201-035	High-carbon ferrochromium	11/3/1978	11/13/1981	3.0	Tariff
201-036	Clothespins	2/18/1979	2/22/1984	5.0	Quota
201-037	Bolts, nuts, and screws of iron or steel	12/26/1978	1/5/1982	3.0	Tariff
201-039	Non-electric cookware	1/17/1980	1/16/1984	4.0	Tariff
201-043	Mushrooms	11/1/1980	10/31/1983	3.0	Tariff
201-047	Heavyweight motorcycles	4/1/1983	10/9/1987	4.5	TRQ
201-048	Stainless steel and alloy tool steel	7/19/1983	9/1/1989	6.1	TRQ, OMA
201-051	Carbon and certain alloy steel products	10/1/1984	9/31/1989	5.0	OMA
201-056	Wood shingles and shakes	7/6/1986	6/1/1991	4.9	Tariff
201-065	Broom corn brooms	11/28/1996	12/3/1998	2.0	Tariff
201-067	Wheat gluten	5/30/1998	6/1/2001	3.0	Quota
201-068	Lamb meat	7/7/1999	11/15/2001	2.4	TRQ
201-069	Certain steel wire rod	3/1/2000	3/1/2003	3.0	TRQ
201-070	Circular welded carbon quality line pipe	3/1/2000	3/1/2003	3.0	Tariff
201-073	Steel	3/20/2002	12/5/2003	1.7	TRQ, Tariff

Source: Reproduced from Liebman and Reynolds (2013).

As listed in Table 10.2, between 1975 and 2016 the duration of safeguard measures has ranged from approximately two years to slightly more than six years. In addition to the steel industry, other firms benefitting from protection include producers of such diverse products as lamb meat, clothespins, motorcycles, and wood shingles.

Since 1975, the United States has been equally as likely to award tariff protection, tariff rate quotas (TRQs), and other quantitative protection, which can take the form of either Orderly Marketing Agreements (OMAs) or quotas. Although the level of protection is typically clear when a tariff is put in place, the level of protection from quantitative protection is harder to manage. For example, in 1998 the United States imposed quantitative restrictions on U.S. imports of wheat gluten. While quota fill rates from individual countries reached or exceeded 100 percent in the first year of protection, a number of important trading partners (including Canada and Mexico) were excluded from the quota, which limited its effectiveness.<sup>713</sup>

What accounts for the limited use of safeguard protection in the United States? As argued in Hansen and Prusa (1995), it could simply be due to the higher legal and administrative thresholds than antidumping and countervailing duty protection. Safeguard regulations require that imports are a substantial cause of “serious” injury, compared to the “material” injury standard in countervailing duty and antidumping cases. Congress has stated that the serious injury standard should be harder to prove than material injury.<sup>714</sup> Unlike in antidumping and countervailing duty investigations, the final decision to apply safeguard measures is made by the President in a final procedural stage. As a result, safeguard investigations tend to be more political and the outcomes more uncertain than antidumping and countervailing duty cases.<sup>715</sup>

Safeguard protection is also relatively rare among other countries in the WTO. For example, between 1950 and 1994 GATT members invoked safeguard protection only 150 times; U.S. cases accounted for 19 percent of total GATT safeguard protection during this time period.<sup>716</sup> Between 1995 and 2015, WTO members initiated 311 safeguard investigations; of these investigations, nearly half (155 investigations) resulted in the imposition of safeguard measures,

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<sup>713</sup> USITC, *Wheat Gluten: Evaluation of the Effectiveness of Import Relief*, USITC Investigation No. TA-204-7, USITC Publication 3478 (Washington, DC: USITC, 2001).

<sup>714</sup> Wendy L. Hansen and Thomas J. Prusa, “The Road Most Taken: The Rise of Title VII Protection,” *World Economy* 18, no. 2 (1995), 299.

<sup>715</sup> *Ibid.*

<sup>716</sup> Perez-Lopez, “GATT Safeguards,” 1991, 524, and WTO, *WTO Analytical Index*, 2007.

compared to more than 3,000 antidumping measures and 202 countervailing duty measures enacted by WTO members over this same time period.<sup>717</sup>

## Special Safeguards

Note that the Commission does not administer all safeguard regulations in the United States. For example, since the Uruguay Round Agreements became effective in 1995, the U.S. Department of Agriculture has administered Special Agricultural Safeguards. Similarly, the Department of Commerce administered the transitional safeguard associated with the elimination of textile and apparel quotas.

In recent years the Commission has been charged with administering two special safeguard programs. The first is a special safeguard program for industries that have experienced serious injury following tariff reductions under a U.S. free trade agreement. Typically, the Commission is authorized to conduct such special FTA safeguard investigations within 10 years of the implementation of a new FTA, and the rules that govern such investigations are very like those governing global safeguard investigations.<sup>718</sup> In practice, the Commission has not conducted any investigations under special FTA safeguard provisions.

The Commission was also charged with administering section 421 of the Trade Act of 1974, which implemented a special safeguard program to help U.S. industries adjust to import surges from China.<sup>719</sup> China agreed to these special safeguard provisions as part of an agreement with the United States that would allow for its accession to the WTO.<sup>720</sup> The rules governing section 421 safeguards differed significantly from those governing global safeguard investigations. For example, section 421 states that Commission must determine whether products from China are being imported in such “increased quantities. . . as to cause or threaten to cause market disruption to the domestic producers.”<sup>721</sup> Importantly, the law defines market disruption as increased imports (either relative or in absolute terms) that are a significant cause of material injury or threat of material injury, rather than the more stringent serious injury requirement in global safeguard investigations. Under the “significant cause” requirement, increased imports

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<sup>717</sup> The United States has accounted for a much smaller share of global safeguard protection since 1995, accounting for just 3.2 percent of safeguard investigations and 3.8 percent of safeguard measures made by all WTO members between 1995 and 2015. World Trade Organization, [https://www.wto.org/english/tratop\\_e/safeg\\_e/safeg\\_e.htm](https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm) (accessed July 18, 2016).

<sup>718</sup> USITC, *Summary of Statutory Provisions Related to Import Relief*, USITC Publication 4468 (Washington, DC: USITC, 2014), 31.

<sup>719</sup> Section 421 of the Trade Act of 1974, 19 U.S.C. § 2451(b)(1) (2000).

<sup>720</sup> U.S.-China WTO Market Access Agreement, November 15, 1999. The provisions of this agreement are similar to those on special safeguards that were included in China’s Accession Protocol to the WTO. WTO Ministerial Conference, *Protocol on the Accession of the People’s Republic of China*, WT/L/432, November 23, 2001, <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/L/432.doc> (accessed March 16, 2016).

<sup>721</sup> Section 421 of the Trade Act of 1974, 19 U.S.C. § 2451(b)(1) (2000).

from China need not be “equal to or greater than” any other cause, an easier requirement to meet than the “substantial” cause required for global safeguards.<sup>722</sup>

Under section 421, if the Commission reached an affirmative injury determination, the Commissioners voting in the affirmative transmitted their remedy recommendation to the USTR. In turn, the statute authorized the USTR to enter into negotiations with China as to the best way to remedy the material injury or threat of material injury. If those negotiations failed, the President could then decide whether and how much safeguard protection to award. Unlike global safeguard actions, there was no legal restriction on the length of time that safeguard protection could be awarded under section 421.

The Commission launched seven section 421 safeguard investigations between 2002 and 2009. Under the less stringent injury requirements, the Commission recommended safeguard action in five of these cases. However, the President declined to impose protection in all but one: passenger vehicle and light truck tires.<sup>723</sup> Specifically, the President chose to impose tariffs starting at 35 percent on September 26, 2009 that would gradually be phased out after a three-year period.

Under the U.S.-China WTO Market Access Agreement, section 421 safeguards were designed to be phased out over the 12 years following China’s accession to the WTO, a period that ended on December 11, 2013.

## Case Studies in Safeguard Protection

A 1982 Commission study on the effectiveness of safeguard protection defined “adjustment to import injury” as “an end to the industry’s state of injury.” The study went on to specify that this adjustment can happen in one of two ways: (1) the industry could modernize and improve its performance so that it becomes more competitive or (2) the industry could contract so that only the most competitive firms survive.<sup>724</sup>

The remainder of this chapter consists of three case studies in safeguard protection to assess the degree to which these industries could adjust, and whether such adjustment took the form of modernization or contraction. The three safeguard actions highlighted, each of which was filed under the Trade Act of 1974, are representative of the wide range of possible outcomes that one might expect from safeguard protection. For example, the footwear industry

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<sup>722</sup> *Ibid.*

<sup>723</sup> U.S. Government Accountability Office (GAO), *U.S.-China Trade: The United States Has Not Restricted Imports under the China Safeguard*, GAO-05-1056 (Washington, DC: GAO, 2005).

<sup>724</sup> USITC, *The Effectiveness of Escape Clause Relief in Promoting Adjustment to Import Competition*, Investigation No. 332-115, USITC Publication 1229 (Washington, DC: USITC, 1982), 6.

continued to contract in the 1970s and 1980s despite safeguard protection, and many of the firms remaining in the industry have refocused their efforts on high-value operations such as design and marketing while outsourcing the actual manufacturing to lower-cost foreign producers. In contrast, many analysts point to the safeguard protection awarded to the U.S. motorcycle industry, which provided Harley Davidson time to reorganize and innovate, as a clear success story. Although the safeguards awarded to the steel industry provided a temporary period of relief to firms, the case study highlights the fact that industries will continue to face challenges from increasing import competition and fluctuating demand well after periods of safeguard protection are lifted.

## Case Study 1: Footwear

The Commission launched a section 201 investigation (Investigation No. 201-18) on footwear on September 28, 1976 at the request of the Senate Finance Committee. The Commission had been following economic conditions in the footwear industry closely. The first safeguard investigation involving the footwear industry had been instituted in 1970 (TEA-18), and resulted in a deadlocked decision by the Commission that resulted in no Presidential action. The footwear industry sought out safeguard protection again in 1975; that investigation (201-007) resulted in the Commission recommending import relief through either tariffs or tariff-rate quotas. President Gerald Ford found that import restraints would not be in the national interest at that time, and instead recommended expedited adjustment assistance to firms.<sup>725</sup>

The number of U.S. footwear producers had declined slightly more than 6 percent between 1969 and 1975, while production had decreased 22 percent between 1969 and 1973. Meanwhile, imports of non-rubber footwear had increased 30 percent between 1970 and 1975 and the import penetration ratio had risen from 48 percent to 82 percent during this same time period. In 1975, Taiwan accounted for 33 percent of U.S. imports of non-rubber footwear, with other leading import sources including Italy, Spain, and Brazil. Although not a leading supplier of footwear yet, accounting for just 12 percent of U.S. imports, imports from South Korea doubled in 1974–75 alone. The Commission report in the case noted that the footwear industry was extremely labor-intensive, and wage rates in the United States significantly exceeded those in Taiwan and South Korea.<sup>726</sup> While all the Commissioners found evidence that imports were a substantial cause of serious injury, four of the Commissioners recommended relief in the form of a tariff-rate quota system and one Commissioner recommended an increase in tariffs of

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<sup>725</sup> USITC, *Footwear: Report to the President on Investigation No. TA-201-18 under section 201 of the Trade Act of 1974*, USITC Publication 799 (Washington, DC: USITC, 1977), A-4.

<sup>726</sup> *Ibid.*



30 percent. The final Commissioner recommended firm-specific adjustment assistance rather than the imposition of import protection.<sup>727</sup>

Instead of imposing the tariff-rate quotas suggested by the Commission, President Jimmy Carter ordered that Orderly Marketing Agreements be negotiated only with Taiwan and South Korea. The agreements, which were in effect from 1977 through 1981, initially limited Taiwanese and South Korean imports of footwear to 78 and 75 percent, respectively, of their footwear imports from 1976. Restrictions were divided across categories, but there was some flexibility to shift quotas across categories and borrow from future periods.<sup>728</sup>

The quotas dramatically limited imports from Taiwan and South Korea, and raised average unit prices for affected footwear from those countries. Other countries could take advantage by increasing their U.S. market share, with imports from unconstrained countries growing 50 percent in 1978 alone.<sup>729</sup> The quotas restrained the growth of footwear imports during the four years they were in place; between 1976 and 1981 U.S. imports of footwear grew 2.6 percent compared to a growth of 25 percent in the five years before the quotas were in place, as illustrated in Figure 10.2.<sup>730</sup>

In a 1980 investigation into whether the OMAs should be extended, U.S. footwear producers reported to the Commission that they had attempted to improve their competitiveness vis-a-vis imports by engaging in (1) marketing efforts, (2) increased investment, (3) efforts to reduce costs, and (4) efforts to streamline management. And, there was some evidence that the health of the industry was significantly better in 1981 than it had been at the time the OMAs were enacted; before-tax profit margins in the U.S. footwear industry were 80 percent higher in 1981 than they had been the year prior, reflecting higher prices associated with the OMAs. However, the Commission report also found that industry efforts to reduce their labor costs through automation were hampered by a number of factors and that labor productivity had increased only 1 percent between 1975 and 1979.<sup>731</sup> Despite the reduced growth of imports and efforts to become more competitive, domestic shipments continued to decline over the period of quota protection, falling almost six percent between 1976 and 1980. Based on the results of this report, the Commission unanimously recommended that the OMA with Taiwan be

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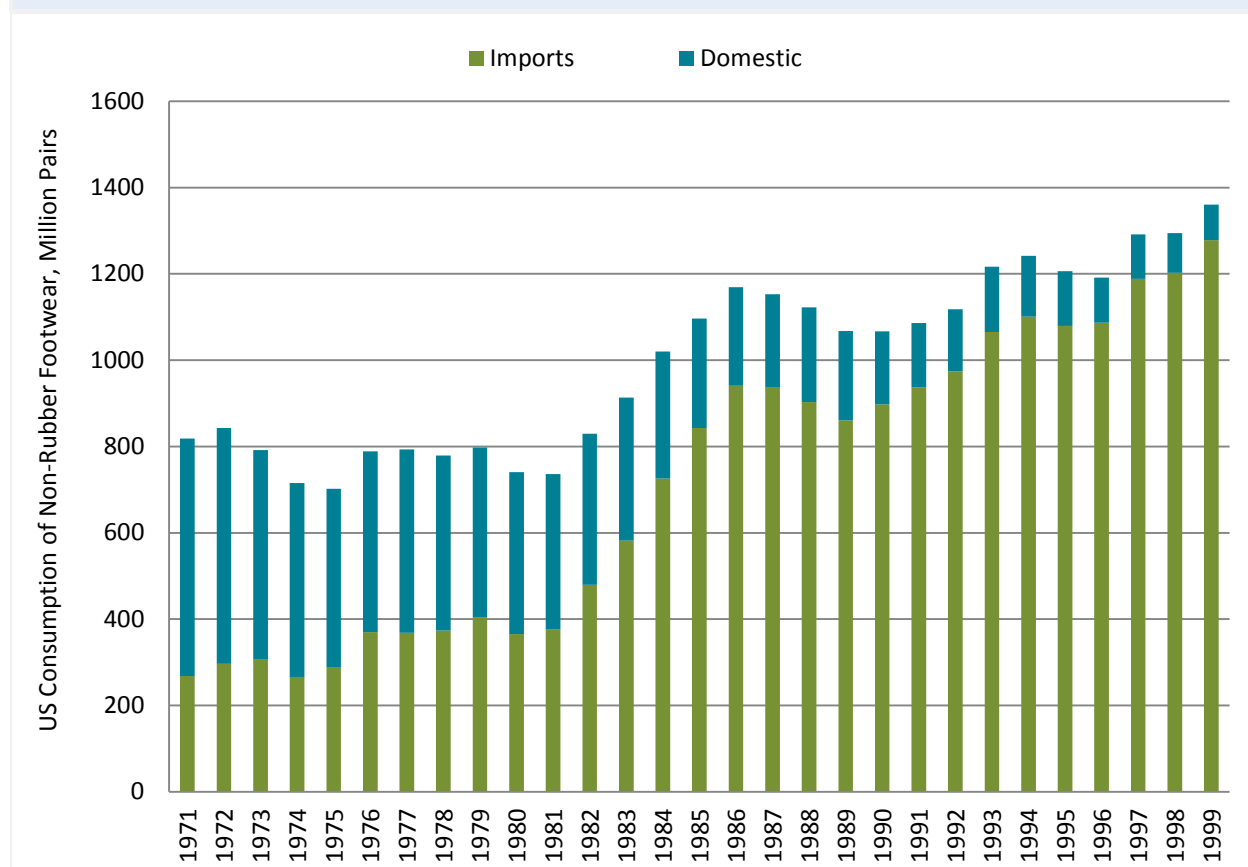
<sup>727</sup> *Ibid.*, 4.

<sup>728</sup> Congressional Budget Office (CBO), *Has Trade Protection Revitalized Domestic Industries?*, by Daniel P. Kaplan, (Washington, DC: Congress of the United States, 1986), 62.

<sup>729</sup> *Ibid.*, 63.

<sup>730</sup> *Ibid.*, 65.

<sup>731</sup> USITC, *Nonrubber Footwear: U.S. Production, Exports, Imports for Consumption, Producers' Price Index, and Consumer Price Index, First Calendar Quarter 1981: Report to the President on Investigation No. 332-93*, USITC Publication 1148 (Washington, DC: USITC, 1981), A19.

**Figure 10.2:** U.S. consumption of non-rubber footwear, 1971–99

Source: USITC, *Nonrubber Footwear Statistical Report*, various issues.

extended an additional two years; Commissioners noted that while the footwear industry had stabilized it was “by no means healthy” and that it would take time for the effect of investments made during the OMA period to be felt.<sup>732</sup> Despite this recommendation, the President did not continue the OMAs.

The Commission launched two more safeguard investigations involving non-rubber footwear: one in January 1984 (201-050) and a second in December 1984 (201-055) both at the request of the Senate Finance Committee. The number of domestic footwear producers had declined another 6.5 percent between 1977 and 1982, while imports of non-rubber footwear increased 65 percent between 1981 and 1984. By 1984, the import penetration rate had increased to 72 percent by quantity and 54 percent by value, reflecting the fact that by this point the U.S. industry had abandoned production of the lowest value-added footwear. Taiwan and South Korea continued to be the major source of U.S. imports of footwear, particularly of low-cost athletic footwear, followed closely by Brazil.<sup>733</sup> Although the Commission unanimously

<sup>732</sup> *Ibid.*, 7.

<sup>733</sup> *Ibid.*, 5.

recommended safeguard action in the latter case, President Ronald Reagan declined to implement the Commission’s recommendation. Legislation passed by Congress in 1985 and 1990 that would have implemented the Commission’s recommendation was vetoed by President Reagan and President George Bush, respectively.<sup>734</sup> According to Fawn Evenson, former director of the Footwear Industries of America, after the 1990 legislation was vetoed the footwear industry gave up trying to protect the industry from imports, explaining “We literally spent millions of dollars on trade cases. We almost went broke trying to protect jobs . . . We are importers. We’re going to spend a lot more time on market access and on exports.”<sup>735</sup>

As of 2013, the total number of domestic footwear manufacturers had fallen to 214 from 409 in 1974. The majority of U.S. footwear companies that remain have focused on outsourcing the production of footwear, while focusing U.S. efforts on design, branding and distribution. Imports account for 98.5 of the U.S. footwear market, with almost 71 percent of these coming from China.<sup>736</sup>

## Case Study 2: Motorcycles

In 1982, the Commission launched a safeguard investigation to determine whether imports were the cause of serious injury or threat to serious injury in the heavyweight motorcycle industry at the request of Harley-Davidson Motor Co. Although the health of the U.S. motorcycle industry was fairly strong in the period immediately preceding the safeguard investigation, the recession of 1981–82 hit the industry quite hard. Domestic production and consumption declined dramatically, while inventories (primarily of imports from Japan) increased from 108,000 to more than 200,000 in a single year.<sup>737</sup>

At the time of the investigation, there were three producers operating in the United States, Harley-Davidson and two Japanese owned companies, Kawasaki and Honda. Of the three, Harley-Davidson was on the shakiest ground. The U.S.-owned firm had accounted for 20 percent of the American market in the late 1970s, but by 1982 its market share had fallen to just 14 percent, and the firm had experienced financial losses in both 1981 and 1982. According to one analysis, “due to the change in market demand, its own entrepreneurial deficiencies,

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<sup>734</sup> Textile and Apparel Trade Enforcement Act of 1985, H.R. 1562, 1985.

<sup>735</sup> *Encyclopedia of American Industries*, s.v. “SIC 3143 Men’s Footwear,” <http://www.referenceforbusiness.com/industries/Leather/Men-s-Footwear-Except-Athletic.html> (accessed March 17, 2016).

<sup>736</sup> USITC, *Shifts in U.S. Merchandise Trade 2014*, 2014, [https://www.usitc.gov/research\\_and\\_analysis/trade\\_shifts\\_2014/footwear.htm](https://www.usitc.gov/research_and_analysis/trade_shifts_2014/footwear.htm), accessed March 17, 2016.

<sup>737</sup> Daniel Klein, “Taking America for a Ride,” *Cato Policy Analysis* No. 32, January 12, 1984.

and a crushing debt problem,” the firm, which had just returned to private ownership in 1981, was quickly approaching bankruptcy.<sup>738</sup>

Commissioners found heavyweight motorcycles were being imported at such increased quantities as to be a threat of serious injury to the domestic industry, warning particularly of the high levels of inventories, and that tariffs on these products should be increased for a five year term—starting at 45 percent in the first year and gradually decreasing to 10 percent by the last year of the safeguard action.<sup>739</sup> On April 1, 1983, President Reagan approved the Commission’s proposal with minor modifications.<sup>740</sup>

Under the safeguard tariffs, U.S. imports of heavyweight motorcycles for consumption declined 86 percent in volume and 78 percent in value between 1982 and 1985.<sup>741</sup> The ratio of imports to consumption declined from 95 percent to 20.3 percent in volume. The volume of imports in the smaller engine category of motorcycles increased 89 percent over the same time period.<sup>742</sup> Average U.S. prices of heavyweight motorcycles increased over this time period, from slightly less than \$4,000 in early 1984 to \$5,800 by the end of 1986.

During the period of safeguard protection, Harley-Davidson “improved and redesigned virtually every component of its motorcycles.”<sup>743</sup> Although the redesign of its motors had started in 1980, Harley-Davidson reported that the safeguard tariffs provided the protection necessary for these adjustments to be fully operationalized and successful. The company also instituted improvements in its product design and manufacturing processes, as well as new marketing programs. Perhaps just as important, the company restructured its debt and launched an initial public offering of stock in 1986. Harley-Davidson also acquired Holiday Rambler Corp., a producer of recreational vehicles, in 1986 which nearly doubled its annual revenues. In May, Harley-Davidson announced record quarterly sales and earnings.

Although the safeguard tariffs were due to expire on April 16, 1988, Harley-Davidson requested in a letter filed with the Commission in March of 1987 that the safeguard relief be terminated

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<sup>738</sup> *Ibid.*

<sup>739</sup> USITC, *Heavyweight Motorcycles and Engines and Powertrain Subassemblies Thereof, Report to the President on Investigation No. TA-201-47*, USITC Publication 1342 (Washington, DC: USITC, 1983), 2. Note that both Kawasaki and Honda produced their motorcycles in U.S. foreign trade zones, and thus had the choice of paying either the safeguard tariff upon entry into the United States or the rates of duty on the imported components on those motorcycles.

<sup>740</sup> President Reagan allocated duty-free allowances to several smaller importers (West Germany, Britain, Italy) each year, so that the duties almost exclusively impacted Japanese producers.

<sup>741</sup> USITC, *Heavyweight Motorcycles: Report to the President on Investigation No. TA-203-17*, USITC Publication 1988 (Washington, DC: USITC, 1987), 74.

<sup>742</sup> *Ibid.*

<sup>743</sup> *Ibid.*, A-28.

early. As a result, safeguard tariffs were removed on October 9, 1987, with Harley-Davidson in a position of fiscal health.

Today, Harley-Davidson remains a safeguard success story. As of 2016, Harley-Davidson continued to hold an estimated 59 percent of the U.S. motorcycle market. One of the primary hurdles facing the company today is declining domestic demand due to the aging of the baby boomer population. As a result, Harley-Davidson and other motorcycle manufacturers are looking more and more to serving international markets. In 2013, Harley-Davidson announced that it would manufacture two motorcycle lines outside of the United States to serve foreign markets rather than serve these markets through exports.

### Case Study 3: Steel

Between 1975 and 2001, the Commission conducted six safeguard investigations involving the U.S. steel industry. Petitions filed in 1975, 1982, 1984, and 1999 had all resulted in safeguard protection in at least a subset of the steel products under consideration in the investigations.<sup>744</sup> This case study will be limited in scope to the safeguard investigation launched in 2001.

As background, the U.S. steel industry is divided into two distinct types of firms: traditional or “integrated” steel mills produce steel out of iron ore and other raw materials while “mini-mills” produce new steel products from scrap metal. In the 1990s, the integrated mills had both a large number of retired workers relative to the size of their current workforce, which generated significant pension costs (so called legacy costs) and high overhead costs.<sup>745</sup> In contrast, mini-mills had lower labor and capital costs. Despite these apparent advantages, integrated mills could produce products such as large, flat rolls of steel that mini-mills were incapable of producing. By 2002, U.S. production was approximately evenly split between these two types of firms.<sup>746</sup>

U.S. steel producers were also struggling to compete with imports,<sup>747</sup> both for the reasons discussed above and others. For example, U.S. firms had much higher labor and environmental costs when compared to their foreign competitors. The U.S. industry also alleged that unfair practices of foreign producers such as subsidization and high tariff barriers gave foreign producers an artificial advantage in the U.S. marketplace. The United States started to import

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<sup>744</sup> The steel industry had also filed numerous successful petitions for antidumping and countervailing duty protection over this time period.

<sup>745</sup> Robert A. Blecker, “US Steel Import Tariffs: The Politics of Global Markets,” in *Contemporary Cases in U.S. Foreign Policy*, edited by Ralph G. Carter (Washington, DC: CQ Press, 2004), 256.

<sup>746</sup> *Ibid.*

<sup>747</sup> Susan Rosegrant, *Standing Up for Steel: The US Government Response to Steel Industry and Union Efforts to Win Protection from Imports (1998–2001)*, Case Program at the John F. Kennedy School of Government, Harvard University (Cambridge: 2002), 194.

significant amounts of steel from Western Europe and Japan starting in the 1960s. Imports from newly industrializing countries such as Brazil, South Korea, and Taiwan grew throughout the 1970s and 1980s. In the 1990s, steel imports from transition economies such as Russia, China, and the Ukraine started to grow.<sup>748</sup>

In the late 1990s, the U.S. steel market was booming due to a period of rapid growth in the United States, but with the strong value of the U.S. dollar during this period much of this growth was met by low-priced imports from countries whose own economies had suffered downturns. In the aftermath of the Asian Financial Crisis in 1997–98, U.S. steel imports increased 37 percent in 1998 alone. Although U.S. steel firms were for the most part still profitable at this time, employment in the industry had dropped by nearly 10,000 workers between 1997 and 1999 alone, and there was considerable lobbying for the imposition of protection to limit this surge in imports. The steel industry filed record numbers of antidumping and countervailing duty petitions over this period, while the Clinton administration launched a plan to respond to increased imports which included plans to negotiate voluntary export restraints with Japan and a steel import monitoring program. The administration approved safeguard restrictions on two narrow categories of steel products in early 2000: a tariff on imports of welded line pipe and a tariff rate quota on imports of steel wire rod. Meanwhile, Congress was pushing the administration to impose more broad-based relief; the House passed legislation imposing steel quotas for a period of three years which was later killed in the Senate, while additional legislation was proposed that would make it easier for the industry to obtain safeguard relief by changing the “serious” injury standard to the “material” injury standard used in antidumping investigations.

Between 1999 and 2002, 30 U.S. steel companies filed for bankruptcy, and thousands of steel workers lost their jobs. The U.S. recession in 2001 that was concurrent with an appreciation of the U.S. dollar aggravated conditions in the industry; import penetration increased to 30 percent by 2000 while average prices fell sharply, particularly in 2000–01.<sup>749</sup> In the wake of these developments, the Commission launched a safeguard investigation on four broad categories of steel products at the request of USTR in June 2001. At the conclusion of the investigation, the Commission made determinations in 27 separate industries (individual steel products): 15 negative determinations, 8 affirmative determinations, and four split decisions.<sup>750</sup> Commissioners were split in their determination of the level of safeguard relief that should be imposed, with some Commissioners recommending tariffs ranging from 20 to 40 percent and others recommending quotas.<sup>751</sup> For some products, the Commission recommended that

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<sup>748</sup> Blecker, “US Steel Import Tariffs,” 2004, 252.

<sup>749</sup> *Ibid.*, 250.

<sup>750</sup> Alan O. Sykes, “The Persistent Puzzles of Safeguards,” *Journal of International Economic Law* 7 no. 3 (2004), 547.

<sup>751</sup> Robert Read, “The Political Economy of Trade Protection,” *The World Economy* 28 (2005), 1120.

nations with which the United States had preferential trading agreements (including Canada, Mexico, Israel, and Jordan) be excluded from safeguard actions.

On March 5, 2002, President George W. Bush instituted safeguard protection on 10 distinct steel products; safeguard tariffs of up to 30 percent and some tariff-rate quotas were imposed for a period of three years, with annual reductions in the level of protection. With only a few exceptions, the levels of protection put in place were higher than those recommended by the Commission.<sup>752</sup> Most of these safeguard protections exempted U.S. preferential tariff agreement partners, in addition to Australia and South Korea, and Brazil and Russia were given relatively high quotas compared to their production levels in 2000. The countries most affected by the safeguard protection included China, Japan, and the members of the European Union. Exclusions were made for individual products at the request of U.S. steel consumers and foreign producers. In total, the safeguard policies covered 24 percent of steel imports by volume and 31 percent as measured by value.<sup>753</sup>

U.S. foreign trade partners filed numerous WTO complaints against the United States. The EU introduced its own steel safeguards in March 2002 for a period that would not exceed the length of time that the U.S. safeguards were put in place; the EU also released a list of products that would be subject to retaliatory tariffs should the U.S. choose not to lift its safeguard protection. The WTO Dispute Settlement panel and Appellate Body found that the United States had violated WTO safeguard obligations in a report circulated in November 2003.

Meanwhile, the Commission was charged with evaluating the effectiveness of the import relief in a report issued in September 2003. The Commission report found that in the first 18 months of the safeguard actions the U.S. steel industry had undergone significant restructuring and consolidation, including several large mergers. There had also been significant investment and restructuring of labor contracts, although the USITC noted that these changes were not necessarily due to the safeguard actions.<sup>754</sup> Steel prices increased modestly during the period of protection, although the industry continued to shed jobs. The Commission did not make any recommendations as to whether the steel safeguards should be continued. In December 2003, the Bush administration announced that it was rescinding the steel safeguard tariffs after just 15 months, stating at the time that the protection had been successful, and thus were no longer needed.

The U.S. steel industry continues to face significant competition from foreign producers. For example, although steel prices initially soared in the initial recovery from the 2008 global recession, global overcapacity caused sharp reductions in steel prices by 2012. The strong U.S.

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<sup>752</sup> *Ibid.*, 1121.

<sup>753</sup> Blecker, "US Steel Import Tariffs," 2004, 265.

<sup>754</sup> Read, "The Political Economy of Trade Protection," 2005, 1129.

dollar has further hampered performance by the U.S. steel since 2015. Import penetration rates in the domestic steel market increased from 27 percent in 2011 to 32 percent in 2014. Large U.S. steel firms have tried to become more competitive by acquiring smaller, more efficient mills, while the least efficient firms have been forced to exit the market.

## Conclusion

The Commission has played a vital role in the process through which U.S. industries can obtain temporary relief from import surges through U.S. safeguard law. Although the regulations governing the imposition of relief have been modified throughout the years, some aspects of the law have stayed consistent—the Commission must determine whether imports are causing or threatening to cause serious injury to the domestic industry. Should the Commission make an affirmative determination, the President can choose whether to impose temporary protection that would allow the domestic industry to adjust to increasing levels of import competition. Current U.S. laws regulating the imposition of safeguard actions mirror those regulations implemented multilaterally under the Uruguay Round of trade negotiations in 1995.

Safeguard protection has the potential to provide more comprehensive relief to domestic industries when compared to other laws administered by the Commission such as antidumping or countervailing duties. However, in practice this form of trade remedy has rarely been used. Consider, for example, that between 1995 and 2014 the United States awarded safeguard protection to only 6 industries, compared to the 345 antidumping measures awarded by the United States over this same time period. There are many potential explanations for this. Because safeguard law requires that imports be a source of “serious” injury rather than the “material” injury standard of antidumping and countervailing duty law, the Commission is less likely to find that safeguard protection is warranted under the law. The Commission has recommended safeguard relief in only 45 percent of cases it considered since 1975. Because safeguard protection must be approved by the President, industries also face more political hurdles in being awarded safeguard protection when compared to other forms of import relief. Of the 33 investigations in which the Commission made affirmative determinations between 1975 and 2001, only 19, or slightly more than half, of these resulted in safeguard protection.

For those industries that have been awarded safeguard protection, the period of import relief has resulted in two types of adjustment. Some industries, such as the footwear industry, have adjusted by contracting to include only the most efficient firms or transforming into an industry that engages in significant amounts of outsourcing. Other industries, such as the motorcycle industry, have been able to invest in new products and production processes, lowering costs and increasing demand for their products so that when safeguard protection is lifted they can once again compete in world markets. As highlighted by the case study associated with steel safeguards, though, virtually all industries continue to face increasing import competition after



safeguard protection is lifted, thus readjustment might be better thought of as a continual process rather one that ends when safeguard protection is lifted.

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## Chapter 10: Safeguards

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# Chapter 11

## Reflections of Members of the Trade Bar



**Photo:** Trade practitioner Eugene L. Stewart addressing the Commission along with Dave Gridley, Bruno Bagnaschi, and Joseph Christiano, then of Torrington; the main hearing rooms in the old and current Commission buildings.

Prepared by Terence P. Stewart and Alfred E. Eckes, Jr.,  
from Interviews Solicited by the ITC Historical Society<sup>755 756</sup>

## Introduction

Several interviews were conducted by former USITC Commissioners of leading practitioners in trade remedy proceedings (antidumping, countervailing duty, escape clause cases) in the 1990s to obtain views on practice before the Commission. Alfred Eckes interviewed Eugene L. Stewart and Bruce Clubb interviewed Noel Hemmendinger in the mid-1990s. When the Commission noticed its intent to prepare a centennial publication, several additional interviews were conducted with leading practitioners in 2015–16 to bring the perspective of practitioners up to the present time. Specifically, Terence Stewart interviewed Richard Cunningham and Joseph Dorn. Thus, what follows are excerpts of interviews with a selected number of practitioners who have appeared before the Tariff Commission and the ITC over a period of some 63 years, from 1953 to the present.

The excerpts were selected in the hope they would provide the reader with an understanding of how practice before the Commission has evolved as viewed from selected practitioners and what advantages were perceived for the practices followed at different times.

We believe that the interviews and the following excerpts offer a unique perspective on the Commission, as practice has evolved over time in response to statutory changes and other factors. The text also includes comments on several high profile cases and on some of the staff who have ably served the Commission over the years.

All of the transcripts have been, or will be, made available to the ITC Historical Society and the USITC Library.

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<sup>755</sup> Professor Eckes is a former Commission Chairman and Eminent Research Professor Emeritus of History at Ohio University. Mr. Stewart is Managing Partner at Stewart and Stewart. The ITC Historical Society was established in 1995 as a 501(c)(3) non-profit organization.

<sup>756</sup> The excerpts from interviews with leading practitioners which follow are against a background of trade remedy statutes which have evolved over the years. Practice at the Commission was modified significantly by the Trade Agreements Act of 1979 and subsequent enactments, discussed in Chapter 9. This legislation broadened judicial review of Commission determinations and provided for access to confidential information of record which has permitted better informed arguments of parties and by the introduction of broadly available judicial review from Commission determinations.

## When did you first appear before the Commission and what observations do you have from that experience?

**Eugene L. Stewart**, who returned from military service in the South Pacific during World War II to attend Georgetown University and its law school, recalled working on a case on jewel watches in 1953.<sup>757</sup> "I had the wonderful learning experience of working at Steptoe and Johnson under a brilliant attorney, Paul Mickey. He managed the firm's work on the second jewel watch case before the Tariff Commission. Under Mr. Mickey I worked directly with Elgin National Watch Company and Hamilton Watch Company and developed data for presentation in the case. Mine was a junior capacity, but I was included in all work sessions and sat in with Mr. Mickey at all hearings at the Commission. Those hearings were before Commissioners [Edgar] Brossard, [Oscar] Ryder, [Lynn] Edminster, and [George] McGill. I was able as a young lawyer to observe with fascination the demeanor and conduct of the commissioners, and the manner in which the case was presented with great skill by senior counsel and by the opposition representing the Swiss watch industry and the government of Switzerland."

"This experience gave me insight into the sharp cleavage in interpretative philosophy that then existed on the Commission and has replicated itself through the years. The effort of the Congress to take politics out of the tariff by creating the Tariff Commission in 1916 resulted in transferring tariff politics from the Congress to the Commission. It was initially astonishing to me, and perplexing as years went by, that of six commissioners, approximately half could with fidelity apply the terms of the statute to the objective facts developed on the record, while the other half would apply economic philosophy and macroeconomic stratagems to arrive at opposite conclusions. In many cases, three Commissioners clearly found the facts indicated serious injury by reason of increased imports, and the other three commissioners in an equally clear-cut decision would find just the opposite."

"In winning the case, we were able to have the votes of four commissioners, including Commissioner Lynn R. Edminster, a brilliant Commissioner, a Democrat and a liberal, but an individual characterized by a high degree of intellectual integrity. The case went to President Eisenhower and would have met the fate of other recommendations for relief, had it not been for the fact that the domestic producers engaged the services of General of the Army Omar Bradley, who had served with General Eisenhower in the European theater. General Bradley worked hard to master the facts of the case, and briefed General Eisenhower, who then made an affirmative determination granting relief to the watch industry."

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<sup>757</sup> Interview conducted September 18, 1996, in San Francisco, CA, by Alfred E. Eckes Jr. for the ITC Historical Society. U.S. Tariff Commission (USTC), *Watch Movements and Parts*, Investigation No. 26, section 7, September 1953.

“From that experience I learned that at the White House level, no matter how hard fought and hard won an affirmative at the Commission might be, it would usually be set at nought by the staff advising the President. Their staff write-up would be strongly influenced by the State Department and its overwhelming desire at all costs to avoid having the President raise tariffs or withdraw tariff concessions. So strong was the influence of the State Department throughout the entire history of the Commission that an affirmative determination and recommendation for relief by the Commission had but a slight chance to [take] effect.”

**Noel Hemmendinger**, a graduate of Princeton University and Harvard Law School, served in the military during World War II, and later in the State Department, where he had responsibility for Japan’s relationship to the GATT negotiations in 1955.<sup>758</sup> His first appearance at the Tariff Commission occurred in an umbrella frames escape-clause case. By a 3–2 vote the Commission recommended withdrawal of the tariff concession, but the Eisenhower administration rejected it after seeking more information.<sup>759</sup>

At that time counsel did not have access to a Commission staff report or, initially, to responses from questionnaires. Representing Japanese respondents, “we handled the economic issues in a very primitive, pragmatic way. We would get the statistics that were available from the Census Bureau, and we made a big use of Dun & Bradstreet reports. Unreliable as they notoriously were, you could always use them for cross-examination. ‘Didn't you tell Dun & Bradstreet thus and so?’ Then some executive would have to say ‘Look, you don't talk the same way to everybody.’ Our objective was to show that imports were a minor source of whatever problems the industry was having, and then we would do our best to compare prices in a way that was advantageous to us. This you could rarely do, because obviously the Japanese were underselling. That is how they were getting into the U.S. market.”

“We might even argue that imported goods were not comparable. I don't think we had an escape-clause case on it, but I recall that Japanese cigarette lighters were made out of American beer cans. My general recollection is that none of that trade was badly hurt by whatever remedies, if any, the President adopted.”

**Richard O. Cunningham:** “I think that I am one of those rarest of all breeds, a Washington, DC, native with a series of degrees from George Washington University who remained here to practice law!<sup>760</sup> I came to Steptoe and Johnson on August 5, 1968, and initially wanted to be a personal injury litigator. One of the partners, Monroe Leigh, a giant in public international law, got me interested in the first international antidumping code, and asked me to do a memorandum. Three months later Westinghouse, a maker of heavy electrical equipment,

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<sup>758</sup> Interview conducted March 20, 1996, in Washington, DC, by Bruce E. Clubb for the ITC Historical Society.

<sup>759</sup> USTC, *Umbrella Frames*, Investigation No. 63, section 7, April 1957.

<sup>760</sup> Interview conducted March 9, 2016, in Washington, DC, by Terence P. Stewart for the ITC Historical Society.



asked us to initiate the first multi-country antidumping case on large power transformers from seven countries.<sup>761</sup> Meanwhile Steptoe was hired by Alyeska Pipeline, building one of the first big Alaskan pipelines, and Monroe asked me to handle the antidumping case. So there I was, handling probably the most complicated, certainly one of the biggest trade cases ever, and we blundered through and won on six of seven countries and obtained a suspension agreement as to Sweden. It's a classic case of being in the right place at the right time, because the U.S. economy was really globalizing at that point. Import concerns were becoming more significant than they had been previously."

**Initially, you appeared on behalf of petitioners and were involved in several highly visible cases, such as the Harley-Davidson escape-clause case in 1982. When did you begin representing respondents?**

**Cunningham:** "Some of the major cases that led us to prominence involved representing Harley-Davidson, first in an antidumping case which we won at Treasury Department and then lost 4–2 at the Commission, and then in an escape-clause section 201 case which we won at the Commission. As one of the staff put it, the win came with a three-point shot at the buzzer by the Chairman, voting in our favor. That was a fascinating, anecdote-rich case but also a very highly visible case. I take great pride in the Harley-Davidson case, the escape-clause case that I love most.<sup>762</sup> It is the one they teach in the textbooks, as to how safeguards ought to be done. The one theological point that I might offer: An industry should never be able to obtain relief unless the relief gives the industry time to revamp and save itself, and the industry has the actual prospect of doing that. Harley-Davidson did a fabulous job in that regard."

"My first respondent-side case came when British Steel came to us in 1975. It turned out to be the start of a relationship that still endures. For 41 years I've been doing work for British Steel and its successor companies. And so we became a majority foreign-side firm. The reason for that was that as these cases developed over the years, they became more multi-respondent cases and multi-country cases, and so frankly there was just a lot more work on the foreign side of the cases. We followed the Willie Sutton principle. If we were asked why do you do respondent-side cases, it's the same answer that Willie Sutton gave when they asked him, 'Why do you rob banks?' He said: 'Well, that's where they keep the money!' [But] we still do petitioner-side cases. I did the initial round of Boeing cases in the WTO against Airbus. We have represented the U.S. Enrichment Corporation, the firm that makes uranium here [a subsidiary of Centrus Energy Corp.]."

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<sup>761</sup> USITC, *Large Power Transformers from France, Italy, Japan, Switzerland, and the United Kingdom*, Investigation Nos. AA1921-86–90, April 1972.

<sup>762</sup> USITC, *Heavyweight Motorcycles, Engines, and Power Train Subassemblies*, Investigation No. TA-201-47, February 1983.

## **Joseph Dorn, you began to practice before the Commission in the late 1970s, before the 1979 Trade Agreements Act. What brought you to trade law and the Commission?**

**Joseph W. Dorn:** “I grew up in Atlanta, Georgia, and after graduating from the University of North Carolina and the University of Virginia Law School, I started practicing with an Atlanta law firm, Kilpatrick and Cody, in February 1974.<sup>763</sup> When a Georgian named Jimmy Carter was elected President, the firm sent me to Washington to help open an office. After moving up to Washington, I received a call one day from an Atlanta partner who said that the firm’s client Atlanta Stove Works was getting killed by imports of cast-iron cookware from Korea and Taiwan. He asked me if there was anything we could do to help this client.”

“Well, I had never taken a course in international trade law and I knew nothing about potential trade remedies. But I told the partner in Atlanta that I would look into it and call him back shortly. I then went to the library—back then you had a library with real books and shelves and so forth—you couldn’t google anything or ask Siri for the answer. And I found something called the Trade Act of 1974, which I thought might be helpful. I looked at that statute and found my way to section 201, which provided an ‘escape-clause’ remedy for U.S. industries suffering serious injury from increasing imports. With that information in hand, I confidently called the partner in Atlanta and told him we had a legal path to help Atlanta Stove Works. We got on the phone and talked to the client, and ended up filing an escape-clause petition in January of 1977. That began my 40-year career in international trade. Had I not gotten that call, there’s no telling where I would be today.”

## **How has practice before the Commission changed?**

**Eugene L. Stewart:** “I share the tendency of old-timers to prefer the good old days. Practice before the Commission in its earlier years was more satisfying from the point of view of petitioners, witnesses, and counsel than in later years. In the earlier years the Commissioners gave abundant time to counsel and witnesses in presenting their cases. They were keenly interested in the cases; they followed with close attention. They asked, for the most part, helpful questions in an effort to clarify the record, to secure information responsive to their particular interest and insight into the case, and also in a gentlemanly way to assist counsel and witnesses in developing more fully the case that they were seeking to present.”

“Commissioners were accessible to counsel; one could simply call at the Commissioner's office, with or without an appointment, be ushered in to his office, and invited to sit down and talk.”

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<sup>763</sup> Interview conducted March 14, 2016, in Washington, DC, by Terence P. Stewart for the ITC Historical Society.

“There was nothing untoward about such discussions because all counsel from all points of view had the same opportunity should they choose to select it. In such interviews, the Commissioners, as in the hearings, would listen intently, ask questions, contribute to the discussion, without disclosing their own predilection with respect to how to decide cases. That practice came to an end in the later years of the Commission, in which in response to the guidance of their General Counsel, the younger Commissioners drew up codes of ethics precluding *ex parte* contacts with Commissioners.”

“Counsel were forbidden to have a conversation with Commissioners, and if you called to offer some clarification of a point that had come up at the hearing, you were then required to prepare a memorandum of that discussion and place it on public record. This rubric pointed toward ethical considerations that had a staggering effect on the collegial relationship of the practitioners before the Commission and the Commissioners. In my judgment, counsel—particularly representing domestic interests—are viewed at arm’s length by Commissioners in hearings. Indeed, I have experienced what in my opinion was overt hostility on the part of Commissioners opposed to the use of the Escape Clause and the Antidumping Act to remedy injury to domestic industries.”

“To some degree, the more relaxed and open atmosphere that prevailed in the early days affected and imbued the staff with a similar attitude. It was relatively easy to drop by and visit with the staff people assigned to work on the case—from the Director of Investigations and the Director of Operations to the staff investigators, and even the economists. It was possible to have an open discussion of the case, to discuss what staff might feel were weaknesses in the record, and their interest in having more information to bolster certain areas of the record that they might feel were weak. In later years the staff have been more apprehensive about contacts by counsel, when essential contacts need to be made to follow up on matters pertaining to the questionnaire or matters which the staff itself propounded. There is in my opinion more of a tendency for staff to hold counsel at arm’s length.”

**Noel Hemmendinger:** “I don't recall ever chatting *ex parte* with a Commissioner. I think I carried over my own sense of how you dealt with a court, but I can say that it was not uncommon in those days for *ex parte* presentations to be made to Commissioners. What we did do at Christmas time was to take a big box of candy to the Secretary's office and to go around (I don't think we gave gifts to them) and extend our New Year or Christmas greetings to the individual Commissioners.”

**Joseph W. Dorn:** “The Commission was a different place when I began. It was common to walk the halls, to talk to Secretary Mason, and then to talk to the General Counsel, and perhaps to bump into a Commissioner. My mentor, Allison Wade, was a good friend of then-Chairman

Daniel Minchew, who was also from the state of Georgia. We would go chat with Chairman Minchew in his office. I believe that it was very common back then."

"Another major difference in the late 1970s was the length and location of hearings. It was very common to have field hearings where the client was located. My first escape-clause hearing was held in Birmingham, Alabama, where my client Atlanta Stove Works had a facility making cast-iron cooking ware. That hearing lasted all day, although it was a fairly simple case. There were no time limits, as I recall."

"I also did Live Cattle and Certain Edible Meat Products of Cattle.<sup>764</sup> That case in 1977 involved two days of hearings in Rapid City, South Dakota, two days in Fort Worth, Texas, two days in Kansas City, and one day in New York City. I'll never forget the hearings in Rapid City, South Dakota, where the Australian Meat Board decided to put on its expert witness. The audience included over 500 ranchers with their cowboy hats and boots. When Allison Wade cross-examined the expert witness, there were whoops and hollers from the ranchers each time he scored a point. It was pretty amazing."

**Richard O. Cunningham:** "The thing that was more different before 1980 was the way hearings were conducted at the Commission. Hearings were conducted not on the rigid time schedules that you have now. Steel hearings went three days, maybe a week, and in some ways it was better that way."

"I have a particular viewpoint on that, because my ambition was to be a litigator. One of the things that I prided myself on, and which I think I did pretty well, was cross-examination. In those days, you could have a serious cross-examination at the Commission, and there were times when we actually elicited, or they elicited from us, real information useful to the Commission. Also, there's nothing more fun than a successful cross-examination of an industry witness on either side in which you are able basically not only to catch them in contradictions, but to blow the essence of his testimony out of the water. There is nothing more satisfying than that, and we can't do that anymore."

"Now the Commission runs hearings, and you have an hour for each side. The Commissioners ask questions, but nobody cross-examines the other side. I think in the last 15 years, I may have asked five questions of the opposing side, maximum. But on the other hand, there was a down side to cross-examination in the old Tariff Commission building. The air conditioning system functioned poorly, and there would be hearings in hot weather where everyone took their jackets off."

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<sup>764</sup> USITC, *Live Cattle and Certain Edible Meat Products of Cattle*, Investigation No. TA-201-25, September 1977.

“Also, it was a time when the Commission wasn’t the center of scrutiny that it became later. You had some quirky, puckish people on the Commission who were willing to write quirky, puckish opinions—my favorite of those being Will Leonard’s opinion in the footwear escape clause case.<sup>765</sup> Picture this: You had been representing a foreign footwear producer who has relied in substantial part on the U.S. market. You have sent him word that the Commission has voted unanimously to impose quite serious restrictions on his imports. He is sending you telegrams and calling you to say ‘How could they do this to me?’ Then you send him Will Leonard’s opinion, which begins as follows: “The time has come, the walrus said, to speak of many things: of shoes (get it—?)—and ships—and sealing-wax—of cabbages—and kings.” And each of the sections was headed with a nursery rhymes quote: there was ‘Wynken, Blynken, and Nod,’ there was the ‘Little Old Lady Who Lived in a Shoe.’ I miss that kind of stuff, to be perfectly frank with you.”

### How did you view the investigative process? What staff members did you interact with frequently?

**Noel Hemmendinger:** Representing respondents, “we found the staff remarkably sympathetic. I concluded, at the time, that there was a generational difference. The staff were university graduates who, for the most part, had been taught that free trade was a good thing. They also reacted, I think, in the human, bureaucratic way to a dominance of old-time, [high-tariff] Republicans at the top of the Commission.”

“My colleague Nelson Stitt and I had come out of the government and we always felt that working sympathetically with staff, whether it be the Commission or the government, was important. You had to respect them and to understand their problems. We had very good relationships at the staff level, which were sometimes quite helpful because they could give information or not.”

**Joseph W. Dorn:** “One thing I’d emphasize is—that the staff was very, very helpful. I was a neophyte in the late 1970s. A senior partner, Allison Wade, was shepherding my work, but Allison also had no international trade experience. We were fortunate that folks like Bill Gearhart, in the General Counsel’s office; Bill Fry, the supervisory investigator; and Ken Mason, the Secretary, were all extremely helpful and gracious with their time. They helped me get comfortable in terms of my first case at the International Trade Commission. I think the Commission has very good and accessible staff relative to most other agencies that I have dealt with, and you have a lot of continuity at the Commission. I think that Bill Gearhart is probably still there. He was the first person I dealt with in my 1977 first escape-clause case. The USITC

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<sup>765</sup> USITC, *Footwear*, Investigation No. TA-201-7, February 1976.

has a lot of folks that have institutional knowledge, and they seem to love what they do and do a good job.”

**Eugene L. Stewart:** “In retrospect there were many giants among the senior staff, foremost among them the Secretaries to the Commission. The first in my experience was Donn Bent, then that ace of aces Ken Mason. Ken had the able, dedicated support of Ruby Dionne; Donn Bent, of Edith Finch. Each of whom were outstanding in their professionalism and their capability, and in their kindness and assistance to counsel.

“Charles Ervin created, and nobly occupied, the office of Director of Operations. He is clearly one of the great intellectual luminaries who has served the Commission over the years. The Directors of Investigation have been superb all, first in my experience William Kane, followed by Bill Fry, and then admirably succeeded by the incomparable Lynn Featherstone. There are several supervisory investigators who stand out in my memory: Al Parks, the quite wonderful John MacHatton, and Bruce Cates, each taken from us prematurely by mortal illness. Throughout my experience the amazingly resourceful, and extraordinarily talented, Eugene Rosengarden calmly produced miracles in the tariff commodity description and coordination with Brussels nomenclature.

“Russell Shewmaker, the epitome of trade-law professionalism, conducted and successfully carried on the Commission's epic work, the revision of the U.S. tariff classification. Giants all, the Commission has been blessed with their services over the many decades of my practice before the Commission.”

**Richard O. Cunningham:** “There were a couple of staff directors and general counsels over the years who always thought that their destiny was to become chairman of the Commission, and in most cases that didn't work out. Russ Shoemaker was very much like that. They really thought of themselves as running the Commission. As in the old adage about the one-eyed man being king in the land of the blind, the general counsel and staff director often thought themselves supreme.”

### **Please compare your early dumping case experience at the Commission to what you'd experienced in the escape-clause cases—any similarities? Any differences?**

**Joseph W. Dorn:** “Well, I think that there are some similarities. In the escape-clause cases, you were arguing about the adverse volume and price effects and injury to the industry. There was a similar approach in the dumping context, although the burden of proof was a lot lower. The hearings in antidumping cases were shorter. I don't remember exactly how that came about, but at some point, the Commission started imposing time restrictions on the parties. And another difference is the detail in the decisions themselves. In my escape-clause cases, you'd

have a decision that was maybe nine pages in length, double-spaced, with very limited discussion of the issues and the evidence. That certainly changed in the antidumping context after the 1979 Act.”

**In terms of the people that have appeared who have been on the other side, what have you viewed as the changes and how practitioners have approached the cases at the Commission?**

**Joseph W. Dorn:** “In the early days, there were a handful of practitioners, and it was very much a boutique practice area. As the practice has evolved, economic consultants have become more common. I think the arguments have become more sophisticated, briefs have gotten longer. I think documentation of factual evidence has become much more robust, records become much larger. Submission of affidavits has become more common. And I think judicial review may have some bearing on that. Both sides want to be sure they have evidentiary support for the propositions they are putting forth, so that findings in their favor will be sustained by the courts.”

**The Trade Agreements Act of 1979 saw a fundamental restructuring of how antidumping and countervailing duty investigations would proceed and what judicial review would be available. How do you see the changes affecting practice at the Commission? Also, do you have thoughts on the WTO review of Commission determinations?**

**Terence P. Stewart:**<sup>766</sup> “Trade remedy proceedings under the antidumping, countervailing duty, and escape-clause laws before 1980 were characterized by relatively truncated decisions by the Commission, limited access to information of record, and very limited judicial review. The same was true for the proceedings before Treasury for dumping or countervailing duty cases. Domestic users of the law were dissatisfied with the often long delays in the proceedings, the limited access to information, and the inability to pursue judicial review in a wide range of situations. Indeed, between 1921 and 1980 there were very few judicial decisions pertaining to any of these administered by Treasury, the Tariff Commission, or the USITC.

“When Congress was considering implementing legislation to adopt the Tokyo Round agreements, it used the occasion to fundamentally restructure transparency of process, access to information, and to more clearly define both the scope of judicial review (which decisions, time for challenges) and the standard of review for antidumping and countervailing duty cases.

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<sup>766</sup> Terence P. Stewart, managing partner of Stewart and Stewart, has practiced before the Commission since 1979, when he joined his father Eugene L. Stewart. Together or separately they have practiced before the Commission for 63 years

Over time, changes (such as access to information) were extended to escape-clause cases as well.

“While other participants have talked about the changes in how hearings were handled and how access to Commissioners and staff changed, the biggest improvement for practitioners was access to all information of record. This didn’t happen all at once at the Commission. But by the end of the 1980s, all interested parties could gain access to the full record before the Commission in Title VII cases. This permitted counsel for parties to make more informed arguments, to identify potential issues of importance for the Commission and Commission staff, and to improve generally the level of advocacy before the Commission. Access to information and the availability of judicial review significantly changed the breadth of staff reports and the depth of analysis by the Commissioners in their decisions.

“This has aided the public by making an understanding of individual cases easier to analyze. While it is correct to say that judicial review overall has not resulted in a large number of reversals of Commission decisions, it would not be correct to say that judicial review hasn’t sharpened the process of investigation, record compilation and use, and decision making at the Commission.”

**Richard O. Cunningham:** “Court review has had less impact than many people think. The Commission seems less concerned than Commerce about getting its decisions reversed; but it is not unconcerned. There are cases in which it is very clear that someone, whether in the General Counsel’s office or on the Commission, sees the results being very controversial and hence potentially subject to challenge. In those cases, someone is directing the staff to write the report and to bullet-proof it from appeal. But it’s not just court appeal, it is also WTO appeals. In particular, the Commission has had a terrible record at the WTO in escape clause cases, for reasons that have to do primarily with [the WTO’s] totally irrational, ideological view. They have at best a jaundiced view of mandatory trade remedy devices, such as antidumping and countervailing duties. They prefer safeguards, or the WTO dispute settlement mechanism, so you can deal with a problem as a trade issue, not as someone asserting rights to relief through litigation. You would think the WTO would say ‘We want to encourage a robust, vibrant escape clause.’ But the WTO has another deeper visceral, not rational but visceral, goal: Encouraging free trade. Anybody who wants to impose barriers to free trade, unless one can find a really, unbelievably compelling reason to do so, that just shouldn’t happen, and in the safeguard context we [the WTO] can stop it from happening.”

**Joseph W. Dorn:** “I don’t think the WTO’s had a very large impact on Commission practice. You’ll never see the Commission citing a WTO decision. You’ll never see the Commission citing the WTO dispute settlement agreement or one of the substantive agreements. The Commission cites the U.S. statute and the U.S. judicial decisions. On the other hand, I do think that WTO



decisions may have had some influence on the Commission's Office of the General Counsel. They are certainly well aware of the WTO decisions. Because ITC lawyers assist USTR in challenging some of the injury determinations made by other WTO members, I would think they would advise the Commission to avoid methodologies or approaches that the U.S. is challenging in WTO complaints against other countries. Thus, I think WTO dispute settlement cases have had some influence on the ITC's practice.

"As to judicial review, judicial review is certainly important because the end result could be flipped from affirmative to negative. But I think the courts have clearly had more influence on the Commerce Department. It's difficult to have the courts issue a decision that requires the Commission to reach an opposite result. So I think most practitioners think that unless you have a split decision, the chances of getting a reversal of the Commission on a remand from the Court of International Trade are fairly slim."

### **What have been the other notable accomplishments of the ITC, in addition to administering trade remedy laws?**

**Noel Hemmendinger:** "Some tasks not well known to the public have been very valuable. While it is not easy for a practitioner like myself to judge the value of the Commission and its advice to Congress and the Executive, I think it played a very useful role in tariff negotiations, providing disinterested technical information to negotiators. In addition, the production of the Tariff Schedules of the United States and the Harmonized Code were absolutely necessary and should be numbered among the notable successes."

## **Reflections on Major Cases**

### **The 1980 Automobile Escape Clause Case<sup>767</sup>**

**Eugene L. Stewart:** "The automobile case was commenced by the United Auto Workers, under the leadership of Douglas Fraser, who was then its president, and a distinguished labor statesman. Of the three major automobile companies, only Ford Motor Company was willing to support the petition actively, and they retained counsel and presented the testimony of their CEO, Philip Caldwell, who was a genuine industrial statesman. Chrysler did not participate even though its chairman, Lee Iacocca, made many bombastic statements regarding the harmful effects of Japanese import competition. The General Motors Corporation elected not to participate as a petitioner or in support of the petition. But they did offer very helpful testimony by their international vice president who helped put things in perspective. The main labor oar was carried by the autoworkers and their president, Douglas Fraser.

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<sup>767</sup> USITC, Motor Vehicles and Chassis and Bodies Thereof, Investigation No. TA-201-44, December 1980.

“The hearing attracted so much interest that it was held away from the Commission at a location where there was a large auditorium. It was completely filled with press and other interested persons. There was no limit on the length of testimony. We were given all the time required and the hearing ran until quite late at night.

“There were five commissioners in office at the time, and the Commission's vote was negative by one vote. Had that vote been affirmative, it would have been a majority affirmative. One commissioner who had given every indication in his demeanor, his questions, and, in discussions with fellow commissioners intended to vote affirmatively, but at the eleventh hour he voted negatively. This was in the closing days of the Carter administration. It is my opinion that the Carter White House did not want an affirmative determination where the actual formulation of action would be done by incoming President Ronald Reagan. In my view, White House intervention caused that swing vote to change. This is simply my surmise based on reading the tea leaves of the kind of informal, not first-hand, information that one can secure in such matters.”

### **Do you think if the vote had been held before the election in 1980, that the outcome might have been different?**

**Eugene L. Stewart:** “Yes, I think so, because President Carter clearly had wooed and sought the support of labor, as had President Reagan. Had the finding been made prior to the election President Carter, I believe, would have supported an affirmative determination, and promptly proclaimed a remedy to that effect. However, it didn't fall out that way. It is a case, I believe, in which White House influence directly affected the result. However, the strong record developed in the case and the opinions of the sitting Republican Commissioners who supported relief were factors which motivated President Reagan to honor his promise to the autoworkers. He used the power of his office to secure the voluntary import quotas agreement with Japan. Thus, the Commission's negative determination in the automobile case led to a nontariff barrier, not amenable to trade agreements. It is an example that when problems are so serious politically that they cry out for adjustment, extracurricular means will be followed, such as by voluntary export quotas to remedy the problem.”

**Noel Hemmendinger**, who represented respondent Fuji Industries, the producers of Subaru, commented on one of the Commissioner's negative opinions: “I particularly have been critical of one commissioner's opinion. Two Commissioners out of conviction found that, under the statutory standard, imports were not the principal cause of injury and two found that they were, also in good faith. But, Commissioner Calhoun found that they did not meet the statutory standard. But, he said the Japanese were insensitive in not doing something about it. In my opinion it was such a naive thing to do, because if he thought that relief was justified he might have put himself in the President's place and voted, let's say, without much explanation for

threat of injury. He had the power to swing that vote and yet he sat there and criticized the Japanese for not doing something about it.”

“I think that the outcome was a very unfortunate result, because one can never put the weight of politics altogether aside when you consider that important trade cases are also political cases. It was inevitable that there was going to be some restriction on imports from Japan at that time. A negotiation by the President was given precedence in the statutory framework was the logical way to do it, but the President was forced to do it outside the framework of the law because of what I thought was the chaotic vote of Commissioner Calhoun. But it was too bad, because that was one of the things that has discredited Section 201 as an effective remedy and has caused the growth of the [anti-dumping act], which I despise, as a prime remedy of choice for American industry that wants import relief.”

**Bruce E. Clubb:**<sup>768</sup> “The automobile case was perhaps the case that sounded the death knell for section 201. It seemed to me that the domestic industry had put a lot of effort into that case and it had some pretty compelling statistics on its side. If they could not win that case, I think that many industries looked at that and said: ‘If the auto industry can’t win that case at the Commission . . . how can anyone win?’

“Now obviously one could win the little cases, the clothespins, the umbrellas and things like that, but not the big-impact cases. I believe that observers, including attorneys, probably concluded after the automobile case that it is going to be very hard to win one of these escape-clause cases and then even if you win, the chances of getting relief from the White House are pretty remote. Moreover, it takes a year and a half or two years to do it. By that time you are dead in the marketplace, so you have to find a quicker solution. Against that background, do you believe that the Commission and the economy would have been better off if you had lost that case?”

**Noel Hemmendinger:** “It would not have made a damn bit of difference, because the President did, under his inherent powers, what he would have done if the Commission had done what I think it should have done. I guess the point I am making has more to do with the respect for an orderly governmental process than it does for the, shall we say, the fate of nations or the true foreign economic policy of the United States. I don't think you are ever going to determine the foreign economic policy of the United States with a Commission decision. That is ridiculous. The Commission can only play a minor, but possibly a very useful role in assisting the government to make good decisions. It is partly my age, I know, but I feel a sense of desperation about the flow of events and the possibility of rational decisions being made.”

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<sup>768</sup> Bruce E. Clubb, a graduate of the University of Minnesota and its law school, served on the Tariff Commission from 1967 to 1971 and then practiced trade law with Baker & McKenzie.

## 1984 Steel Escape Clause<sup>769</sup>

**Eugene L. Stewart:** “In the case of the carbon steel mill products, where Bethlehem Steel was the petitioner, supported by other steel companies, I had the honor to represent Bethlehem in the preparation and litigation of the petition. The case succeeded in large part because of Bethlehem's full commitment to utilizing all its resources in preparation, in securing witnesses of the highest credibility, and in prosecuting the case. Curtis Barnette, then general counsel, now the CEO of Bethlehem, provided strong leadership. The Commission, as you know, made an affirmative determination and recommended relief in the form of import quotas. The President elected not to grant that particular form of relief but used the force and effect of the Commission's recommendation . . . to encourage the principal steel-supplying countries to enter into voluntary agreements to restrict their exports to the United States.

“That is an instance where the Commission's affirmative determination was essential. It empowered the President to secure the consent of the principal steel-exporting foreign countries to a modality of regulation that spared the United States retaliation, trade wars, and all of those dreadful things which free traders conjure up whenever import action is taken.

“The import quotas recommended by the Commission were in line with the needs of the industry. The Commissioners voting for relief made a sensitive reading of what was required. The value of the way the President played his hand was that he defused the potential for the principal supplying countries to take retaliatory action by withdrawing tariff concessions, or creating the kind of international commotion that they like to do when they are trying to influence American presidents not to act. In any event the steel industry was satisfied with the voluntary import quotas. To enforce the program, Congress passed the Steel Import Stabilization Act [Title VIII of the Trade and Tariff Act of 1984, 19 USC 2253 note], and it laid down a benchmark for the volume of imports that would be permitted.”

**During the 1980s the U.S. steel industry filed a number of antidumping and countervailing duty cases against foreign suppliers and countries. You were involved in these as well. In retrospect, do you think the antidumping and countervailing duty cases contributed to the recovery of the U.S. steel industry?**

**Eugene L. Stewart:** “They certainly did. Industry was determined to utilize these remedies. Bethlehem Steel, United States Steel, Republic, Inland, and other companies fully participated with their own counsel as petitioners. The merits of the 1982 cases were extremely strong. The amount of countervailable subsidies found was quite large, the dumping margins were sizable, and it was quite clear that the case for injury was very strong. Once the preliminary

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<sup>769</sup> USITC, Carbon and Certain Alloy Steel Products, Investigation No. TA-201-51, July 1984.

countervailing duty and antidumping margins were determined, the principal supplying countries 'sued for peace' by requesting that the administration devise an approach that prevented the cases from going to final determination. There would have been in place, year after year, countervailing duty orders and antidumping duty orders. This gave rise to an agreement for voluntary export restraints.<sup>770</sup>

“The steel antidumping and countervailing duty cases, and escape-clause case, were outstanding in that they coalesced into providing positive assistance that enabled the domestic carbon steel industry to turn its situation around and to do the necessary restructuring. The steel industry closed obsolete plants, invested in new facilities, and remains a viable factor not only in the United States but in world steel trade.”

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<sup>770</sup> USITC, Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany, Investigation Nos. 701-TA-86-144, 701-TA-146-147, and 731-TA-53-86, February 1982.



# Chapter 12

## Intellectual Property Investigations



**Photo:** The Commission's Administrative Law Judges in 2016: Chief Judge Charles Bullock, Judge Theodore Essex, Judge Sandra Lord, Judge MaryJoan McNamara, Judge Thomas Pender, Judge David Shaw.

**V. James Adduci II, Sarah E. Hamblin, Louis S. Mastriani, Deanna Tanner Okun, and Tom M. Schaumberg<sup>771</sup>**

## Abstract

The U.S. International Trade Commission (Commission or USITC) was created by Congress in 1916 as the U.S. Tariff Commission (Tariff Commission or USTC).<sup>772</sup> As the relative importance of tariffs has declined and other obstacles to international trade have gained importance, the agency's functions have increased and expanded.<sup>773</sup> Intellectual property investigations have comprised a variable portion of the Commission's workload over the past 100 years. In 1922, Congress granted the Commission authority to investigate alleged unfair acts and recommend trade remedy actions to the President, but activity under the statute has followed more general patterns of global economic competition: in periods of lower economic interactivity or when the U.S. economy had a comparative advantage, fewer claims of unfair acts were brought before the Commission, whereas in times of greater economic and technological competition, activity under the statute increased. The agency has promulgated regulations to implement U.S. laws relevant to protecting U.S. industries from unfair competition and has undertaken institutional and procedural changes in response to significant new responsibilities conferred as a result of amendments to those laws.

Intellectual property investigations most frequently allege patent infringement, but the Commission's governing statute grants it the authority to investigate a broad range of unfair acts in importation, including copyright and trademark infringement, theft of trade secrets,

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<sup>771</sup> This chapter was provided by former Chairman Deanna Okun and practitioners James Adduci, Sarah Hamblin, Louis Mastriani, and Tom Schaumberg.

<sup>772</sup> Revenue Act of September 8, 1916, Pub. L. No. 64-271, § 702, 39 Stat. 796 (1916).

<sup>773</sup> Senate Finance Committee, *Trade Reform Act of 1974: Report of the Committee on Finance*, 93d Cong., 2d sess., S. Rep. No. 93-1298 (November 26, 1974), 115.



false designation of origin, and other forms of unfair competition. In the contemporary global market, with its concomitant drives for increased efficiency and higher productivity at lower costs, intellectual property rights holders increasingly rely on the ITC for protection against unfair competition. As a result, intellectual property investigations continue to grow increasingly complex, and occupy a central role in the Commission's work.<sup>774</sup>

## Introduction

Intellectual property (IP) has played an important role in this country's economic system since the nation's founding.<sup>775</sup> Early intellectual property debates reflected the divided history that has permeated the U.S. political system from its inception.<sup>776</sup> As a net importer of goods covered by intellectual property in the first half of the 19th century, copyright and patent rights were limited.<sup>777</sup> Consequently, the courts soon faced challenges to those laws and began formulating a more nuanced body of law on intellectual property.<sup>778</sup> By the 1840s, patent

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<sup>774</sup> In 2016, intellectual property-based activities at the ITC accounted for approximately 31% of the Commission's resources. U.S. International Trade Commission (USITC), Budget Justification: Executive Summary, Fiscal Year 2017 (Washington, DC: USITC, 2016), 13, [https://www.usitc.gov/documents/2017\\_cbj\\_exec\\_summ\\_v15.pdf](https://www.usitc.gov/documents/2017_cbj_exec_summ_v15.pdf).

<sup>775</sup> The Constitution granted Congress the power to "promote the progress of science and useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Constitution, Article I, Section 8. The Patent Act of 1790, 1 Stat. 109 (April 10, 1790) and Copyright Act of 1790, 1 Stat. 124 (May 31, 1790) were among the first pieces of legislation passed by the U.S. Congress. Within 40 years, Congress issued new and significantly more complex legislation on both copyrights and patents. Copyright Act of 1831, 4 Stat. 436 (February 3, 1831); Patent Act of 1836, 5 Stat. 117 (July 4, 1836). The 1836 Patent Act introduced the examination system that remains in use today.

<sup>776</sup> In 1791, Alexander Hamilton, then Secretary of the Treasury, delivered his "Report on Manufactures" to Congress. Hamilton advocated for promoting manufacturing, encouraging immigration, and enacting modest tariffs to protect America's fledgling industries. Alexander Hamilton, "Report on Manufactures," Communicated to the House of Representatives, December 5, 1791, [http://constitution.org/ah/rpt\\_manufactures.pdf](http://constitution.org/ah/rpt_manufactures.pdf). Notably, Britain forbade both the exportation of machines and the emigration of skilled labor (see Peter Andreas, *Smuggler Nation: How Illicit Trade Made America* (New York: Oxford University Press, 2013)). In 1792, Congressional votes on Hamilton's proposed tariffs broke along North-South fault lines: representatives of Northern states largely approved; Southern states largely disapproved; and mid-Atlantic states were divided. See Douglas A. Irwin, "The Aftermath of Hamilton's 'Report on Manufactures,'" *The Journal of Economic History*, vol. 64, no. 3 (September 2004), 800.

<sup>777</sup> The Copyright Acts of 1790 and 1831 protected against little more than verbatim copying of an author's work. See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 208 (CCED Pa. 1853) (No. 13,514). Both the Patent and Copyright Acts of 1790 failed to extend protection to foreign intellectual property rights holders. Rampant American piracy of British publications and technologies throughout the first half of the 19th century led to considerable tension between the countries. See Susan Sell, "Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement," *Loyola of Los Angeles Law Review* vol. 38, no. 267 (2004), 285–286; Sidney Moss, *Charles Dickens' Quarrel with America* (Whitson Pub. Co, 1984); and Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967). In 1887, the U.S. acceded to the Paris Convention for the Protection of Industrial Property (1883), granting reciprocal recognition of IP rights.

<sup>778</sup> See, e.g., *Lowell v. Lewis*, 15 Fed. Cas. 1018 (C.C. D. Mass. 1817); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); *Prouty v. Ruggles*, 41 U.S. (16 Pet.) 336, 341 (1842); *Winans v. Denmead*, 56 U.S. (15 How.) 330 (1853).

protection had been extended to industrial designs,<sup>779</sup> and trademark infringement was recognized as a distinct cause of action.<sup>780</sup> Trademark law especially, as an outgrowth of the commercialization of intellectual property, was tied to notions of unfair competition, which also included allegations of price fixing, price discrimination, palming off, and counterfeiting.<sup>781</sup>

Following the Civil War, the American economy became increasingly dependent on industry; technological developments led to petitions in the courts for broader interpretations of IP rights.<sup>782</sup> The United States had shifted from a net importer to a net exporter of goods dependent on intellectual property, and required a more sophisticated international trade policy. Congress frequently debated tariffs and unfair competition in the late 19th century, but those debates rarely produced substantive policy changes.<sup>783</sup> Experts advised that lower tariffs and stronger intellectual property protection would benefit the country economically, but Congress remained heavily protectionist. Tariffs constituted the primary tool of international

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<sup>779</sup> Act of August 29, 1842, Ch. 263 § 3, 5 Stat. 543.

<sup>780</sup> See, e.g., *Taylor v. Carpenter*, 11 Paige Ch. 292 (N.Y. Ch. 1844); *Coats v. Holbrook, Nelson & Co.*, 3 N.Y. Leg. Obs. 404, 405, 2 Sandf. Ch. 586, 594, 7 N.Y. Ch. Ann. 713 (N.Y. Ch. 1845); *Amoskeag Manufacturing Company v. Spear*, 4 N.Y. (2Sandf.) 599, 604 (Sup. Ct. 1849).

<sup>781</sup> For contemporary discussions of the definition of unfair competition and the various forms thereof, see Tim W. Dornis, *Trademark and Unfair Competition Conflicts: Historical-Competitive, Doctrinal, and Economic Perspectives* (New York: Cambridge University Press, 2017), 89, fn. 39, 41–42.

<sup>782</sup> New technologies became potential subjects of protection, but many new technologies, such as photography and lithography, lowered the cost of infringement. Kenneth L. Sokoloff and B. Zorina Khan, “Intellectual Property Institutions in the United States: Early Development and Comparative Perspective,” World Bank Summer Research Workshop on Market Institutions (July 17–19, 2000), 5, <http://www.dklevine.com/archive/sokoloff-kahn.pdf>. See, e.g., *United States v. Burns*, 79 U.S. 246 (1871) (institutional R&D provisions); *Wallace v. Holmes*, 29 F. Cas. 74 (No. 17,100) (C.C.D. Conn. 1871) (indirect infringement); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photographs could be copyrighted).

<sup>783</sup> See, e.g., 7 Cong. Rec. App. 147–70, 226–29 (May 1878) (unfair competition); 7 Cong. Rec. H3725 (unfair competition); 13 Cong. Rec. S55–63 (Dec. 1881) (tariff commission); 13 Cong. Rec. H4536 (tariff commission); 14 Cong. Rec. App. 143 (sugar tariff); 14 Cong. Rec. S1759 (sugar tariff); 14 Cong. Rec. S2679 (ore tariffs); 15 Cong. Rec. S3329 (tariffs; free trade; income tax); 17 Cong. Rec. S4825 (dairy; unfair competition); 19 Cong. Rec. S3237 (copyright protection); Senate Finance Committee, Subcommittee on Tariff, Hearings in Connection with H.R. 9051, 50th Cong., 1st sess., HRG-1888-FNS-0009 (1888); House Committee on Ways and Means, *Report to Accompany H.R. 4864*, 53d Cong., 2d sess., H. Rep. No. 53-234 (1893) (tariffs); Senate Finance Committee, *Replies to Tariff Inquiries*, 53d Cong., 2d sess., S. Rep. No. 53-702 (1894).

trade policy,<sup>784</sup> while intellectual property and unfair competition policy continued to develop in commercial law, especially in the areas of interstate commerce and antitrust legislation.<sup>785</sup>

Around the turn of the century, the courts dealt with a number of important unfair competition cases.<sup>786</sup> Similarly, the early 20th century brought significant legislative and governmental developments in the areas of intellectual property protection and unfair competition.<sup>787</sup> In 1914, Congress created the Federal Trade Commission as an “expert body to analyze and define unfair methods of competition” in domestic commerce.<sup>788</sup> In international trade, tariffs

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<sup>784</sup> Congress first used an outside body to aid it in tariff legislation in 1865. Congress found the Special Commissioner of the Revenue’s 1866 tariff recommendations politically distasteful, and did not make use of a Tariff Commission again until 1882. With the Act of May 15, 1882, 22 Stat. 64, Congress created the Tariff Commission of 1882. Congress attempted to affect the outcome of the Commission’s recommendations in favor of protectionist tariffs by forbidding the Commission from proposing a “radical or subversive change in the present general economical policy of the country.” The Commission’s report recommended the creation of a customs court, and the reduction of tariff duties. The protectionist Congress disregarded the report. Joshua Bernhardt, *The Tariff Commission: Its History, Activities and Organization* (New York: D. Appleton and Company, 1922), 3–8. See also 71 Cong. Rec. H2113–14.

<sup>785</sup> Act of February 4, 1887 (Interstate Commerce Act), Pub. L. No. 49-41 (February 4, 1887); Sherman Anti-Trust Act, 26 Stat. 209, July 2, 1890, 15 U.S.C. 1–7. See J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition, 4th Ed.*, (Thomson Reuters, 2015), 23, fn. 8 and 25–27 regarding the Congressional debates on antitrust issues leading up to the Sherman Act. Congress’ first attempt to protect trademarks (An Act to revise, consolidate, and amend the statutes relating to patents and copyrights, 16 Stat. 198 (July 8, 1870)) was struck down by the Supreme Court in 1879 (*In re Trademark Cases*, 100 U.S. 82 (1879)). The Court held that most trademarks were unoriginal and thus deemed the trademark provisions unconstitutional. The Sherman Act was rendered largely impotent by *United States v. E.C. Knight*, 156 U.S. 1 (1895) (American Sugar trust case).

<sup>786</sup> For a survey of the types of patent-related cases and issues before the Patent Office and Courts in the late 19th century, see Department of the Interior, *Decisions of the Commissioner of Patents and of United States Courts in Patent Cases, Together with Decision of the Secretary of the Interior in Regard to Appellate Jurisdiction of the Secretary of the Interior, Important Decisions of State Courts, and Decisions in Trade-Mark Cases*, 54th Cong., 2d sess., H. Doc 354 (1896). See also *Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (price fixing); *Edison v. Lubin*, 122 F. 240, 242 (3d Cir. 1903) (copyright protections extended to developments within previously protected categories); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) (principle of competition central to U.S. antitrust law); *Lochner v. New York*, 198 U.S. 45 (1905); *Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 213 U.S. 325 (1909); *Standard Oil Co. v U.S.*, 221 U.S. 1, 65-68 (1911); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (price fixing).

<sup>787</sup> In 1909, Congress revised the Copyright Act, specifically balancing the rights of the intellectual property holder with the public interest. House Committee on Patents, *Report on the Copyright Act of 1909*, H. Rep. No. 60-2222, 60th Cong., 1st sess. (1909), 7. In the same year, the Court of Customs Appeals was created (Payne-Aldrich Tariff Act, Ch. 105, 36 Stat. 11 (August 5, 1909)). In the antitrust arena, the 1914 Clayton Act addressed many of the issues that had rendered the Sherman Act impotent. Clayton Act, Ch. 323, 38 Stat. 730 (October 15, 1914), 15 U.S.C. § 12; Senate Committee on the Judiciary, *Amendments to Sherman Antitrust Law and Related Matters*, 63d Cong., 2d sess., HRG-1908-SJS-0003 (1914).

<sup>788</sup> An Act to create a Federal Trade Commission, Pub. L. No. 63-203 (September 26, 1914); 51 Cong. Rec. S11455. In the debate prior to the enactment of the Federal Trade Commission Act, Senator Newlands pronounced that “it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices.” 51 Cong. Rec. 12136 (1914); quoted in Gilbert Holland Montague, “Unfair Methods of Competition,” *Yale Law Journal* 25 (1915–16), 20, <https://archive.org/details/jstor-787527>.

remained the leading device for dealing with unfair competition. In the early years of the 20th century, Congress again considered the merits of a permanent tariff commission. Members of the business community argued that political imperatives<sup>789</sup> were outweighing economic considerations in the formulation of the tariffs, and numerous trade associations testified in favor of the creation of a body to provide “scientific” tariff analysis.<sup>790</sup>

The U.S. Tariff Commission was created by the Revenue Act of 1916, effectuating the convergence of jurisprudence and foreign policy in the fields of tariffs, IP, and unfair trade.<sup>791</sup> From its inception, the Tariff Commission was granted broad authority to investigate matters relating to international trade, but the Tariff Commission’s early activities focused largely on tariffs.<sup>792</sup> Soon after the Tariff Commission’s establishment, however, Congress acknowledged an increasing threat from unfair competition in international trade—such as patent infringement, false labeling, and the deceptive use of trademarks—and crafted legislation expanding the Tariff Commission’s investigative authority to include a broader range of unfair acts in importation.<sup>793</sup>

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<sup>789</sup> High tariffs were an important political device, frequently cited in election campaigns by protectionist members of Congress. With the ratification of the Sixteenth Amendment in 1913, the income tax had supplanted tariffs as the country’s primary source of revenue. Although no longer of central importance to the economy, political tensions over tariffs remained high. For a discussion of use of tariffs in electoral politics, see, e.g., Karen E. Schnietz, “The 1916 Tariff Commission: Democrats’ Use of Expert Information to Constrain Republican Tariff Protection,” *Business and Economic History*, vol. 23, no. 1 (Fall 1994).

<sup>790</sup> See generally House of Representatives, *Report of the Industrial Commission on the Relations and Conditions of the Capital and Labor Employed in the Mining Industry*, 57th Cong., 1st sess., H. Doc. 181 (1901); House of Representatives, *Report of the Industrial Commission on the Relations and Conditions of the Capital and Labor Employed in Manufactures and General Business*, 57th Cong., 1st sess., H. Rep. No. 57-183 (1901); *Journal of the House of Representatives*, 60th Cong., 1st sess., 5217 H. Jnl. 60-1 (December 2, 1907); Department of Commerce and Labor, Bureau of Manufactures, *Monthly and Consular Trade Reports*, 60th Cong., 1st sess., H. Doc. 593 (1908); House Committee on Ways and Means, *A Permanent Tariff Commission: Hearings Before the Speaker of the House of Representatives and the Chairman of the Committee on Ways and Means*, 60th Cong. 1st sess., HRG-1908-WAM-0012 (February 4, 1908); *Journal of the House of Representatives*, 61st Cong., 3d sess., 5839 H. Jnl. 61-3 (December 5, 1910); House Committee on Ways and Means, *Tariff Commission: Hearings on H.R. 26232 and H.R. 28433*, 61st Cong., 3d sess. (December 13, 1910); Senate Committee on the Judiciary, *Hearings on the Maintenance of a Lobby to Influence Legislation*, 63d Cong., 1st sess. HRG-1913-SJS-0006–HRG-1913-SJS-0010 (1913).

<sup>791</sup> Only 10 years earlier, I. Street wrote: “Though the law concerning infringement of trade-marks and that concerning unfair competition have a common conception at their root . . . the infringement of a trade-mark . . . is conceived of as an invasion of property. . . . Unfair competition, on the other hand, cannot be placed on the plane of invasion of property right. This tort is strictly one of fraud, and a fraudulent intent or its equivalent is essential to liability.” I. Street, *Foundations of Legal Liability* (1906), 421, cited in Irvin H. Fathchild, “Statutory Unfair Competition,” *Missouri Law Review*, vol. 1, iss. 1 (January 1936), 3–4.

<sup>792</sup> Senate Finance Committee, *Trade Reform Act of 1974: Report of the Committee on Finance*, 93d Cong., 2d sess., S. Rep. No. 93-1298 (November 26, 1974), 115.

<sup>793</sup> The Commission’s first investigation alleging patent infringement was *Synthetic Phenolic Resin* (filed December 16, 1925, instituted April 16, 1926). The Court of Customs and Patent Appeals affirmed the Commission’s jurisdiction to consider patent infringement as an unfair act in 1930 (*Frischer & Co., Inc., v. Bakelite Corporation*, 39 F.2d 247 (CCPA 1930), cert. denied, 282 U.S. 852 (1930)).

## The Problem of Unfair Imports

The 1916 Revenue Act included the following investigatory duties of the Tariff Commission: (1) to maintain and update the tariff schedule “and, in general, to investigate the operation of customs laws”;<sup>794</sup> (2) to “make such investigations and reports as may be requested by the President or by either of said committees [the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate] or by either branch of the Congress”;<sup>795</sup> and (3) “to investigate . . . conditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping.”<sup>796</sup>

Recognizing a threat from low-cost imports, the U.S. House of Representatives Committee on Ways and Means recommended the adoption of a dumping provision to place importers “in the same position” as domestic manufacturers.<sup>797</sup> Accordingly, under the heading “Unfair Competition,” section 801 of the 1916 Revenue Act decreed:

That it shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell, or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation into the United States, in the principal markets of the country of their production or of other foreign countries to which they are commonly exported, after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof into the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.<sup>798</sup>

While Congress explicitly addressed dumping in the 1916 Act,<sup>799</sup> it was the 1919 report of an investigation conducted by the Tariff Commission that would advance Congress’ consideration of other forms of unfair competition in import trade.

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<sup>794</sup> Pub. L. No. 64-271, § 702.

<sup>795</sup> *Ibid.*, § 703.

<sup>796</sup> *Ibid.*, § 704.

<sup>797</sup> House Committee on Ways and Means, *Report to accompany H.R. 16763*, 64th Cong., 1st sess., H. Rep. No. 64-922 (July 5, 1916).

<sup>798</sup> Pub. L. No. 64-271, § 801.

<sup>799</sup> As in the case of the Federal Trade Commission Act (Pub. L. No. 63-203), the Revenue Act of 1916 did not define “unfair competition.”

## Section 316—An Antidumping Law “with Teeth”

The Tariff Commission first recommended legislative action to the House Committee on Ways and Means to address the prevalence of unfair acts in importation in a 1919 report *Dumping and Unfair Foreign Competition in the United States: Characteristics of Dumping and Certain Other Foreign Competitive Practices (1919 Report)*. After criticizing aspects of the contemporary U.S. antidumping law, the *1919 Report* stated with regard to potential legislation:

These defects of the statute somewhat support the contention that administrative remedies to prevent dumping are superior to criminal laws. If the act of 1916 is adhered to, attention should be given to the careful revision and strengthening of its provisions. Such amendment would not be inconsistent with the enactment of definite and authoritative instructions to the Federal Trade Commission to deal with dumping as a phase of unfair competitive methods.<sup>800</sup>

In addition to dumping, the Tariff Commission evaluated a range of potentially unfair commercial practices. In a section of the *1919 Report* entitled “Deceptive Use of Trade-Marks, Imitation of Goods and Advertising; False Labeling; Exploitation of Patents; Commercial Threats and Bribery,” the report delineated:

In the same way, unmistakable differences from dumping are evident where the deceptive use of trade-marks, deceptive imitation of goods, false labeling, exploitation of patents, deceptive advertising and commercial threats and bribery are involved. In these latter instances it is clear, without either argument or detailed analysis, that distinguishable phases of unfair competition require divergent legislative treatment from that which is indicated if the consequences of dumping are to be avoided.<sup>801</sup>

Congress recognized the need for additional legislation, and on June 29, 1921, the House of Representatives introduced H.R. 7456 “to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.”<sup>802</sup> In the floor debate, members of the Senate expressed concern about the perils of unfair competition: “Dumping and other unfair methods of competition in importation have been recognized as a menace, particularly under postwar conditions, to American industries.”<sup>803</sup> The Senate

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<sup>800</sup> U.S. Tariff Commission (USTC), *Dumping and Unfair Foreign Competition in the United States: Characteristics of Dumping and Certain Other Foreign Competitive Practices* (Washington, DC: USTC, 1919), 33–34; USTC, *Sixth Annual Report of the USTC, 1922* (Washington, DC: GPO, December 4, 1922), 3–4 (commenting on passage of section 316).

<sup>801</sup> USTC, *Dumping and Unfair Foreign Competition in the United States*, 1919, 11.

<sup>802</sup> An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes, 67th Cong., 1st sess., H.R. 7456 (June 29, 1921).

<sup>803</sup> 67 Cong. Rec. 5879 (April 24, 1922).

amended the bill, adding section 316 to address such concerns.<sup>804</sup> As enacted, section 316 of the Tariff Act of 1922 declared unlawful:

unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.<sup>805</sup>

The new provision authorized the Tariff Commission to investigate alleged unfair methods of competition and unfair acts<sup>806</sup> and to recommend action to the President. Should the President determine a violation had occurred, the statute directed the President to impose additional duties allowing flexibility within limits, or, in extreme cases, to exclude the product at issue from importation into the United States.<sup>807</sup>

Speaking about section 316 specifically, Senator Reed Smoot (R-UT) explained how the Senate’s proposed statute was preferable to a general tariff hike: “In the economic uncertainty of the present, manufacturers in some lines of merchandise have asked for high tariff rates more because of what they fear than because of what they are experiencing. Such law as I have suggested would assure American producers that they will not be subjected to unfair competition from countries abroad.”<sup>808</sup>

Congress clearly envisioned that section 316 would supplement existing antidumping laws, better protecting American industries from a wide range of unfair practices: “The provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had.”<sup>809</sup> Senator Smoot famously declared: “If any doubt whatever exists to the effectiveness of the tariff rates and the provisions of the elastic tariff . . . the addition of this effective unfair competition statute should

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<sup>804</sup> Senate Finance Committee, *Report to Accompany H.R. 7456*, 67th Cong., 2d sess., S. Rep. No. 67-595 (1922).

<sup>805</sup> Tariff Act of 1922, Pub. L. No. 67-318, § 316(a), 42 Stat. 858 (1922).

<sup>806</sup> The statute granted that “an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles” and that “the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon *certiorari* applied for within three months after such judgment of the United States Court of Customs Appeals.” *Ibid.*, § 316(c).

<sup>807</sup> *Ibid.*, § 316(b)–(e).

<sup>808</sup> 67 Cong. Rec. 5879 (April 24, 1922).

<sup>809</sup> S. Rep. No. 67-595 (1922), 3.

remove it. We have in this measure an anti-dumping law with teeth in it—one which will reach all forms of unfair competition.”<sup>810</sup>

In 1923, the Tariff Commission reported that, following the general suggestions of the *1919 Report*, Congress had enacted section 316, which “extends to import trade practically the same prohibition against unfair methods of competition which the Federal Trade Commission Act provides against unfair methods of competition in interstate trade.” Thus, section 316 made it “possible for the President to prevent unfair practices, even when engaged in by individuals residing outside the jurisdiction of the United States.”<sup>811</sup>

Section 316 of the Tariff Act also set a lower standard for finding a violation of the statute compared to that required for dumping under section 801 of the 1916 Revenue Act. The Tariff Commission’s *1919 Report* had “highlighted the difficulty of proving that dumping is practiced with the intent of destroying a United States industry, or of monopolizing trade of a certain article.”<sup>812</sup> As set forth in the *1919 Report*:

It should also be observed that economic conditions are more significant in the development of dumping practices than is any particular intent. In conducting private industry, the prevailing motive is profit. Ordinarily, therefore, it must be extremely difficult to establish as an essential element of the offense a separate and destructive purpose, as specified in the congressional act of 1916. In dumping, the intent to injure, destroy, prevent the establishment of industry, or restrain or monopolize trade or commerce in the United States is not necessarily present. Certainly when the practice is resorted to, motives other than those enumerated may, and, at times, do exist.<sup>813</sup>

Section 316 took into consideration the Tariff Commission’s *1919 Report* by dropping “intent” and creating an injury standard: “The effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.”<sup>814</sup>

Despite the broad protections offered by the statute, it was used infrequently in the 1920s. This likely was due in part to a lack of defined procedures and a poor understanding of the new law. Additional authority allowable at the time likely played a role as well: under the original rules,

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<sup>810</sup> 67 Cong. Rec. 5879 (April 24, 1922).

<sup>811</sup> USTC, *1922 Annual Report*, 3–4.

<sup>812</sup> Brian G. Brunsvold, Charles F. Schill, and Ursula Schwendemann, “Injury Standards in Section 337 Investigations,” *Northwestern Journal of International Law and Business* 4, no. 1 (1982): 77–78.

<sup>813</sup> USTC, *Dumping and Unfair Foreign Competition in the United States*, 1919, 20.

<sup>814</sup> Brunsvold, Schill, and Schwendemann, “Injury Standards in Section 337 Investigations,” 1982, 77–79.



the Commission had discretion as to whether to institute an investigation.<sup>815</sup> Moreover, if a full investigation was ordered, “private parties often had to argue the same issues twice: once before the Tariff Commission and once before representatives of the President. The result was that early investigations took an average of three years to complete and were very costly.”<sup>816</sup> Nevertheless, for those cases where the Tariff Commission deemed a full investigation warranted, the results revealed the statute’s benefits. During the time section 316 was in effect, the Tariff Commission conducted six full investigations, including one based on patent infringement. Four of those investigations concluded with recommendations that the President exclude the unfairly imported article, all of which the President approved.<sup>817</sup>

## The Statute Evolves: Section 316 Becomes Section 337

In 1929, Congress undertook a large-scale revision of U.S. tariff policies, including the portions of the Revenue Act of 1916 and the Tariff Act of 1922 that related to the U.S. Tariff Commission. As part of the resultant Smoot-Hawley Tariff Act of 1930, section 316 was re-designated section 337 as the statute regulating unfair trade practices.<sup>818</sup> The section remained largely unchanged, but included two amendments: (1) the elimination of the Presidential authority to issue additional duties, because such duties were considered to be an inadequate remedy,<sup>819</sup> and (2) the elimination of Supreme Court review.<sup>820</sup>

In 1940, Congress enacted section 337a, establishing definitively that importation of an article manufactured abroad by a process that infringed a U.S. process patent was an unfair act within

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<sup>815</sup> “No investigation shall be ordered by the [tariff] commission unless such application or preliminary investigation discloses to the satisfaction of the [tariff] commission there are good and sufficient reasons therefor under the law.” USTC, *1922 Annual Report*, 64. For a more detailed description of the agency’s rules and procedures, see section below, “Agency Rules and Procedures for Unfair Import Investigations.”

<sup>816</sup> S. Alex Lasher, “The Evolution of the Domestic Industry Requirement in Section 337 Investigations before the United States International Trade Commission,” *University of Baltimore Intellectual Property Law Journal* 18, no. 2 (2010): 2.

<sup>817</sup> J. Stephen Simms, “Scope of Action against Unfair Import Trade Practices under Section 337 of the Tariff Act of 1930,” *Northwestern Journal of International Law and Business* 4, no. 1 (1982): 241.

<sup>818</sup> See House of Representatives, H.R. 2667 [*Report No. 7*], 71st Cong., 1st sess., H. Rep. No. 71-7 (May 9, 1929): “The committee felt that it was desirable to have all the provisions of law relating to the United States Tariff Commission incorporated in the Tariff Act of 1929 where they properly belong. Consequently, sections 700 to 709 of the Revenue Act of 1916, as amended, which provided for the organization, general powers, and procedure of the commission, and section 318 of the Tariff Act of 1922, which imposed certain additional duties upon the commission, have been included in the bill with certain amendments as sections 330 to 335, inclusive, of Part II of Title III. The so-called flexible tariff provisions, contained in section 315, together with sections 316 and 317, of the Tariff Act of 1922, have been incorporated as sections 336, 337, and 338 of the bill with certain amendments hereinafter noted.”

<sup>819</sup> USTC, *Twelfth Annual Report of the USTC*, 1928 (Washington, DC: USTC, December 3, 1928), 21.

<sup>820</sup> See *supra*, fn. 37; Tariff Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590 (1930).

the Tariff Commission's jurisdiction.<sup>821</sup> This amendment overruled the holding of the U.S. Court of Customs and Patent Appeals in *In re Amtorg Trading Corp* that importation of articles into the United States made under U.S. process patents was not an unfair method of import competition,<sup>822</sup> and firmly established the Tariff Commission's jurisdiction over patent-related unfair acts.<sup>823</sup>

World War II and its aftermath consumed most of the 1940s. In 1939, the Tariff Commission had reported: "The Tariff Commission . . . now submits its Twenty-third Annual Report amid the disturbances created by the outbreak of war in Europe. This war has already produced important changes in actual movements of trade and commercial policies."<sup>824</sup> From 1940 to 1943, the Tariff Commission's annual reports concerned primarily work in support of the war effort,<sup>825</sup> and in 1944 and 1945, the Tariff Commission focused on anticipated changes in international trade patterns following the cessation of hostilities.<sup>826</sup>

There continued to be few or no Section 337 cases in the years immediately following World War II, chiefly due to the predominant position of the United States in the postwar global economy:

The United States emerged from World War II as the preeminent industrialized nation in the world. In that role, American industries had much to gain from liberalized trade policies that would permit free access for American goods to European and Asian markets. Indeed, by 1950, the United States produced over 40% of the world's gross national product (GNP), as compared to Europe's 21% and Japan's 1.6%. From 1950–1970, the United States was the world's biggest creditor, with a trade surplus of roughly

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<sup>821</sup> An Act to limit the importation of articles, products, and minerals produced, processed, or mined under process covered by outstanding United States patents; to define unfair trade practices in certain instances; and for other purposes, Pub. L. No. 76-710, H.R. 8285, 76th Cong. (July 2, 1940).

<sup>822</sup> Simms, "Scope of Action against Unfair Import Trade Practices," 1982, 242.

<sup>823</sup> *In re Amtorg Trading Corp.*, 22 C.C.P.A. 558, 75 F.2d 826, 24 U.S.P.Q. 315 (1935). The legislative history clearly expresses the intent of Congress: "This bill is designed to correct the present problem which was created when the Court of Customs and Patent Appeals in the case *In re Amtorg Trading Corporation* reversed its former decisions and held that the importation of products made abroad in accordance with a United States process patent without consent of patentee was not regarded as an unfair method of competition." House Committee on Mines and Mining, *Reference to Certain Mining Practices and Defining Unfair Trade Practices in Certain Instances: Report to accompany H.R. 8285*, 76th Cong., 3d sess., H. Rep. No. 76-1781 (1940).

<sup>824</sup> USTC, *Twenty-Third Annual Report of the USTC, 1939* (Washington, DC: GPO, December 1, 1939), 1.

<sup>825</sup> See generally USTC, *Twenty-Fourth Annual Report of the USTC, 1940* (Washington, DC: GPO, December 1, 1940); *Twenty-Fifth Annual Report of the USTC, 1941* (Washington, DC: GPO, December 1, 1941); *Twenty-Sixth Annual Report of the USTC, 1942* (Washington, DC: GPO, January 6, 1943); *Twenty-Seventh Annual Report of the USTC, 1943* (Washington, DC: GPO, January 1, 1944).

<sup>826</sup> USTC, *Twenty-Eighth Annual Report of the USTC, 1944* (Washington, DC: GPO, January 1, 1945); *Twenty-Ninth Annual Report of the USTC, 1945* (Washington, DC: GPO, January 3, 1946).

1% GNP. Under these conditions, there was no pressure from American manufacturers to aggressively enforce protectionist trade laws such as Section 337.<sup>827</sup>

From the mid-1950s through the 1960s, section 337 activity was low, with only a few cases pending or complaints considered each year. There was renewed interest in Section 337 by the late 1960s, continuing into the 1970s.<sup>828</sup> In 1968, the President issued a temporary exclusion order based on the Commission's recommendation<sup>829</sup> in a section 337 investigation related to the patented drug furazolidone.<sup>830</sup> The *Furazolidone* order<sup>831</sup> was the first exclusion order

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<sup>827</sup> Lasher, "The Evolution of the Domestic Industry Requirement," 2010, 2, (citing Thomas Prusa, "An Economic History and Analysis of Section 337," in *Technology, Trade, and World Competition: Protecting Intellectual Property with Trade Sanctions* (Japanese Electronic Industry Development Association, 1990), 140, on economic data).

<sup>828</sup> Harvey Kaye and Paul Plaia, Jr., "The Filing and Defending of Section 337 Actions," *North Carolina Journal of International Law and Commercial Regulation*, vol. 6, no. 3 (1981); Harvey Kaye and Paul Plaia Jr., "The Tariff Commission and Patents: Anatomy of a 337 Action (Part I)," *Journal of the Patent Office Society*, vol. 55, no. 6 (June 1973), 347.

<sup>829</sup> Notably, the Commissioners were equally divided on both the question of recommending a temporary exclusion order and whether to institute a full investigation. Section 330(d) of the Tariff Act of 1930 provides that "(1) Whenever . . . a majority of the commissioners voting are unable to agree upon findings or recommendations, the findings (and recommendations, if any) unanimously agreed upon by one-half of the number of commissioners voting may be considered by the President as the findings and recommendations of the Commission: Provided, That if the commissioners voting are divided into two equal groups each of which is unanimously agreed upon findings (and recommendations, if any), the findings (and recommendations, if any) of either group may be considered by the President as the findings (and recommendations, if any) of the Commission. In any case of a divided vote referred to in this paragraph the Commission shall transmit to the President the findings (and recommendations, if any) of each group within the Commission with respect to the matter in question (2) Whenever . . . one-half of the number of commissioners voting agree that the investigation should be made, such investigation shall thereupon be carried out . . ." § 330(d), Act August 7, 1953, ch. 348, title II, §201, 67 Stat. 472 (cited in *USTC Annual Report of the USTC, FY 1969*, TC Publication 301 (Washington, DC: GPO, November 1970), 16–17).

<sup>830</sup> *Furazolidone*, Investigation No. 337-21, USTC Publication 299, Comm'n recommendation at 7–8 (November 1969). The exclusion order remained in effect until April 26, 1973 (38 Fed. Reg. 10824 (1973)), when it was canceled "pursuant to an order issued by the President on April 17, 1973 because the patent involved expired on that date." Kaye and Plaia, "The Tariff Commission and Patents: Anatomy of a 337 Action (Part II)," *Journal of the Patent Office Society*, vol. 55, no. 6 (July 1973), 422, fn. 106.

<sup>831</sup> 33 Fed. Reg. 12680 (1968).

issued since the mid-1930s.<sup>832</sup> By the 1970s, the trade gap between the United States and its major trading partners had narrowed significantly, and for the first time in the years following World War II, the United States ran a trade deficit. As a result, economists noted that American industries became more vulnerable to import competition, and expressed a renewed interest in section 337.<sup>833</sup> Moreover, the issuance of several other exclusion orders in the early 1970s increased activity under the statute.<sup>834</sup>

## The Modern Statute

As pressure from foreign imports increased, American industries lobbied Congress to revise the U.S. trade laws. With the enactment of the Trade Act of 1974, section 337 was overhauled to

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<sup>832</sup> On December 25, 1935, the President issued an exclusion order in the investigation with respect to coilable metal rules (instituted February 8, 1934) (USTC, *Twentieth Annual Report of the USTC, 1936* (Washington, DC: GPO, December 1, 1936), 44). In the third formal investigation under section 337 regarding cigar lighters (docket no. 11, instituted August 14, 1936), the Commission recommended a temporary exclusion order, which the President issued on November 9, 1936. Related U.S. District Court action prompted the Commission to recommend that the President terminate the temporary order of exclusion. The President did so on July 22, 1937, and the Commission terminated the investigation on July 27, 1937 (USTC, *Twenty-First Annual Report of the USTC, 1937* (Washington, DC: GPO, December 1, 1937), 37). The Commission recommended an exclusion order in *Self-closing containers* (1962), but the President decided not to issue such an order USTC. *Outcome or Current Status of Complaints Filed with the United States Tariff Commission Under the Provisions of Section 337 of the Tariff Act of 1930 Between January 1, 1949 and July 1, 1964*, USTC Publication 130 (Washington, DC: USTC, 1964), 8–9), <https://www.usitc.gov/publications/337/pub130.pdf>. Kaye and Plaia cite the issuance of the exclusion order in the furazolidone investigation as the beginning of the “modern era of this statute.” Harvey Kaye and Paul Plaia, Jr., “The Filing and Defending of Section 337 Actions,” 1981, 465.

<sup>833</sup> Prusa, “An Economic History and Analysis of Section 337,” 1990, 140. The Commission completed 1 investigation in fiscal year 1970, and initiated 3 preliminary inquiries (USTC, *Annual Report of the USTC, FY 1970*, TC Publication 356 (Washington, DC: GPO, January 1971), 27–28). In fiscal year 1971, the Commission had 7 cases before it, 6 of which were new investigations, and initiated 2 preliminary investigations (USTC, *1971 Annual Report*, TC Publication 467 (Washington, DC: GPO, March 1972), 14). Fiscal year 1972 continued the upward trend in interest in section 337: the Commission had 9 preliminary investigations in progress throughout the year (4 were completed and dismissed; 5 were pending at the close of the fiscal year), and 6 full investigations in progress throughout the year. Additionally, in fiscal year 1972, the Commission reopened 1 investigation that was completed in fiscal year 1971, in response to a request for re-hearing (USTC, *1972 Annual Report*, TC Publication 536 (Washington, DC: GPO, January 1973), 14–15). By fiscal year 1973, the Commission had 7 cases before it under section 337, and initiated 13 new cases (USTC, *1973 Annual Report*, TC Publication 648 (Washington, DC: GPO, January 1974), 14). At the beginning of fiscal year 1974, the Commission had 18 cases before it under section 337, and 8 new cases were initiated (USTC, *1974 Annual Report*, TC Publication 710 (Washington, DC: GPO, January 1975), 12). There were 16 investigations pending at the beginning of fiscal year 1975, and another 11 investigations were instituted that year (USITC, *Annual Report, 1975*, Publication 790 (Washington, DC: GPO, November 1976), 13).

<sup>834</sup> The President issued exclusion orders in *Panty Hose*, Investigation No. 337-25 on February 17, 1972; *Lightweight Luggage*, Investigation No. 337-28 on December 13, 1971 (USTC, *1972 Annual Report, 1973*, 15); and *Convertible Game Tables*, Investigation No. 337-34 on May 2, 1974 (USTC, *1974 Annual Report, 1975*, 13). However, Kaye and Plaia noted that in the early 1970s, “Presidential involvement and the time delays caused by the slow moving administrative process of the Tariff Commission dissuaded many from using the statute.” Kaye and Plaia, “The Filing and Defending of Section 337 Actions,” 1981, 465.

put it substantially in its modern form.<sup>835</sup> The determination whether section 337 was violated was made subject to the requirements of the Administrative Procedure Act (APA), including notice and hearing on the record.<sup>836</sup> The 1974 Act included the right to raise all legal and equitable defenses, clarifying that the USITC could consider patent validity and enforceability for purposes of determining violation of section 337. Findings of patent invalidity or unenforceability, however, were not *res judicata*.<sup>837</sup> Investigations were to be completed within specific time limits, i.e., 12 months, or 18 months if the investigation was determined to be more complicated.<sup>838</sup>

To support the Commission's independence,<sup>839</sup> Congress granted the Commission, rather than the President, authority to determine violation of section 337 and to determine relief, including cease and desist orders.<sup>840</sup> Before granting such relief, however, Congress directed the Commission to consider the effect of said relief on certain public interest factors,<sup>841</sup> weighing any negative impact on the public health and welfare against the positive effects of protecting U.S. intellectual property rights:

Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare; on competitive conditions in the United States economy; on production of like or directly competitive articles in the United States; or on the United States consumer, than would be gained by protecting the patent holder (within the context of U.S. patent laws) then . . . such exclusion order should not be issued.<sup>842</sup>

The shift in primary authority from the President to the Commission was significant. Leading practitioners, testifying before the Senate's Committee on Finance, had argued that the effort expended to bring investigations to a conclusion under the authority of the President was unnecessary compared to any actual benefit from "permit[ting] the President to use a section 337 proceeding as one of the means by which he could shape and influence trade."<sup>843</sup> The Finance Committee's report, on the other hand, "recognized . . . that the granting of relief

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<sup>835</sup> Trade Act of 1974, Pub. L. No. 93-618, §§ 171–175, 88 Stat. 2009–2011 (January 3, 1975). Prior to the passage of the 1974 Act, the Commission instituted 72 preliminary investigations and 35 full investigations under Section 337. *USTC, 1974 Annual Report*, 1975, 13.

<sup>836</sup> *Ibid.*, § 337(c); Administrative Procedure Act, 5 U.S.C. § 551 et seq.

<sup>837</sup> S. Rep. No. 93-1298 (1974), 196.

<sup>838</sup> Pub. L. No. 93-618, § 337.

<sup>839</sup> S. Rep. No. 93-1298 (1974), 115, 193–199.

<sup>840</sup> Pub. L. No. 93-618, §§ 201–203.

<sup>841</sup> *Ibid.*, § 337.

<sup>842</sup> S. Rep. No. 93-1298 (1974), 197.

<sup>843</sup> Harvey Kaye and Paul Plaia, Jr., "Revitalization of Unfair Trade Causes in the Importation of Goods: An Analysis of the Amendments to Section 337," *Journal of the Patent Office Society* 57, nos. 4 and 5 (1975).

against imports could have a very direct and substantial impact on United States foreign relations, economic and political.”<sup>844</sup>

Ultimately, Congress balanced a continued need for Presidential input with procedural efficiencies inherent in vesting primary authority in the Commission by granting the President 60 days after receipt of a final Commission determination to intervene and disapprove the Commission’s action for policy reasons<sup>845</sup> Notably, “the President’s power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337; such finding [would be] determined solely by the Commission, subject to judicial review.”<sup>846</sup>

One of the practitioners who testified before Congress regarding the lack of need for presidential involvement later predicted that future Presidents rarely would invoke the authority to disapprove Commission action on violation.<sup>847</sup> That statement has proven prescient, as the President exercised that authority only five times from the enactment of the 1974 Trade Act through the end of 1987.<sup>848</sup> In 2013, the United States Trade Representative (USTR), on behalf of the President, did so again, for the first time since 1987.<sup>849</sup>

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<sup>844</sup> S. Rep. No. 93-1298 (1974), 199.

<sup>845</sup> Pub. L. No. 93-618, § 337(g).

<sup>846</sup> S. Rep. No. 93-1298 (1974), 199.

<sup>847</sup> Kaye and Plaia, “Revitalization of Unfair Trade Causes,” 1975.

<sup>848</sup> *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Investigation No. 337-TA-242 (December 3, 1987); *Certain Alkaline Batteries*, Investigation No. 337-TA-165 (January 11, 1985); *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, Investigation No. 337-TA-099 (July 9, 1982); *Certain Multi-Ply Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof*, Investigation No. 337-TA-082 (June 22, 1981); *Certain Welded Stainless Steel Pipe and Tube*, Investigation No. 337-TA-029 (April 22, 1978).

<sup>849</sup> In 2013, the USTR, under authority delegated by the President in 2005, disapproved the remedy in *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Investigation No. 337-TA-794, an investigation in which Apple products were subject to exclusion. The USTR decision relied heavily on a joint policy statement from the Department of Justice and the U.S. Patent and Trademark Office (SEP Policy Statement), citing concerns regarding injunctive remedies in cases involving standard essential patents (SEPs). (Letter from Michael B.G. Froman, U.S. Trade Representative, to Irving A. Williamson, Chairman, USITC (August 3, 2013)). Importantly, the USTR decision quotes from the SEP Policy Statement, explaining that exclusion orders are not an inappropriate remedy *per se* in SEP cases. Shortly after the 794 investigation, USTR refused to disapprove a Commission remedy in an investigation filed by Apple against Samsung, citing the absence of SEPs in the investigation (USTR, “Statement of the U.S. Trade Representative Regarding the Determination of the United States International Trade Commission in the Matter of Certain Electronic Digital Media Devices and Components Thereof, Investigation No. 337-TA-796,” press release, October 2013, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/October/Froman-decision-USITC-investigation>).

In response, in part, to growing trade deficits throughout the 1980s,<sup>850</sup> as well as the increasing importance of intellectual property rights to the U.S. economy,<sup>851</sup> Congress amended section 337 as part of the Omnibus Trade and Competitiveness Act of 1988. Section 337 was amended specifically to strengthen the enforcement of intellectual property rights. Congress found that “the existing protection under section 337 of the Tariff Act of 1930 against unfair trade practices is cumbersome and costly and has not provided United States owners of intellectual property rights with adequate protection against foreign companies violating such rights,”<sup>852</sup> and thus amended section 337 “to make it a more effective remedy for the protection of United States intellectual property rights.”<sup>853</sup>

Most notably, the injury requirement, which had been included in section 316 in 1922 and had remained unchanged by subsequent amendments,<sup>854</sup> was eliminated for investigations in which the asserted unfair act is the infringement of a federally registered intellectual property right. This requirement was eliminated because previously, in some patent-based investigations, although there was infringement, no violation was found due to the inability to prove injury.<sup>855</sup> As part of the 1988 amendments, the Committee on Ways and Means recognized that:

unlike dumping or countervailing duties, or even other unfair trade practices such as false advertising or other business torts, the owner of intellectual property has been granted a temporary statutory right to exclude others from making, using, or selling the protected property. The purpose of such temporary protection, which is provided for in Article I, Section 8, Clause 8 of the United States Constitution, is “to promote the

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<sup>850</sup> 134 Cong. Rec. S10653–54 (August 3, 1988).

<sup>851</sup> Senate Finance Committee, *Report of the Committee on Finance on S. 490*, 100th Cong., 1st sess., S. Rep. No. 100-71 (June 12, 1987), 127; House Committee on Ways and Means, *Trade and International Economic Policy Reform Act of 1987: Report of the Committee on Ways and Means to Accompany H.R. 3*, 100th Cong., 1st sess., H. Rep. No. 100-40 (April 6, 1987), 153; *see also* 134 Cong. Rec. S10713-15 (August 3, 1988), in which Senators mentioned the relationship between innovation, intellectual property rights, and American competitiveness several times during the floor debates. For example, Sen. Lautenberg said, “Mr. President, a recent International Trade Commission study found that America’s most competitive industries are losing over \$40 billion a year in sales as a result of inadequate protection of intellectual property. . . . America’s economic edge is its technology and its innovation. But, if we are to enjoy the fruits of our labor—the jobs and growth that are to come from innovation—we need to stop the piracy of American intellectual property. . . . Mr. President, our trade deficit cannot be erased overnight. We need to remove unfair trade practices. We need to promote American competitiveness. American innovation is key to American competitiveness. That innovation is tied up in our patents, copyrights, trademarks, and semiconductor mask works. We need to protect those rights, and take action to gain respect for those rights abroad.”

<sup>852</sup> Omnibus Trade and Competitiveness Act of 1988, 100th Cong., 2d sess., H.R. 4848, § 1341 (July 25–26, 1988), 106.

<sup>853</sup> *Ibid.*; *see also* S. Rep. No. 100-71 (1987), 128.

<sup>854</sup> Brunsvold, Schill, and Schwendemann, “Injury Standards in Section 337 Investigations,” 1982, 12.

<sup>855</sup> *Certain Optical Waveguide Fibers*, Investigation No. 337-TA-189, Comm’n action and order (April 1985); *Corning Glass Works v. U.S. Int’l Trade Comm’n*, 799 F.2d 1559 (Fed. Cir. 1986).

Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.”<sup>856</sup>

The resulting bargain with the inventor creates a public interest in patent protection, thus making infringement itself an injury:

In return for temporary protection, the owner agrees to make public the intellectual property in question. It is this trade-off which creates a public interest in the enforcement of protected intellectual property rights. Any sale in the United States of an infringing product is a sale that rightfully belongs only to the holder or licensee of that property. The importation of any infringing merchandise derogates from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest.<sup>857</sup>

Accordingly, Congress determined that injury presumed from proof of infringement by the imported articles was sufficient, and no additional proof of injury was required.<sup>858</sup> However, the requirement that the domestic industry be “efficiently and economically operated” was eliminated from the statute in its entirety. Title 19 U.S.C. § 1337a, establishing process patent infringement as an unfair act, first added in 1940, was repealed and reincorporated into section 337 as section 337(a)(1)(B)(ii).<sup>859</sup>

In addition, Congress recognized that non-manufacturing industries that create and exploit intellectual property also should have the ability to establish a domestic industry and obtain relief under the statute. Prior to 1988 there were no explicit criteria for domestic industry set forth in the statute. The 1988 Act codified the criteria for establishing a domestic industry that had been established through precedent—significant investment in plant and equipment and significant employment of labor or capital—and expanded the criteria by adding “substantial investment in its exploitation, including engineering, research and development, or licensing.”<sup>860</sup> With these amendments, Congress specifically overturned precedent that a complainant could not base a domestic industry on licensing:

The third factor . . . goes beyond the ITC’s recent decisions in this area. This definition does not require actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States. . . . The definition could . . . encompass universities

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<sup>856</sup> H. Rep. No. 100-40 (1987), 156.

<sup>857</sup> *Ibid.*

<sup>858</sup> *Ibid.*

<sup>859</sup> Pub. L. No. 76-710; 19 U.S.C. § 1337a (1940); 19 U.S.C. § 1337(a)(1)(B)(ii).

<sup>860</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(a)(3), 102 Stat. 1212–13 (August 23, 1988).



and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.<sup>861</sup>

The 1988 amendments clearly evince an intent by Congress to broaden access to section 337. However, Congress balanced that action with limits inherent in the domestic industry requirement: “This domestic industry requirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property from utilizing Section 337.”<sup>862</sup>

Also in the late 1980s, the statute was subject to a challenge by the European Economic Community (EEC). On April 29, 1987, the EEC “informed contracting parties that it had requested Article XXIII: 1 consultations with the United States concerning the application of Section 337 of the United States Tariff Act of 1930.”<sup>863</sup> The EEC contended that section 337 was inconsistent with U.S. obligations under the General Agreements on Tariffs and Trade (GATT). In this challenge, filed in response to the USITC determination in *Certain Aramid Fiber*, Investigation No. 337-TA-194, the EEC contended that section 337 violated the GATT’s national treatment requirements in that it “subjected imported goods to a treatment which was less favourable than the treatment accorded by United States federal district courts to goods of national origin in patent infringement suits.”<sup>864</sup> On January 16, 1989, a GATT panel issued a report finding that section 337 violated U.S. national treatment obligations under GATT. The specific aspects of section 337 found to violate GATT were (1) time limits for completion of investigations; (2) the unavailability of counterclaims; and (3) the ability of the complainant to file a parallel complaint in district court. The report was subsequently adopted on November 7, 1989. Thus, under GATT, the United States had three options: eliminate section 337; amend section 337 to make it GATT compliant; or face GATT-approved retaliation by the EEC. From 1988 to 1995, section 337 investigations continued as the future of section 337 was debated.

Contemporaneous with these discussions was the Uruguay Round of negotiations under GATT, which led to the creation of the World Trade Organization. As a part of the implementing legislation—the Uruguay Round Agreements Act—Congress amended section 337 to address the issues raised by the GATT Panel Report. First, the statutory time limits for completing investigations were eliminated. However, a Senate report noted that Congress expected the

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<sup>861</sup> S. Rep. No. 100-71 (1987), 129.

<sup>862</sup> H. Rep. No. 100-40 (1987), 156–57; *see also* S. Rep. No. 100-71 (1987), 129; 19 U.S.C. § 1337(a)(2) and (3) (2012).

<sup>863</sup> “United States Section 337 of the Tariff Act of 1930: Report by the Panel adopted on 7 November 1989” (L/6439–36S/345) (GATT Panel Report) at 1.1, [https://www.wto.org/english/tratop\\_e/dispu\\_e/87tar337.pdf](https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf); L/6160 (29 April 1987), <https://docs.wto.org/gattdocs/g/.%5CGG%5CL6199%5C6160.PDF>.

<sup>864</sup> “United States Section 337 of the Tariff Act of 1930: Report by the Panel Adopted on 7 November 1989” (L/6439–36S/345) (GATT Panel Report) at 3.1(i), [https://www.wto.org/english/tratop\\_e/dispu\\_e/87tar337.pdf](https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf).

USITC to be able to continue to complete investigations in an expeditious manner.<sup>865</sup> Consistent with the new statutory changes, the Commission adopted the practice of setting target dates for completion of investigations. Second, counterclaims were permitted to be filed, but they were to be immediately transferred to U.S. district court. Third, Congress established 28 U.S.C. § 1659(a), granting parties named both as a respondent in a section 337 investigation and as a defendant in a U.S. district court action involving the same subject matter the right to have the district court action stayed, pending completion of the section 337 investigation. Upon completion of the section 337 investigation, the record may be transferred to the U.S. district court pursuant to 28 U.S.C. § 1659(b).<sup>866</sup> Section 337 has remained generally unchanged since the Uruguay Round Agreements Act.

## Institutional Implementation of the Congressional Mandate

### Unfair Competition Investigations Pre-1974

Section 316 of the Tariff Act of 1922 vested the President with authority to deal with violations of the section “when found by the President to exist.”<sup>867</sup> To assist the President, the still-new Tariff Commission was empowered to investigate any alleged violation “on complaint under oath or upon its own initiative.”<sup>868</sup> Within weeks of the 1922 Tariff Act becoming law, President Warren G. Harding set forth by Executive Order that:

All requests, applications, or petitions for action or relief under the provisions of sections 315, 316, and 317 of Title III of the tariff act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such commission.<sup>869</sup>

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<sup>865</sup> Senate, *Uruguay Round Agreements Act: Joint Report to accompany S. 2467*, 103d Cong., 2d sess., S. Rep. No. 103-412 (November 22, 1994), 118–19.

<sup>866</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 261 and 321, 108 Stat. 4908–4910, 4943–4946 (1994); To amend section 337 of the Tariff Act of 1930, 102d Cong., 2d sess., S. 3172 (August 11 (legislative day, August 5), 1992).

<sup>867</sup> Pub. L. No. 67-318, § 316(a).

<sup>868</sup> *Ibid.*, § 316(b).

<sup>869</sup> USTC, *1922 Annual Report, 1923*, 61, (quoting Exec. Order No. 3746 (October 7, 1922)).

Consistent with the statute's direction and President Harding's order, in 1922 the Tariff Commission promulgated certain rules of procedure applicable to section 315, 316, and 317 investigations.<sup>870</sup>

The statute also provided that in section 316 cases, the Tariff Commission "shall afford such hearing . . . with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation."<sup>871</sup> While the statutory language was somewhat equivocal, the Tariff Commission reported in 1925 that "it has been the practice of the commission to accord a full public hearing in every such investigation."<sup>872</sup> In addition to final public hearings, the Tariff Commission also appears to have exercised discretion in holding preliminary hearings at the outset of some investigations "to assist the commission in defining more precisely the subject matter of the investigation, to ascertain as far as practicable the scope of the field work required, and to permit an expression of opinion by interested parties as to the best methods of obtaining full information upon the subject matter under investigation."<sup>873</sup>

Complaints [were] investigated in approximately the same manner as [were] applications for cost investigations. The major efforts of the economist [were] directed to an ascertainment of whether the domestic industry [was] efficient, and whether a prima facie case of substantial injury to the industry ha[d] been presented. The General Counsel [took] an active part in the investigation, particularly in connection with those phases of the case relating to the unfair practices. The importers involved [were] interrogated as to their activities and, if necessary, an examination [was] made of their books and records.<sup>874</sup>

The Tariff Commission reported that the volume of time and labor it consumed related to such investigations, as well as to the scrutiny of complaints and preliminary inquiries to determine whether to institute formal investigations, greatly exceeded that required for a hearing itself. The Commission would assign a staff investigation team including a lawyer, an economist, and at least one technical expert to review the Complaint and responses from interested parties and in fulfilling its investigatory function, the Commission independently gathered information

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<sup>870</sup> *Ibid.*, 64–66. For a detailed discussion of the evolving rules of procedure, see section below, "Agency Rules and Procedures for Unfair Import Investigations."

<sup>871</sup> Pub. L. No. 67-318, § 316(c).

<sup>872</sup> USTC, *Ninth Annual Report of the USTC, 1925* (Washington, DC: GPO, December 8, 1925), 15.

<sup>873</sup> *Ibid.*, 14.

<sup>874</sup> U.S. Department of Justice (USDOJ), *Monograph of the Attorney General's Committee on Administrative Procedure: Part 14: Administration of the Customs Laws, United States Tariff Commission, Bureau of Customs, 77th Cong., 1st sess., S. Doc. No. 10 (1941)*, 25.

to assist it in making a preliminary decision, including through questionnaires and field trips.<sup>875</sup> In support of the Commission's work in this area, the Attorney General's Committee on Administrative Procedure reported that "the Tariff Commission conducts one of the most elaborate fact-gathering systems in the Government, involving both continuous accumulation of data and investigation and report upon special problems, with resort to field work at home and abroad where necessary."<sup>876</sup> "Aided by the information and views brought forward at the hearing" and the information gathered through its investigatory work, the Commission examined all the information received during the investigation and made a preliminary determination.<sup>877</sup>

The pre-institution responsibilities the Tariff Commission referenced are set forth in its original rules of procedure: "No investigation shall be ordered by the commission unless such application or preliminary investigation disclose to the satisfaction of the commission there are good and sufficient reasons therefor under the law." In the early days of the statute, the Tariff Commission regularly rejected or, after preliminary inquiry, dismissed complaints.<sup>878</sup> In addition to formal rejection or dismissal, many unfair practice cases were disposed of informally during the preliminary investigation.<sup>879</sup> The rudimentary pleading requirements, a lack of familiarity with a new statute, and the format of the proceedings may have been partly responsible.

At the conclusion of a preliminary investigation, the Tariff Commission made recommendations to assist the President to fulfill the statutory requirement:

That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided*, That the Secretary of the Treasury may

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<sup>875</sup> Harvey Kaye and Paul Plaia, Jr., "The Tariff Commission and Patents: Anatomy of a 337 Action (Part I)," *Journal of the Patent Office Society*, vol. 55, no. 6 at 360-62 (June 1973).

<sup>876</sup> USDOJ, Attorney General's Committee on Administrative Procedure, *Final Report of the Attorney General's Committee* (Washington, DC: USDOJ, 1941), 111-12, <https://www.regulationwriters.com/downloads/apa1941.pdf>.

<sup>877</sup> USTC, *1925 Annual Report, 1926*, 14-16.

<sup>878</sup> USTC, "Letter and Report of the United States Tariff Commission" (March 30, 1929) (reporting that 16 complaints had been dismissed without prejudice after preliminary investigation over the life of the statute to that point). The report of the Attorney General's Committee on Administrative Procedure noted that "in the great majority of cases an investigation and a preliminary decision suffice to settle the matter. Comparatively few cases flower into controversies in which the parties take conflicting positions of such moment to them that resort is necessary to the procedure of the courtroom." USDOJ, *Final Report of the Attorney General's Committee*, 1941, 35.

<sup>879</sup> The Attorney General's Committee on Administrative Procedure noted that "because these proceedings have been shaped by the Commission in the form of a private controversy, the effectuation of a 'settlement' depends upon the efforts of the parties." S. Doc. No. 10 (1941), 25.

permit entry under bond upon such conditions and penalties as he may deem adequate.<sup>880</sup>

Subsequent full investigations focused on presentations at a hearing, with the hearing transcript providing the only opportunity for participating parties to insure their evidence was included on the record, as material presented during the preliminary inquiry was not recognized unless presented again at the hearing.<sup>881</sup> The General Counsel did not take an active role in the hearings; the parties were “invariably” represented by counsel, who directed the hearing through the introduction of evidence and the cross-examination of witnesses. The standard for admissibility of evidence was broad: the Commission freely admitted hearsay testimony and *ex parte* statements.<sup>882</sup> Similarly, the Commission adopted a liberal policy with regard to the treatment of confidential business information:

Considerable evidence is received in confidence which, while relating to individual business data, is not encompassed by even a liberal definition of “trade secrets or processes.” The inability of the opposing party to cross-examine or introduce rebutting evidence with respect to such information may be a serious obstacle in the path of the ascertainment of the veracity of the data. . . . One may suggest, therefore, that the Commission alter its standard of confidentiality in unfair practice cases so as to permit for the nondisclosure only of evidence encompassed within the scope of “trade secrets or processes.”<sup>883</sup>

As early as 1925, the Tariff Commission recognized that “hearings in investigations under section 316 have, by reason of the nature of the subject matter, a *quasi* judicial character.”<sup>884</sup> The Tariff Commission’s findings after a full investigation were deemed conclusive if supported by evidence.<sup>885</sup> However, the finality of such findings was subject potentially to (1) the Tariff Commission granting a request for rehearing, or, to (2) an appeal on questions of law brought by importers to the U.S. Court of Customs Appeals. (This court was one precursor to the U.S.

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<sup>880</sup> Pub. L. No. 67-318, § 316(f).

<sup>881</sup> Harvey Kaye and Paul Plaia, Jr., “The Tariff Commission and Patents: Anatomy of a 337 Action (Part II—Conclusion),” *Journal of the Patent Office Society*, vol. 55, no. 7 (July 1973), 425.

<sup>882</sup> Hearing procedures constituted one area where the Attorney General’s Committee saw room for improvement: “The outstanding feature of this process is the refusal of the Commission to be bound by the contents of the record. It has taken the position that all the evidence upon which it relies need not be introduced at the hearing, but may be ascertained from the *ex parte* investigations of its staff both before and during the hearing. . . . If the Commission were to shoulder the burden of presenting the case against the importer, gaps in the record would not be likely to occur and the need for reference to the results of *ex parte* investigations would no longer exist except insofar as the accuracy of confidential data was involved; in the latter situation, it would continue to be necessary to check on the correctness of such information by *ex parte* investigations.” S. Doc. No. 10 (1941), 27–28.

<sup>883</sup> *Ibid.*

<sup>884</sup> USTC, 1925 Annual Report, 1926, 14.

<sup>885</sup> Pub. L. No. 67-318, § 316(c).

Court of Customs and Patent Appeals, now the U.S. Court of Appeals for the Federal Circuit (Federal Circuit)).<sup>886</sup> In addition, until 1930, a judgment of the U.S. Court of Customs Appeals on U.S. Tariff Commission findings was subject to review by the Supreme Court upon successful application for *certiorari*.<sup>887</sup> Final findings, together with the official record, were transmitted to the President for a decision on violation. The Commission's findings were not made public until the President approved the Commission's recommendation.<sup>888</sup>

If a violation was found, the President was required to impose additional duties at a rate "not exceeding 50 nor less than 10 per centum of the value of such articles" to offset the unfair method or act, or, in extreme cases, to exclude "such articles as [the President] shall deem the interests of the United States shall require, imported by any person violating the provisions of this act."<sup>889</sup> Additional duties were eliminated by amendment in the Tariff Act of 1930, because such duties were considered to be an inadequate remedy, leaving an exclusion order as the only remedy.<sup>890</sup> Once entered, a remedy would continue in effect until the President found that the conditions that led thereto no longer existed.<sup>891</sup>

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<sup>886</sup> *Ibid.*, § 316(c).

<sup>887</sup> Pub. L. No. 71-361, § 337. Regarding the elimination of Supreme Court review, see S. Rep. No. 71-37 (September 4, 1929): "Under the existing law the President is in nowise bound by any decision of the courts in the matter. As a result of this lack of finality to the decision of the Supreme Court, appellate proceedings before it upon writ of certiorari do not present a 'case or controversy' within the meaning of Article III of the Constitution. Such proceedings are, therefore, of such character that Congress can not constitutionally give the court jurisdiction over them. . . . The committee has, therefore, omitted the provisions of law giving jurisdiction to the United States Supreme Court upon certiorari." The elimination of Supreme Court review had the ancillary effect of expediting the transmission of the Commission's final findings to the President. USTC, *Fourteenth Annual Report of the USTC, 1930* (Washington, DC: GPO, December 1, 1930), 2.

<sup>888</sup> Pub. L. No. 71-361, § 337(d); S. Doc. No. 10 (1941), 19.

<sup>889</sup> USTC, *1922 Annual Report, 1923*, 61-62; Pub. L. No. 67-318, § 316(e).

<sup>890</sup> In a report submitted on March 30, 1929, to the chairman of the Committee on Ways and Means, the U.S. Tariff Commission addressed the practice of issuing additional duties under section 316: "Subdivision (e) of this section by its present language permits the continuance of the unfair and unlawful practices against which the section is directed, upon payment of an additional duty to 'offset' such practices, not exceeding 50 nor less than 10 per cent ad valorem. . . . A form of competition which is found and declared to be unfair and unlawful can not be 'offset' by increasing the import duty. The methods or acts complained of under this section are either a violation of the statute or they are fair and lawful. There is no middle ground. If the statute is violated, then the proper remedy is to stop the unfair and unlawful competition by excluding the article in question from importation, and that has been the commission's recommendation to the President in every proceeding under this section where the existence of any such unfair method or act was established." ("Letter and Report of the United States Tariff Commission," March 30, 1929); see also USTC, *1928 Annual Report, 1929*, 21.

<sup>891</sup> Pub. L. No. 67-318, § 316(g).

## From Tariff Commission to Trade Commission: Unfair Competition Investigations Post-1974

The Trade Act of 1974 was signed into law on January 3, 1975.<sup>892</sup> After almost 60 years, the Tariff Commission was renamed the United States International Trade Commission in recognition of the Commission's evolving role in trade.<sup>893</sup> Following the enactment of the 1974 Trade Act, the Commission's role in section 337 investigations changed from advisory to adjudicatory. Looking back in 1982, practitioners observed that:

The Commission no longer analyzes facts developed at a slow pace by staff researchers, with a little assistance from the parties, to prepare a final report to the President recommending some action. The Commission was thrust into a rigorous adjudicative process where it had to participate in litigating a case under the Administrative Procedure Act to determine the existence of an unfair act, consider the effect of such an act on a domestic industry, and also conduct a non-adjudicative policy oriented review of public interest issues to decide whether to issue a remedy.<sup>894</sup>

In its new adjudicatory role, the Commission would be required to determine for each investigation whether there had been a violation and the appropriate remedy therefor, "on the record after notice and opportunity for a hearing," in accordance with provisions of the Administrative Procedure Act (APA).<sup>895</sup> Remedies would be entered by the Commission and "would become effective unless overturned by the President for policy reasons."<sup>896</sup> Final determinations by the Commission would be subject to judicial review by the Court of Customs and Patent Appeals (CCPA).<sup>897</sup>

At the end of FY 1974, the Commission had pending before it 16 section 337 investigations instituted in the preceding two years.<sup>898</sup> Those pending investigations were re-designated Investigation Nos. 337-TA-1 through 337-TA-16, for which the new statutory time limits would

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<sup>892</sup> "The amendments made by this section shall take effect on the 90th day after the date of the enactment of this Act, except that, for purposes of issuing regulations under section 337 of the Tariff Act of 1930, such amendments shall take effect on the date of enactment of this Act." Pub. L. No. 93-618, § 337(c).

<sup>893</sup> Over the years, the Commission's functions had been enlarged to include "varied aspects of international trade and economics." Additionally, the Trade Act of 1974 further strengthened the Commission's independence from the Executive Branch. S. Rep. No. 93-1298 (1974), 115.

<sup>894</sup> Brunsvold, Schill, and Schwendemann, "Injury Standards in Section 337 Investigations," 1982, 103.

<sup>895</sup> Pub. L. No. 93-618, § 337(c); Administrative Procedure Act, 5 U.S.C. § 551 et seq.

<sup>896</sup> USITC, *1975 Annual Report*, 1976, 4.

<sup>897</sup> Pub. L. No. 93-618, § 337(c).

<sup>898</sup> USTC, *1974 Annual Report*, 1975, 12; USITC, *1975 Annual Report*, 1976, 13.

run from the date the amendments took effect.<sup>899</sup> The first investigation instituted after the effective date of the amendments was *Certain Record Players Incorporating Straight Line Tracking Systems*, Investigation No. 337-TA-17, on July 7, 1975.<sup>900</sup>

As an institution, the Commission took swift action to implement the Trade Act of 1974, noting in its 1976 *Annual Report* that:

On the administrative side, the Commission embarked on some bold new innovations which promise to have considerable impact on its activities in the years to come. A complete reorganization of the Commission staff, with an emphasis on substantive responsibilities, is intended to put the structure of the Commission more in line with its expanded functions, make it more responsive to the requirements levied upon it, and make it more efficient in terms of human and fiscal resources.<sup>901</sup>

By the end of FY 1976, the Commission had hired a permanent Administrative Law Judge (ALJ), created the forerunner of the Office of Unfair Import Investigations (OUII), and completed a revision and expansion of the rules for adjudication and enforcement under section 337. In the years immediately following these initial changes, reorganization continued on a smaller scale, particularly with respect to section 337's investigative functions, for which there were a number of changes before the USITC settled on OUII for that function.

Initially, the Commissioners continued to preside over investigations incorporating the new APA requirements, although Administrative Law Judges (ALJs) likely also were brought in on an *ad hoc* basis from other agencies to handle some early cases before the first permanent ALJ was hired in 1976.<sup>902</sup> The Commission apparently had long viewed itself as having the option to utilize ALJs. Back in 1939, reporting on a new addition to the rules of general application, the

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<sup>899</sup> “[W]ith respect to investigations being conducted . . . on the day prior to the 90th day after the date of the enactment of this Act, such investigations shall be considered as having been commenced on such 90th day.” Pub. L. No. 93-618, § 337(c).

<sup>900</sup> USITC, *1975 Annual Report*, 1976, 8.

<sup>901</sup> USITC, “Message from the Chairman,” *Annual Report, 1976* (Washington, DC: GPO, 1977).

<sup>902</sup> USITC, *1976 Annual Report*, 1977, 22. From 1976 to 2016, the Office of the ALJs has seen 18 ALJs. The first full-time ALJ was Judge Myron R. Renick, who served from 1976 to 1977. The first Chief Judge, starting in 1978, was Donald K. Duvall, the original author of the treatise on section 337, *Unfair Competition and the ITC*. Chief Judge Janet Saxon followed Chief Judge Duvall and served as Chief Judge from 1984 until 1995. After a long period without a Chief Judge, the Commission in 2008 appointed Judge Paul J. Luckern to the post. The current Chief Judge, Charles E. Bullock, was appointed in 2011 after Judge Luckern's retirement. The two longest-serving ALJs, who both started in 1984, were Judges Luckern and Sidney Harris. Judge Harris served 23 years before his retirement in 2007. Judge Luckern served 27 years before his retirement in 2011. Completing the full list of ALJs that have served or continue to serve at the Commission are: Judge John J. Mathias, Judge Debra Morriss, Judge Delbert Terrill, Judge Robert R. Barton, Jr., Judge Carl C. Charneski, Judge Theodore R. Essex, Judge Robert K. Rogers, Judge Edward J. Gildea, Judge Thomas B. Pender, Judge David P. Shaw, Judge Sandra Dee Lord, and Judge MaryJoan McNamara.



Commission stated: “Since its creation the Commission has had the authority to designate agents to hold hearings but has heretofore not exercised that power in the administration of sections 336 and 337 and their predecessor statutes.”<sup>903</sup> That rule provided that “hearings may be conducted by . . . any duly authorized agent or agents of the Commission, and the record shall be presented for consideration of the Commission.”<sup>904</sup> The enactment of the Trade Act of 1974, and the resultant implementation of the APA, led the Commission to use ALJs to preside over hearings and issue recommended determinations for review by the Commission.<sup>905</sup>

In addition, during 1976, the Commission undertook an extensive reorganization of its functions.<sup>906</sup> The Commission was authorized by statute “to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.”<sup>907</sup> The USITC’s regulations provided that the Commission might “by such agents as it may designate, prosecute any inquiry necessary to its duties.”<sup>908</sup> Thus, the Commission created new offices and reassigned existing personnel to handle section 337 investigations under its revised mandate to complete unfair import investigations under the APA, as well as other functions for which the newly designated U.S. International Trade Commission was responsible.

Prior to the reorganization, the Office of the General Counsel used a team approach for handling the Commission’s investigative role in section 337 investigations. Each team included an attorney from the General Counsel’s office and an economist and/or commodity specialist from other offices within the Commission. This team of three or more people would run the investigation and investigate the industry on their own and with the parties in the case.<sup>909</sup> The team would “look at the economic and efficient operation of that domestic industry, study the injury that was alleged to have occurred during the course of the unfair act and also study the patents and come up with [their] own view of what the patent validity and infringement were.”<sup>910</sup>

The General Counsel’s participation in unfair competition investigations dated back to section 316. In 1928, the Commission described the role of its legal division:

The most obvious participation of the legal division as the agent in work of the commission arising under the tariff act of 1922 is the administration of section 316. . . .

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<sup>903</sup> USTC, *1937 Annual Report*, 1937, 45.

<sup>904</sup> 19 C.F.R. 201.15 (1939 printing).

<sup>905</sup> David Foster, Wayne Herrington, Tom Schaumberg, and Charles Schill, “Major Developments in Section 337 from 1922 to Today: An Overview, Milestones, and Implications,” transcript of panel presentation at meeting, *The History and Development of Section 337 Practice at the ITC* (Washington, DC: USITC, March 30, 2016), 34–36.

<sup>906</sup> USITC, *1976 Annual Report*, 1977, 21.

<sup>907</sup> 19 U.S.C. § 1335.

<sup>908</sup> 19 C.F.R. § 201.4(a) (1976).

<sup>909</sup> Foster *et al.*, “Major Developments in Section 337,” 2016, 35.

<sup>910</sup> *Ibid.*

The legal division, assisted by the division of international relations, passes upon all complaints of alleged unfair competition, and, if a hearing be had before the commission, follows everything that takes place in the hearing. After the hearing the legal division formulates for the commission the findings of law and fact which serve as the basis of the commission's report to the President.<sup>911</sup>

In or around 1976, questions arose about the role of the General Counsel's Office in section 337 investigations. Concerns were raised as to whether the General Counsel should maintain dual functions, acting first in an investigative role and advocating as a party, and second in an advisory role, working with the Commissioners on the final opinions of the Commission. Such concerns found support in the APA:<sup>912</sup> under APA section 554(d)(2), the employee who presides at the reception of evidence may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."<sup>913</sup> Accordingly, it was argued that the investigatory functions of section 337 should be separated from the Offices of the Commissioners, who are the final decision makers under section 337, in order to avoid any potential conflict. In any event, one result of the 1976 reorganization was the creation of the Office of Legal Services (OLS), which was given responsibility for the investigatory portion of section 337 investigations. To fulfill these duties, a number of attorneys moved from the General Counsel's office in 1977 to form the core of the newly-created OLS.<sup>914</sup>

The role of the General Counsel in section 337 investigations remained significant after the reorganization. In fact, the office gained new responsibilities during this time. The General Counsel's office retained, and still performs, its advisory role with the Commissioners and its

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<sup>911</sup> USTC, *1928 Annual Report, 1928*, 26–27; USTC, *Eleventh Annual Report of the USTC, 1927* (Washington, DC: GPO, December 5, 1927), 22. Speaking specifically about injury, practitioners wrote: "Prior to the institution of this requirement [APA compliance], the Commission's opinions often contained very little information which could lead to an understanding of how injury was determined in an investigation. Before the effective date of the Trade Act of 1974, the Commission obtained information primarily through inquiries by its staff (questionnaires, plant inspections and interviews). The information obtained in this manner was untested by the parties to any significant degree. The APA, by contrast, requires that the facts used by the Commission in making its determination be adversary-tested. . . . On the whole . . . the application of the APA has encouraged the presentation of a greater variety and amount of information." Brunsvold, Schill, and Schwendemann, "Injury Standards in Section 337 Investigations," 1982, 98.

<sup>912</sup> Foster *et al.*, "Major Developments in Section 337 from 1922 to Today," 2016, 35–36.

<sup>913</sup> 5 U.S.C. § 551 et seq.

<sup>914</sup> USITC, *Annual Report, 1977*, USITC Publication 868 (Washington, DC: USITC, March 1978).

participation in crafting the final opinions of the Commission.<sup>915</sup> In addition, the 1974 Trade Act authorized the Commission to represent itself in legal court proceedings; this new function was delegated to the General Counsel's Office.<sup>916</sup> Just a few years earlier, upon authorization from the U.S. Department of Justice, the General Counsel's office had represented the Commission related to a show cause order and restraining order aimed at preventing the Commission from initiating judicial proceedings to enforce a subpoena in Investigation No. 337-24 related to ampicillin alleged to be imported in violation of a U.S. patent.<sup>917</sup> Those proceedings were the first time the Commission was represented in litigation by its own counsel.<sup>918</sup> Following the 1976 reorganization, the General Counsel's office had primary responsibility for defending the Commission's decisions.

The new Office of Legal Services was modeled on offices in other agencies having investigative powers. Organizationally, it was placed under the new Office of Operations, reporting through the deputy director.<sup>919</sup> Among the initial goals for the office was to expand the types of unfair methods of competition and unfair acts investigated under section 337.<sup>920</sup> In furtherance of this goal, staff from OLS and others, with institutional encouragement, gave presentations around the country to educate practitioners about section 337 and explain its uses, among other efforts.<sup>921</sup> In addition, OLS attorneys conducted preliminary investigations under the new section 603(a) of the Trade Act of 1974, which provides that "in order to expedite the performance of its functions under this Act, the International Trade Commission may conduct preliminary investigations, determine the scope and manner of proceedings, and consolidate proceedings before it."<sup>922</sup> OLS attorneys also participated as a party in full section 337

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<sup>915</sup> From 1980–87, the Commission annually identified the Assistant General Counsel designated for section 337 investigations. USITC, *Annual Report, 1980*, USITC Publication 1084 (Washington, DC: USITC, July 1981); USITC, *1981 Annual Report*, USITC Publication 1352 (Washington, DC: USITC, February 1983); USITC, *1982 Annual Report*, USITC Publication 1412 (Washington, DC: USITC, August 1983); USITC, *1983 Annual Report*, USITC Publication 1580 (Washington, DC: USITC, September 1984); USITC, *1984 Annual Report*, USITC Publication 1718 (Washington, DC: USITC, July 1985); USITC, *Annual Report, 1985*, USITC Publication 1847 (Washington, DC: USITC, April 1986); USITC, *Annual Report, 1986*, USITC Publication 1935 (Washington, DC: USITC, January 1987); USITC, *Annual Report, 1987* (Washington, DC: USITC, February 1988).

<sup>916</sup> "The Commission shall be represented in all judicial proceedings by the attorneys who are employees of the commission, or, at the request of the commission, by the Attorney General of the United States." Pub. L. No. 93-618, § 174. In practice, the Commission has asked the Solicitor General to represent the Commission in proceedings before the U.S. Supreme Court.

<sup>917</sup> U.S. Tariff Commission (USTC), *Ampicillin: Report to the President on Preliminary Inquiry into Complaint Under Section 337 of the Tariff Act of 1930* (Washington, DC: USTC, 1970).

<sup>918</sup> USTC, *1972 Annual Report, 1973*, 15–16.

<sup>919</sup> USITC, *1977 Annual Report, 1978*, 28.

<sup>920</sup> Patents had long been established as a basis for section 337 investigations in cases under the original statute. See *Synthetic Phenolic Resin* (filed December 16, 1925, instituted April 16, 1926); see also Pub. L. No. 76-710.

<sup>921</sup> Foster *et al.*, "Major Developments in Section 337," 2016, 44.

<sup>922</sup> Pub. L. No. 93-618, § 603(a).

investigations arising out of both section 603 preliminary investigations and section 337 complaints drawn from the public.<sup>923</sup>

The USITC's reorganization related to section 337 investigations continued throughout the 1970s and early 1980s. In 1979, OLS was redesignated as a division under a larger office, becoming the Unfair Import Investigations Division (UIID). The new UIID reported to the Office of Investigations, placed under the Office of Operations.<sup>924</sup> However, in 1985, that group was again redesignated, and elevated to the level of an office when it became OUII. The office first known as OLS, then UIID, and finally OUII was headed by a series of directors and chiefs as it evolved.<sup>925</sup>

In its annual report to Congress for 1985, the Commission stated regarding the creation of OUII:

During the fiscal year, the Commission made an administrative change affecting the conduct of section 337 investigations. In recognition of the increasing role of these cases in ensuring free and fair trade, the Unfair Import Investigation Division, formerly a part of the Office of Investigations, became a separate office of the Commission (the Office of Unfair Import Investigations).<sup>926</sup>

That expanded role reflected the increasing number of investigations. In 1985, there were 60 active section 337 investigations. In addition, some credit was perhaps due to the earlier outreach by OLS, with the USITC reporting in 1985 that the most common methods of unfair competition alleged were infringement of patent, copyright, or trademark; theft of trade secrets; passing off; or violation of the antitrust laws.<sup>927</sup> The Commission also reported that

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<sup>923</sup> Pub. L. No. 93-618, § 603. Regarding section 603 preliminary investigations, see Italo H. Ablondi and H. Henning Vent, "Section 337 Import Investigations—Unfair Import Practices," *Loyola of Los Angeles International and Comparative Law Review* vol. 4, no. 1 (1981), 30–31.

<sup>924</sup> USITC, *1980 Annual Report*, 1980, 47.

<sup>925</sup> Director Harold Brandt opened OLS in 1976. Edward M. Lebow and Talbot Lindstrom each served as Acting Chief of then-UIID in 1979 and 1980, respectively. David I. Wilson was Chief of UIID from 1981 to 1983. Arthur B. Wineberg took over as acting chief of UIID in 1984 and was elevated to Director in 1985, at the same time that UIID was re-designated OUII (an office in its own right). He continued as Director of OUII through 1987. Lynn Levine took over OUII in 1988, and continued as Director for 25 years until her retirement from government service in 2012. In 2013, Margaret Macdonald, an experienced section 337 litigator in private practice, became Director of OUII.

<sup>926</sup> USITC, *1985 Annual Report*, 1986, 10.

<sup>927</sup> *Ibid.*

year that it “continued to be at the forefront of legal and technological issues” in section 337 investigations.<sup>928</sup>

In addition to the institutional changes discussed above, a number of issues of first impression were decided. For example, 1981 marked the first temporary exclusion order since the 1974 Trade Act amendments, issued in *Certain Apparatus for the Continuous Production of Copper Rod*, Investigation No. 337-TA-89.<sup>929</sup> Also in 1981, the USITC issued its first limited exclusion order in *Large Video Matrix Display Systems*, Investigation No. 337-TA-75.<sup>930</sup> Before that time, “all Commission exclusion orders had applied to all potentially infringing products regardless of the foreign manufacturers.”<sup>931</sup> The heightened requirements that must be satisfied to obtain a general exclusion order under the current statute had not yet been added. However, taking into consideration the product at issue, stadium scoreboards, the Commission determined “in cases which concern a large capital good item made to specific order, it would be inappropriate to exclude similar products of other manufacturers since there had been no showing that other products infringed the patent in question.”<sup>932</sup>

Also in 1981, the Commission self-initiated its first section 337 investigation, based on a complaint by UIID, in *Certain Airtight Cast-Iron Stoves (Stoves III)*, Investigation No. 337-TA-106.<sup>933</sup> Two years later, the Commission self-initiated its first patent-based investigation in *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Investigation No. 337-TA-151. Commission Secretary Kenneth R. Mason filed the Complaint “[b]y order of the Commission.”<sup>934</sup> Interestingly, the investigation was based on a patent held by the U.S. Department of Agriculture. The Commission ultimately terminated the investigation before a final determination on the merits.<sup>935</sup> In addition, an impactful procedural change occurred

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<sup>928</sup> High-technology products of the time for which producers sought protection of alleged infringement of intellectual property rights included aramid fibers, amorphous metals, optical wave-guide fibers, computer-related equipment (e.g., rotary wheel printers and double-sided floppy disks), medical devices (e.g., artificial kidneys and apparatus for disintegration of urinary calculi), and capital equipment (e.g., motor graders and stretch-wrapping apparatus). Consumer products depicting the *Gremlins* characters and Duracell batteries also sought protection under section 337. USITC, *1985 Annual Report*, 1986, 10.

<sup>929</sup> USITC, *1981 Annual Report*, 1983, 11; Regarding motions for temporary relief, see Tom M. Schaumberg, *A Lawyer's Guide to Section 337 Investigations before the U.S. International Trade Commission*, 3rd ed. (Chicago, IL: American Bar Association, 2016), 93, fn. 132.

<sup>930</sup> *Certain Large Video Matrix Display Systems and Components Thereof*, Investigation No. 337-TA-75, USITC Publication 1158, Comm'n op. at 28 (June 1981); USITC, *1981 Annual Report*, 1983, 11.

<sup>931</sup> USITC, *1981 Annual Report*, 1983, 11.

<sup>932</sup> *Ibid.*

<sup>933</sup> *Ibid.*, 11–12; see also Schaumberg, *A Lawyer's Guide to Section 337 Investigations*, 2016, 75, fn. 1.

<sup>934</sup> *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Complaint, Investigation No. 337-TA-151 (June 4, 1983).

<sup>935</sup> *Certain Apparatus for Flow Injection Analysis and Components Thereof*, Investigation No. 337-TA-151, Comm'n action and order at 1 (November 1984); USITC, *1983 Annual Report*, 1984, 11. The Secretary of Agriculture appealed, but the Federal Circuit held that the Commission's decision was not a final determination, and thus, not appealable. *Block v. U.S. Intern. Trade Comm'n*, 777 F.2d 1568 (Fed. Cir. 1985).

when the USITC amended its rules in 1982 to enable the current practice in which ALJs issue initial determinations on violation, subject to discretionary review by the Commission, instead of recommended determinations.<sup>936</sup>

OUII's functions and responsibilities also have varied somewhat since its initial formation as OLS. OUII was briefly responsible for the Trade Remedy Assistance Center from 1985 to 1988.<sup>937</sup> After the Omnibus Trade and Competitiveness Act eliminated injury for most investigation types in 1988, OUII shifted its focus from analyzing the threat or effect of injury to analyzing complex patent infringement issues.<sup>938</sup> The January 2011 supplement to the Commission's *Strategic Human Capital Plan, 2009–2013*, changed the staffing of investigations:

Once an investigation is instituted, OUII will place the highest priority on issues unique to section 337, including the domestic industry requirement, remedy, the public interest, and bonding, as well as any other issues uniquely affecting Commission policy. OUII will also continue its efforts: a) to ensure that the investigation record is fully developed, b) to resolve procedural disputes between the other parties without the need to resort to the presiding administrative law judge, and c) to facilitate settlement.<sup>939</sup>

Most recently, added to OUII's duties is the office's fact-finding role in one class of cases in a pilot program designed to expedite advisory and modification proceedings. Under the pilot program, investigative attorneys will be responsible for requests requiring minimal fact-finding and submit their recommendations directly to the Commission for potential action thereon.<sup>940</sup>

Overall, OUII has served—and continues to serve—three primary functions in original investigations and ancillary proceedings, such as enforcement proceedings. First, OUII provides an informal service to the public by offering a draft review for complaints before filing. The advice from OUII at this stage is not binding on complainant(s) and, indeed, no such review before filing is required. Second, after a complaint is filed, OUII takes on a new role and

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<sup>936</sup> 47 Fed. Reg. 25134 (1982).

<sup>937</sup> A function based on a requirement in 19 U.S.C. 1339; USITC, *1985 Annual Report*, 1986, 38; USITC, *1986 Annual Report*, 1987, 42; USITC, *1987 Annual Report*, 1988, 31; USITC, *1988 Annual Report* (Washington, DC: USITC, 1989), 23; USITC, *Annual Report, 1989*, USITC Publication 2264 (Washington, DC: USITC, March 1990), 28.

<sup>938</sup> USITC, *Supplement to the Strategic Human Capital Plan, 2009–2013*, 2011, 19, [https://www.usitc.gov/press\\_room/documents/human\\_capital\\_plan\\_supplemental\\_1-18-2011.pdf](https://www.usitc.gov/press_room/documents/human_capital_plan_supplemental_1-18-2011.pdf).

<sup>939</sup> USITC, *Supplement to the Strategic Human Capital Plan*, 2011, 23–24.

<sup>940</sup> USITC, *USITC Pilot Program for Rulings on Redesigned Products in Commission Post-Order Proceedings: Background and Facts*, n.d. (accessed August 1, 2016), [http://www.usitc.gov/press\\_room/documents/featured\\_news/337modprocpilot\\_fs\\_final.doc](http://www.usitc.gov/press_room/documents/featured_news/337modprocpilot_fs_final.doc) and USITC, *Pilot Program Will Test Expedited Procedures for USITC Modification and Advisory Opinion Proceedings*, n.d. (accessed August 1, 2016), [https://www.usitc.gov/press\\_room/featured\\_news/pilot\\_program\\_will\\_test\\_expedited\\_procedures\\_usitc.htm](https://www.usitc.gov/press_room/featured_news/pilot_program_will_test_expedited_procedures_usitc.htm).

formally examines the complaint for sufficiency and compliance with the Commission’s rules, in order to make a recommendation to the Commission as to whether to institute an investigation based on the complaint. OUII may request supplemental information or suggest the complaint be amended before the Commission issues a decision on institution. Third, after institution of a complaint, an OUII investigative attorney, if designated, becomes a party to the investigation.<sup>941</sup> OUII may interact with private parties, as any other party would, but—also like the private parties—it may not engage in *ex parte* communication with the offices included in the decision-making process: the ALJs, the General Counsel, and the Commissioners.

Litigation of claims under section 337 in its present form is generally attributed to the Trade Act of 1974. The reorganization undertaken following its enactment is responsible for the agency structure we recognize today, with OUII, the office of the ALJs, the General Counsel, and the Commissioners each playing an important role in the process. While Congress again made significant amendments to section 337 in 1988 and 1994, with the possible exception of eliminating statutory deadlines in 1988, none of those amendments changed procedure related to section 337 to the same degree as the 1974 Trade Act.

## Agency Rules and Procedures for Unfair Import Investigations

### The Early Rules

Section 316 of the Tariff Act of 1922 gave the Tariff Commission authority to investigate unfair methods of competition and unfair acts in import trade “under and in accordance with such rules as it may promulgate.”<sup>942</sup> Consistent with the statute, and with the support of President Warren G. Harding, the Tariff Commission promulgated the first rules of procedure applicable to investigations under sections 315, 316, or 317 in 1922.<sup>943</sup>

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<sup>941</sup> In its 2011 Supplement to the Human Capital Plan, the Commission noted that “although the statute does not require that the Commission maintain an independent office, the APA requires that the prosecutorial/investigative functions, such as the pre-institution work, and presenting arguments and evidence before an ALJ, be separated from the Commission decision-making,” and that “in cases with significant issues peculiar to section 337 (such as domestic industry or public interest) . . . the participation of OUII is likely to aid the decision-making process.” OUII attorneys have developed “particular expertise and institutional knowledge” on issues of public interest, and “act as a party to the litigation with no commercial interest in the outcome.” USITC, *Supplement to the Strategic Human Capital Plan*, 2011, 3, 19–20; See also USITC, *Section 337: Building the Record on the Public Interest*, n.d. (accessed March 1, 2017), [https://usitc.gov/press\\_room/documents/featured\\_news/publicinterest\\_article.htm](https://usitc.gov/press_room/documents/featured_news/publicinterest_article.htm) and 76 Fed Reg. 64803–64810 (2011), [https://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/finalrules210.pdf](https://www.usitc.gov/secretary/fed_reg_notices/rules/finalrules210.pdf).

<sup>942</sup> USTC, *1922 Annual Report*, 1922, 61 (referencing § 316(c)).

<sup>943</sup> USTC, *1923 Annual Report*, 1923, 34; USTC, *1925 Annual Report*, 1925, 91.

These first rules were few in number and provided little additional guidance beyond the mandate in the statute itself.<sup>944</sup> Interestingly, the original rules provided the Commission discretion in choosing whether to institute a full investigation: “No investigation shall be ordered by the commission unless such application or preliminary investigation discloses to the satisfaction of the commission that there are good and sufficient reasons therefor under the law.”<sup>945</sup>

Prior to the implementation of the Trade Act of 1974, the Tariff Commission revised these rules several times. While most of the changes were small—updating references, tweaking language, etc.—a few changes provide insight into the development of the Commission’s practices and procedures.

The 1922 rules provided for the Tariff Commission to routinely conduct an inquiry into whether a temporary exclusion should be ordered “pending further investigation.”<sup>946</sup> By 1930 the rules specified the inquiry would only be carried out if requested in the complaint.<sup>947</sup>

With respect to responses to complaints, parties would have to wait for a rule until 1930. The rules reproduced in the *1930 Annual Report* specified that “after an investigation shall have been ordered” and the complaint served on “any owner, importer, consignee, or agent of either,” 30 days were provided in which to submit a “written answer under oath and to show cause, if any there be, why the provisions of section 337 should not be applied.”<sup>948</sup>

In 1937, the Tariff Commission first separated “provisions of general application,” common to all investigations, from provisions applying specifically to section 336 and 337 investigations (previously sections 315 and 316, respectively), to avoid duplications.<sup>949</sup>

Reporting to Congress in 1937, the Tariff Commission identified as “probably the most important change in procedure . . . the question of furnishing interested parties, and the public, information concerning the Commission’s activities in matters pending before it.” Section 337 complaints would be publicized “at the time of filing” and made available for inspection, with the goal of facilitating information gathering and expediting Tariff Commission decisions concerning complaints.<sup>950</sup>

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<sup>944</sup> USTC, *1922 Annual Report*, 1922, 64–66.

<sup>945</sup> *Ibid.*, 64.

<sup>946</sup> *Ibid.*

<sup>947</sup> USTC, *1930 Annual Report*, 1930, 24.

<sup>948</sup> *Ibid.*

<sup>949</sup> USTC, *1937 Annual Report*, 1937, 45.

<sup>950</sup> *Ibid.*



In 1938, the Tariff Commission’s rules became more generally accessible. That year, the government began publishing the Code of Federal Regulations (CFR). The CFR put the Tariff Commission’s rules—along with the rules of other agencies—on a standard publication schedule, with updates published in the daily *Federal Register* in the interim periods.<sup>951</sup>

On June 11, 1946, after unanimous adoption by both houses of Congress, the President approved the Administrative Procedure Act, marking the end of an effort—interrupted by World War II—that was initiated in 1938 in response to criticism of federal administrative agencies.<sup>952</sup> The new APA would apply, with limited exceptions, to every agency and authority of the government.<sup>953</sup> The Tariff Commission qualified for a number of the referenced exceptions before section 337 was later amended by the Trade Act of 1974.

On the APA’s effective date, the Tariff Commission issued a complete restatement of its rules, which included “new material . . . in the nature of public information as to the organization and functions of the Tariff Commission,” and published them in the *Federal Register*, complying with the APA requirement to “keep the public currently informed of their organization, procedures and rules.”<sup>954</sup> Otherwise, its previous rules were “retained in substance, and no changes in basic procedure were adopted,” consistent with the APA allowance that “an agency need not invent procedures where it has no reason to establish any procedures.”<sup>955</sup>

Unless required by statute, “the rules of agency organization, procedure or practice,” “interpretive rules,” and “general statements of policy” were exempt from APA rulemaking.<sup>956</sup> Application of the APA’s “uniform standards” for “adjudicatory proceedings” also required an express statement in the enabling statute of the relevant agency, which Congress did not add to section 337 until the Trade Act of 1974.<sup>957</sup> Similarly, the APA requirement relating to judicial review applied “except so far as . . . agency action is by law committed to agency discretion,” and section 337 at the time provided for action only if the existence of an unfair method or act was “established to the satisfaction of the President.”<sup>958</sup>

In 1958, as part of the Trade Agreements Extension Act, Congress amended the Tariff Act to revise the Commission’s authority to issue rules. Congress deleted from section 337 the words

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<sup>951</sup> CFR §§ Preface and 1.0 at iii and 1 (1938).

<sup>952</sup> USDOJ, *Attorney General’s Manual on the Administrative Procedure Act*, Prepared introduction by the United States Department of Justice Tom C. Clark, Attorney General (Washington, DC: USDOJ, 1947), Introduction, 5–6. <https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947>.

<sup>953</sup> USITC, *Thirtieth Annual Report of the USITC*, 1946 (Washington, DC: GPO, January 3, 1947), 10; USDOJ, *Attorney General’s Manual*, 1947, 9.

<sup>954</sup> *Ibid.*

<sup>955</sup> USITC, *1946 Annual Report*, 1947, 10; USDOJ, *Attorney General’s Manual*, 1947, 21.

<sup>956</sup> USDOJ, *Attorney General’s Manual*, 1947, 19–21, 30.

<sup>957</sup> *Ibid.*, 40–41.

<sup>958</sup> *Ibid.*, 94 (citing House Hearings (1945), 38 (Sen. Doc., 84)); 19 U.S.C. § 1337(e) (1946).

“under and in accordance with such rules as [the Tariff Commission] may promulgate,” and added new section 335 (19 U.S.C. § 1335) authorizing the Tariff Commission “to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties.”<sup>959</sup> Section 335 appears to have been first cited with reference to section 337 rules on December 7, 1962, in a notice of final rules of practice and procedure in the *Federal Register*.<sup>960</sup>

By 1962, the long-standing concept that complaints “need not be drawn in any particular form,” as the statement appeared the prior year, had been eliminated entirely.<sup>961</sup> It is well established today that the USITC requires detailed fact pleading, for which specific information is required by rule.<sup>962</sup> However, the original 1922 rules specified that, “an application [was] not required to be in any special form.”<sup>963</sup> Also in 1962, the Tariff Commission carved out and supplemented prior provisions related to disclosure to create a new rule for “confidential business data.”<sup>964</sup>

## 1976: Rules Implementing the Trade Act of 1974

The rules of practice and procedure governing investigations of alleged unfair practices in import trade remained essentially the same from 1962 through April 1975, when new and amended rules were introduced. The Trade Act of 1974 had left section 337 jurisdiction unchanged: “No change has been made in the substance of the jurisdiction conferred under section 337(a) with respect to unfair methods of competition or unfair acts in the import trade.”<sup>965</sup> However, the statutory amendments making the APA applicable to section 337, among other changes relevant to the conduct of investigations, prompted the USITC to overhaul its rules, putting them substantially in a form recognizable to current practitioners.<sup>966</sup>

Under part 201, the USITC proposed amendments relating to definitions, filing of documents, timing, service, and attendee fees and mileage.<sup>967</sup> The USITC also added part 210 (replacing part 203).<sup>968</sup> The proposed additions to new part 210 demonstrated the transition to APA

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<sup>959</sup> Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 335, 72 Stat. 680 (1958).

<sup>960</sup> 27 Fed. Reg. 12117, 12118 and 12120 (1962).

<sup>961</sup> 27 Fed. Reg. 12117, 12120 (1962); 19 CFR § 203.2 (1961).

<sup>962</sup> In 2016, requirements for the content of complaints can be found in 19 C.F.R. § 210.12.

<sup>963</sup> USTC, *1922 Annual Report*, 1922, 64.

<sup>964</sup> 27 Fed. Reg. 12117, 12118 (1962).

<sup>965</sup> S. Rep. No. 93-1298 (1974), 194.

<sup>966</sup> On September 2, 1975, the USITC published its notice of proposed rulemaking in the *Federal Register* to “implement sections 337 and 337a of the Tariff Act of 1930, as amended by Section 341 of the Trade Act of 1974.” The short time was allotted for comments due to “the urgency of proceeding under section 337 in the investigation of complaints pending before the Commission.” (40 Fed. Reg. 40173 (1975)). Final rules were published on April 27, 1976, with an effective date of May 27, 1976 (41 Fed. Reg. 17710 (1976)). The revised rules first appeared in a *Code of Federal Regulations* volume in 1977.

<sup>967</sup> *Ibid.*

<sup>968</sup> 40 Fed. Reg. 40173 (1975).

adjudication of alleged unfair practices. The new or amended rules provided for discovery, for the orderly presentation of information at hearings and preservation in the record, and for decisions and associated procedures, among other things.<sup>969</sup>

## Looking Forward from the Trade Act of 1974

The 1976 amendments are remarkable because they helped usher in the current due-process era through APA determinations on the record after notice and opportunity for hearing. However, periodic and even major rules packages continue to shape the rules governing section 337 within the limits of the Commission’s statutory authority. While not exhaustive, a discussion highlighting some post-1976 changes to the USITC’s rules and procedures follows.

### Early Post-1975 Additions and Changes to Procedure

In 1981, the Commission added procedures for consent orders, which were already in use, and for certain non-adjudicative proceedings. The new rules relied in part on the USITC’s original jurisdiction under section 337 as the basis “to conduct proceedings supplemental to the formal adjudicative investigations provided for by Part 210 of the Commission’s Rules of Practice and Procedure.”<sup>970</sup>

Of particular importance to current practice were changes in 1982 regarding ALJ determinations. The Commission first brought in ALJs to preside over investigations in 1976, as part of its implementation of the APA. At that time, the ALJs were directed to issue their opinions as recommended determinations which would be reviewed by the Commission.<sup>971</sup> Final rules issued in 1982 permitted ALJs to issue initial determinations on violation, for both summary determination and permanent relief, as well as termination of investigations, instead of issuing recommended determinations.<sup>972</sup> The amendments also made Commission review of those initial determinations discretionary, thus providing a procedural vehicle for selective review and modification of issues decided by the presiding ALJ. After a set period of time, if not reviewed, the initial determination would become the Commission’s determination.<sup>973</sup>

### Conformity with the Statute

Amendments to section 337 made by the Omnibus Trade and Competitiveness Act in 1988 (OTCA) and the Uruguay Round Agreements Act (URAA) in 1994 necessitated many conforming changes to the Commission’s rules of practice and procedure. In both cases, amendments to

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<sup>969</sup> 40 Fed. Reg. 40173, 40174–183 (1975).

<sup>970</sup> 46 Fed. Reg. 17526 and 17527 (1981).

<sup>971</sup> 47 Fed. Reg. 25134 (1982).

<sup>972</sup> *Ibid*; 48 Fed. Reg. 20225 (1983).

<sup>973</sup> 47 Fed. Reg. 25134 (1982).

the rules required by the statutory changes were first issued as interim rules due to the immediate or nearly immediate effective dates of the OTCA and URAA, respectively. The Commission also noted in both cases “that interim regulations should not respond to anything more than the exigencies created by the new legislation.” The APA itself allowed for exceptions to notice and comment rule making under the circumstances presented, thus allowing for the adoption of interim rules.<sup>974</sup>

### **Selected Initiatives for Improving Section 337 Investigations**

In 2011, the USITC issued final rules after comment to implement electronic filing of most documents with the Commission. The Commission anticipated both reducing costs and improving the “efficiency and effectiveness of the filing process,” the latter of which is evident from the smooth transition to the new filing methods.<sup>975</sup>

Also in 2011, the USITC issued final rules after comment to assist the Commission in identifying investigations requiring further development of public-interest issues and to improve information gathering on public interest “at each stage of the investigation.”<sup>976</sup> The importance of the public interest had been highlighted by the 1974 Trade Act, and already was considered by the Commission in every section 337 investigation.<sup>977</sup> The amended rules supplemented procedures to enable collection of more and better information to support that consideration.

In 2013, the Commission issued two sets of final rules after comment, making a large number of changes that were identified as procedural. The notice categorized these amendments as necessary technical, clerical, or harmonization changes.<sup>978</sup> Amendments therein limiting certain discovery responded to some criticism of the Commission. Thus, in addition to the limits on Commission discovery inherent in the short time available to complete discovery, compared to district court, the Commission limited the number and type of depositions and capped the number of interrogatories, consistent with the limit already ordered by many ALJs.<sup>979</sup> Additionally, the 2013 amendments further strengthened the Commission’s strong fact pleading requirements, which already exceeded district court notice pleading requirements, to require additional pleading for domestic industry and accused products.<sup>980</sup>

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<sup>974</sup> 53 Fed. Reg. 33044–5 (1988); 59 Fed. Reg. 32125 (1994).

<sup>975</sup> 76 Fed. Reg. 61937 (2011).

<sup>976</sup> 76 Fed. Reg. 64803 (2011).

<sup>977</sup> Pub. L. No. 93-618, § 337(d), (e), and (f); S. Rep. No. 93-1298 (1974), 193, 197.

<sup>978</sup> 78 Fed. Reg. 23474 (2013); 78 Fed. Reg. 29618 (2013).

<sup>979</sup> 78 Fed. Reg. 23474, 23483–84 (2013). Interestingly, in 1984, the Commission “considered and rejected a formal quantitative limitation on interrogatories and depositions.” Noting that the ALJs often placed limits in practice, the Commission left the limit to the ALJs’ discretion (49 Fed. Reg. 46123, 46125 (1984)).

<sup>980</sup> 78 Fed. Reg. 23474 (2013).

Lastly, no discussion of the rules would be complete without noting the ground rules published by individual ALJs. The ground rules are akin to local rules in district court and were put into use soon after ALJs started handling unfair import investigations. Together with the Commission’s procedural rules, the ALJs’ ground rules provide the parties with details and instructions regarding matters such as the handling of motions and the taking of discovery.<sup>981</sup> Ground rules not only provide guidance regarding the details of practice before each ALJ, they play an important role in expediting cases and in protecting against abuses of the discovery process.<sup>982</sup>

## Key Issues in the Litigation of Section 337 Investigations

In the litigation of section 337 investigations, the “record in each investigation must be developed and analyzed in an objectively unbiased manner, and the resulting determinations must be well-reasoned, timely, and consistent with the law.”<sup>983</sup> As previously discussed, section 337 itself, as well as the rules and internal organization associated with section 337 investigations, has undergone a number of changes over the years. However, since the provision’s enactment in 1922 as section 316, the core elements that must be proven to establish a violation of section 337 have remained the same: an importation, a domestic industry, and an unfair act (including a continued need to show injury to a domestic industry for investigations not based on federally registered IP identified in section 337). As section 337 is a trade remedy statute, both importation and domestic industry are critical elements of a violation. With limited—although important—exceptions, importation is rarely litigated.<sup>984</sup> Domestic industry in particular has been strictly construed in recent years. Lastly, while patent infringement has long been recognized as an unfair act and continues to be the most prevalent unfair act asserted, the USITC accepts all generally recognizable forms of unfair competition as a basis for an investigation under section 337.

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<sup>981</sup> USITC, *Section 337 Investigations: Frequently Asked Questions* (Washington, DC: USITC, 2009), 2, [https://www.usitc.gov/intellectual\\_property/documents/337\\_faqs.pdf](https://www.usitc.gov/intellectual_property/documents/337_faqs.pdf).

<sup>982</sup> For example, ALJs include ground rules requiring parties to propose a procedural schedule that is consistent with the Target Date set by the ALJ. *See, e.g., Certain Flash Memory Devices & Components Thereof*, Investigation No. 337-TA-1034, order no. 4 at 2–3 (February 6, 2017) (providing target date and hearing date; requesting parties submit procedural schedule addressing all other events set forth in Ground Rules); *see also Certain Liquid Crystal eWriters & Components Thereof*, Investigation No. 337-TA-1035, order no. 4 at 2–3 (February 2, 2017) (setting some procedural schedule dates & requesting that parties jointly propose dates for other events listed in the order). In addition, some ALJs require parties to submit statements addressing potential narrowing of the claims at issue, as well as the scope of discovery. *See, e.g., Certain Footwear Products*, Investigation No. 337-TA-936, order no. 2 at Attachment A (Joint Discovery Statement checklist) and Exhibit A (Discovery Statement Checklist) (November 17, 2014) (seeking proposed limitations to document production, interrogatories, depositions, etc.; requiring identification of dispositive issues that should be resolved early).

<sup>983</sup> USITC, *Annual Performance Plan, FY 2016–2017 and Annual Performance Report, FY 2015*, 9, [https://www.usitc.gov/documents/usitc\\_2016\\_2017\\_app\\_and\\_2015\\_apr.pdf](https://www.usitc.gov/documents/usitc_2016_2017_app_and_2015_apr.pdf).

<sup>984</sup> Schaumberg, *A Lawyer’s Guide to Section 337 Investigations*, 2016, 47.

## Importation

For the USITC to exercise its authority in a section 337 investigation, there must be evidence of an importation into the United States, a sale for importation into the United States, or a sale after importation into the United States of the accused article. Importation is considered both a jurisdictional and substantive requirement. The Federal Circuit has held that “the jurisdictional requirements of section 1337 mesh with the factual requirements necessary to prevail on the merits”; however, the Federal Circuit has held that even when elements of violation and jurisdiction intertwine, the USITC should assume jurisdiction and decide the case on the merits.<sup>985</sup>

The Commission has given a broad interpretation to the importation requirement holding, for example, that the importation of one article is sufficient for jurisdiction and there need not be a commercial sale—i.e., importation of a promotional sample is sufficient.<sup>986</sup> Re-importation of an article made in the United States that was shipped abroad for further manufacturing or finishing constitutes an importation under section 337.<sup>987</sup> Furthermore, a prior importation may support a finding of violation.<sup>988</sup> As to sale for importation, which is intended to reach foreign manufacturers of imported products who may not be directly involved in the importation, a contract for sale of an accused article, as defined by the Uniform Commercial Code, intended for importation is sufficient, even absent an actual importation.<sup>989</sup>

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<sup>985</sup> *Amgen, Inc. v. U.S. Int’l Trade Comm’n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990). The Federal Circuit affirmed this position in *Amgen, Inc. v. U.S. Int’l Trade Comm’n*, 519 F.3d 1343, 1350–1352 (Fed. Cir. 2008), but following a rehearing *en banc*, the Federal Circuit withdrew the section of the 2008 opinion discussing jurisdiction because the Court held that a decision on that issue was unnecessary based on the facts of the case (*Amgen, Inc. v. Int’l Trade Comm’n*, 565 F.3d 846, 853–854 (Fed. Cir. 2009)).

<sup>986</sup> *Certain Trolley Wheel Assemblies*, Investigation No. 337-TA-161, USITC Publication 1605, Comm’n op. at 8 (November 1984).

<sup>987</sup> *Certain Sputtered Carbon Coated Computer Disks & Prods. Containing Same, Including Disk Drives*, Investigation No. 337-TA-350, USITC Publication 2701, Comm’n op. at 9 (November 1993).

<sup>988</sup> *Certain Rotary Printing Apparatus Using Heated Ink Composition, Components Thereof, & Systems Containing Said Apparatus & Components*, Investigation No. 337-TA-320, order no. 1 (January 14, 1991): “Neither importation nor sale during the pendency of the investigation is required to support a Section 337 violation, and discontinuance of an unfair practice is not an adequate defense.”

<sup>989</sup> *Certain Variable Wind Speed Turbines*, Investigation No. 337-TA-376, initial determination, at 7–19 (June 20, 1996), *aff’d on appeal*; *Enercon GmbH v. U.S. Int’l Trade Comm’n*, 151 F.3d 1376, 1383 (Fed. Cir. 1998).

## Domestic Industry

Another statutory requirement for section 337, as a trade remedy statute, in addition to importation, is whether the complainant can establish that a domestic industry exists or is in the process of being established. Prior to the 1988 amendment, this required evidence of significant domestic investments by the complainant and/or its licensees in manufacturing or manufacturing-related activities such as quality control, packaging, and service and repair.<sup>990</sup> In general, these investments must be in plants or facilities, equipment, and employees. The USITC has never set forth the specific amount of investment required to show significance, but rather has made this determination on a case-by-case basis using a flexible, market-oriented approach.

For intellectual property (IP)-based investigations, the investments must relate to a domestic article that “practices” the asserted IP right. In other words, if the complainant is not making investments in the United States, and thus not exploiting or utilizing their IP right in the United States, section 337 will not provide a remedy for infringement of the IP right. After the Federal Circuit decision in *Schaper*, there was not a substantial amount of litigation related to the domestic industry requirement until the late 1980s and the enactment of the Omnibus Trade and Competitiveness Act of 1988.

The Omnibus Trade and Competitiveness Act of 1988 codified and delineated the domestic industry requirement for section 337 investigations based on infringement of certain federally registered IP rights. In addition to providing for a domestic industry based on manufacturing, Congress recognized that there could be an IP-based domestic industry demonstrated through the substantial exploitation in the United States of the IP right through engineering, research and development, or licensing.<sup>991</sup> As previously discussed, Congress noted that this provision would assist such innovators and owners of IP rights as startup companies and universities, who may not engage in manufacturing.<sup>992</sup> Since that time, much of the debate regarding domestic industry rule has focused on the requirements for demonstrating the substantial exploitation of an IP right.<sup>993</sup>

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<sup>990</sup> See, e.g., *Schaper Mfg. Co. v. Int’l Trade Comm’n*, 717 F.2d 1368, 1372 (Fed. Cir. 1983) (“The patent must be exploited by production in the United States”); see also *Certain Cube Puzzles*, Investigation No. 337-TA-112, Views of Chairman Eckes and Commissioner Haggart at 26–30 (December 30, 1982).

<sup>991</sup> Pub. L. No. 100-418, § 1342(a).

<sup>992</sup> S. Rep. No. 100-71 (1987), 129.

<sup>993</sup> In response in part to the USITC decision in *Gremlins* finding that a domestic industry could not be based on licensing of an asserted IP right. In 1988, Congress added section 337(a)(3)(C), which provides that “substantial investment in [the asserted IP right’s] exploitation, including engineering, research and development, or licensing,” could be the basis for a domestic industry.

Following the enactment of the Omnibus Trade and Competitiveness Act of 1988, as the parameters of the domestic industry requirement were clarified, once again, challenges to domestic industry subsided somewhat for the next 20 years. The early years of the 21st century, however, presented questions about the business models of non-practicing entities (NPEs).<sup>994</sup> The Commission recognized that “[n]o generally accepted definition of an NPE exists.”<sup>995</sup> Therefore, for analytical purposes, the Commission uses the following categories:

*Category 1 NPEs.* Entities that do not manufacture products that practice the asserted patents, including inventors who may have done R&D or built prototypes but do not make a product covered by the asserted patents and therefore rely on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore rely on licensing to meet the domestic industry requirement; start-ups that possess IP rights but do not yet manufacture products that practice the patent; and manufacturers whose own products do not practice the asserted patents. *Category 2 NPEs.* Entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents.<sup>996</sup>

Although the extent of the use of section 337 by Category 2 NPEs to obtain favorable licensing agreements has been debated, a number of important Commission opinions demonstrate strict scrutiny by the USITC to ensure that alleged domestic industries were closely examined and

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<sup>994</sup> See, e.g., “Abusive Patent Litigation: The Issues Impacting American Competitiveness and Job Creation at the International Trade Commission and Beyond,” hearing before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, April 16, 2013, <https://judiciary.house.gov/hearing/hearing-on-abusive-patent-litigation-the-issues-impacting-american-competitiveness-and-job-creation-at-the-international-trade-commission-and-beyond-0/> and [https://judiciary.house.gov/files/hearings/printers/113th/113-24\\_80459.PDF](https://judiciary.house.gov/files/hearings/printers/113th/113-24_80459.PDF). See also “International Trade Commission Patent Litigation,” hearing before the same subcommittee, <https://judiciary.house.gov/hearing/international-trade-commission-patent-litigation/> and [https://judiciary.house.gov/wp-content/uploads/2016/04/114-67\\_99782.pdf](https://judiciary.house.gov/wp-content/uploads/2016/04/114-67_99782.pdf); and [https://www.usitc.gov/press\\_room/documents/featured\\_news/337facts.pdf](https://www.usitc.gov/press_room/documents/featured_news/337facts.pdf).

<sup>995</sup> USITC, *Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs (Updated Quarterly)*, n.d., Accessed January 27, 2017,

[https://www.usitc.gov/intellectual\\_property/337\\_statistics\\_number\\_section\\_337\\_investigations.htm](https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm).

<sup>996</sup> *Ibid.*



specific requirements for establishing a licensing-based domestic industry were met.<sup>997</sup> In 2011, the USITC addressed the statutory parameters for the types of investments that could constitute a licensing-based domestic industry under section 337(a)(3)(C). Questions had arisen as to what types of investment were relevant, i.e., whether expenditures on outside counsel, particularly for enforcement of the patent through litigation, were relevant or how to allocate expenditures made to license a portfolio rather than a specific patent.

In *Coaxial Cable Connectors*, the Commission found that “litigation activities (including patent infringement lawsuits) may satisfy these requirements if a complainant can prove that these activities are related to licensing and pertain to the patent at issue, and can document the associated costs.”<sup>998</sup> In *Certain Multimedia Display & Navigation Devices*—the USITC’s opinion establishing a framework for evaluating investments related to a license portfolio—the Commission held as a threshold matter that in order to qualify as an investment in a licensing-based domestic industry, an alleged investment must (1) have a nexus to the exploitation of the asserted patent, (2) relate to licensing, and (3) occur in the United States.<sup>999</sup> If the alleged investments met these parameters, the USITC would then consider whether the investments were substantial.<sup>1000</sup> Applying this analysis, the USITC found that the complainant had failed to establish a licensing-based domestic industry.

Another issue for a licensing-based domestic industry was whether the complainant had to satisfy the technical prong, i.e., whether there had to be an article that practices the patent. The USITC had long taken the position that there was no technical prong requirement for a licensing-based domestic industry. Consistent with the legislative history of the 1988 amendments, the Commission interprets the “its” in “substantial investment in its exploitation”

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<sup>997</sup> After the U.S. Supreme Court decision in *eBay Inc. v. MercExchange, LLC* (*eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)), which held that to obtain a preliminary injunction in U.S. district court, a patent owner had to meet the standards for a preliminary injunction in non-patent cases, including a demonstration of irreparable harm, there was speculation that Category 2 NPEs would turn to the USITC as an alternative forum because Category 2 NPEs likely would not meet the District Court’s irreparable harm standard. The decision in *eBay* does not apply to issuance of relief in section 337 investigations because the USITC’s remedy is specific to imported goods: “Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that *eBay* does not apply to Commission remedy determinations under Section 337” (*Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010)). In addition, the ability to name multiple unrelated respondents in one investigation became important after Congress enacted the America Invents Act, which established stricter requirements for joinder in patent litigation in district court (Pub. L. No. 112-29, 125 Stat. 284, H.R. 1249 (September 16, 2011)). This requirement was also expected to cause an increase in filings by Category 2 NPEs. These fears appear not to have been realized. See, e.g., “USITC Section 337 Investigations—Facts and Trends Regarding Caseload and Parties, June 10, 2104 Update,” [https://www.usitc.gov/press\\_room/documents/featured\\_news/337facts.pdf](https://www.usitc.gov/press_room/documents/featured_news/337facts.pdf).

<sup>998</sup> *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Investigation No. 337-TA-650, Comm’n op. at 42–44 (April 14, 2010).

<sup>999</sup> *Certain Multimedia Display & Navigation Devices & Sys., Components Thereof, & Prods. Containing Same*, Investigation No. 337-TA-694, Comm’n op. at 7–8 (August 8, 2011).

<sup>1000</sup> *Ibid.*, 8.

in 337(a)(3)(C) to refer to “the patent, copyright, trademark, mask work or design.”<sup>1001</sup> Relying substantially on the legislative history, “[USITC] practice [had] been not to require a complainant to demonstrate for purposes of a licensing-based domestic industry the existence of protected articles practicing the asserted patents.”<sup>1002</sup> However, in 2013, the Federal Circuit, in *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, found to the contrary:

The “substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing” must be “with respect to the articles protected by the patent,” which means that the engineering, research and development, or licensing activities must pertain to products that are covered by the patent that is being asserted. Thus, just as the “plant or equipment” referred to in subparagraph (A) must exist with respect to articles protected by the patent, such as by producing protected goods, the research and development or licensing activities referred to in subparagraph (C) must also exist with respect to articles protected by the patent, such as by licensing protected products.<sup>1003</sup>

Subsequently, the Commission in *Certain Computers and Computer Peripheral Devices & Components Thereof & Products Containing Same*, Investigation No. 337-TA-841, reversed the ALJ and terminated an investigation with a finding of no violation, holding that respondents “failed to demonstrate . . . that the domestic industry articles practice the asserted patents. The existence of articles is, in view of recent Federal Circuit authority, a requirement for demonstrating the existence of a domestic industry.”<sup>1004</sup>

Since that time, many NPEs have failed in their efforts to litigate at the USITC, demonstrating that the Commission has, through its application of carefully crafted standards, denied relief to multiple complainants based on failure to establish the required domestic industry.

Although the evolution of the licensing-based domestic industry has proven to be the most controversial, other aspects of the domestic industry requirement have evolved as well. The USITC clarified the requirements for establishing a domestic industry based on research and development, providing not only that there must be a product that practices the asserted patent, but also that the complainant must demonstrate a nexus between the investments and

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<sup>1001</sup> *Certain Computers and Computer Peripheral Devices & Components Thereof & Products Containing Same*, Investigation No. 337-TA-841, Comm’n op. (public version) at 27 (January 9, 2014).

<sup>1002</sup> *Ibid.*, 27–28.

<sup>1003</sup> *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295 (Fed. Cir. 2013); see also *Microsoft Corp. v. Int’l Trade Comm’n*, 731 F.3d 1354 (Fed. Cir. 2013) (addressing the same question with respect to a domestic industry based on engineering research and development).

<sup>1004</sup> *Certain Computers and Computer Peripheral Devices & Components Thereof & Products Containing Same*, Investigation No. 337-TA-841, Comm’n op. (public version) at 44 (January 9, 2014).

the asserted patent.<sup>1005</sup> In other words, a complainant cannot rely solely on research and development investment in the product that practices the patent, unless it is a physical embodiment of the patent. For all types of domestic industry investment, the USITC clarified that investments need only be “with respect to articles protected by the patent”; the investments may relate to components specifically designed or intended for use as a part of the patented product.<sup>1006</sup> Additionally, in recent years, the USITC has inquired more deeply into the investments alleged to support a domestic industry: successful claims have required more evidence as to the nature of the alleged domestic industry activities and their significance to the domestic industry product.<sup>1007</sup>

The existence of a domestic industry, or one in the process of being established, is an essential component of a section 337 violation and is central to section 337’s purpose as a trade remedy statute. As the U.S. economy has evolved, this requirement has evolved, recognizing different types of economic activity as demonstrating the existence of a domestic industry. Originally designed to protect the United States’ manufacturing base, section 337 now also protects the United States’ growing IP-based industries centered around such activities as research and development, engineering, or licensing. The USITC has recognized, however, that Congress did not define exploitation, but instead identified these activities as examples of exploitation, explaining “that by using the term ‘including’ and the conjunction ‘or,’” Congress indicated they are not exclusive, leaving open the possibility that other activities exploiting IP rights may provide a basis for a domestic industry.<sup>1008</sup> As the U.S. economy evolves, the domestic industry requirement of section 337 is likely to also evolve.

## Unfair Acts

### Patent Infringement

Most section 337 investigations involve unfair acts of infringement of IP specified in the statute, or “statutory IP”—that is, registered patents, copyrights, trademarks, semiconductor mask works, or boat hull designs. The vast majority of all complaints filed since 1974 have asserted claims of patent infringement, either alone or with other statutory IP claims.

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<sup>1005</sup> *Certain Integrated Circuit Chips & Prods. Containing the Same*, Investigation No. 337-TA-859, Comm’n op. (August 22, 2014).

<sup>1006</sup> *Certain Beverage Brewing Capsules, Components Thereof, & Prods. Containing the Same*, Investigation No. 337-TA-929, Comm’n op. at 82–83 (April 5, 2016).

<sup>1007</sup> *Certain Printing & Imaging Devices & Components Thereof*, Investigation No. 337-TA-690, Comm’n op. at 26 (February 17, 2011).

<sup>1008</sup> *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Investigation No. 337-TA-650, Comm’n op. 45 (April 14, 2010).

The first complainant to allege that patent infringement was an unfair act under section 316 was the Bakelite Corporation in 1926.<sup>1009</sup> The Tariff Commission agreed, and held that importation and sale of articles that infringed U.S. patents, including articles made by a patented process, was, in fact, an unfair method of competition or unfair act under section 316, and proceeded to consider the validity of the patent.<sup>1010</sup> On appeal, the CCPA affirmed the Commission's consideration of patent infringement as an unfair act, but held that addressing validity was beyond the Commission's duties.<sup>1011</sup> Subsequent cases established the boundaries of patent infringement under the statute.<sup>1012</sup> Ultimately, the scope of unfair methods of competition and unfair acts that the Commission could consider was established to be very broad. By 1955, after the CCPA heard its final appeal from the *Synthetic Star Sapphires and Synthetic Star Rubies* investigation, it was clear to the court that "the importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair."<sup>1013</sup>

As mentioned above, considerations beyond infringement initially were limited: "The validity of the patent or patents involved may not be questioned by the Tariff Commission nor by this court on appeal therefrom, but . . . a regularly issued patent must be considered valid unless and until a court of competent jurisdiction has held otherwise."<sup>1014</sup> Section 337 is a trade statute, not a patent statute. The Commission now considers validity and enforceability defenses along with patent infringement, but these determinations are solely for the purpose of the section 337 investigation at issue and are not *res judicata*, nor do the determinations provide collateral estoppel in district court.<sup>1015</sup>

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<sup>1009</sup> *Synthetic Phenolic Resin* (filed December 16, 1925, instituted April 16, 1926).

<sup>1010</sup> *Ibid.*

<sup>1011</sup> *Frischer & Co., Inc., v. Bakelite Corporation*, 39 F.2d 247 (CCPA 1930), *cert. denied*, 282 U.S. 852 (1930).

<sup>1012</sup> See *In re Orion Co.*, 71 F.2d 458 (CCPA 1934) (applying section 337 to address articles that infringe patents); *In re Northern Pigment Co.*, 71 F.2d 447 (CCPA 1934) (applying section 337 to address articles made abroad using a patented process). The Commission's authority as to articles made abroad using a patented process was rescinded in 1935 in *In re Amtorg Trading Corporation*, which overturned *Northern Pigment* and held that there was no infringement because the patented process was not practiced in the United States (22 CCPA 558, 75 F.2d 826 (1935)). Shortly thereafter, however, legislation in 1940 specifically overruled *Amtorg* and affirmatively stated that importation of a product made abroad using a process covered by a U.S. patent is considered an unfair act (19 U.S.C. § 1337a).

<sup>1013</sup> *In re Von Clemm*, 229 F.2d 441, 444 (CCPA 1955) (affirming Tariff Commission findings regarding patents with product and process claims).

<sup>1014</sup> *Ibid.*, 444 (citing *Frischer & Co., Inc., v. Bakelite Corporation*, 39 F.2d 247 (CCPA 1930)); *In re Orion Co.*, 71 F.2d 458 (CCPA 1934); *In re Northern Pigment Co.*, 71 F.2d 447 (CCPA 1934).

<sup>1015</sup> The Second Circuit has found that this is only true as to patent determinations. See *Union Mfg. Co. v. Han Baek Trading Co.*, 763 F.2d 42, 46 (2d Cir. 1985) ("ITC adjudications of unfair trade practice and trademark infringement causes of action are entitled to *res judicata* effect").

The prevalence of patent-based claims under section 337 demonstrates the central role of IP rights in U.S. trade in an increasingly interconnected world. For the first decade following the enactment of the Trade Act of 1974, when businesses increasingly availed themselves of section 337, low-tech items, such as tools and basic consumer products, constituted most of the articles involved in section 337 investigations. The rapid rise of the electronics, computer, and other high-tech industries in the late 1980s led to a change both in the products commonly involved in section 337 investigations<sup>1016</sup> and in the number of average cases filed and instituted per year.<sup>1017</sup> The rapid pace of investigations at the USITC makes the forum particularly attractive to high-tech industries, whose product “life cycle” in the market may last only a few months or years. From 2009 to 2013, the “smartphone wars” raged at the USITC, contributing to the record number of investigations instituted in FY 2011.<sup>1018</sup> By early 2014, the disputes were largely resolved by a series of global settlements between the major players, and the complaints of several pending institutions were withdrawn as a result. In the years since the smartphone wars, the Commission has returned to a more historically consistent caseload and

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<sup>1016</sup> Schaumburg, *A Lawyer’s Guide to Section 337 Investigations*, 2016, 4–5.

<sup>1017</sup> The substantial percentage increase in the Commission’s case load in 2010 and 2011 is generally attributed to several factors, including the smartphone wars, which included many retaliation countersuits; the Supreme Court’s 2006 decision in *eBay* (*eBay v. MercExchange*, 547 U.S. 388 (2006)), which made obtaining a permanent injunction for patent infringement in district court less certain; and the increase in the importance of IP to the economy generally.

<sup>1018</sup> These disputes first reached the USITC when Nokia filed a complaint naming Apple as respondent and alleged infringement of seven patents (*Certain Electronic Devices, Including Mobile Phones, Portable Music Players, & Computers*, Investigation No. 337-TA-701, notice of institution, 75 Fed. Reg. 4583 (January 28, 2010)). In 2010, seven additional investigations were instituted based on complaints filed by Apple, HTC, Motorola, and Microsoft (*Certain Mobile Communications & Computer Devices & Components Thereof*, Investigation No. 337-TA-704 (Apple); *Certain Personal Data & Mobile Communications Devices & Related Software*, Investigation No. 337-TA-710 (Apple); *Certain Portable Electronic Devices & Related Software*, Investigation No. 337-TA-721 (HTC); *Certain Mobile Devices, Associated Software, & Components Thereof*, Investigation No. 337-TA-744 (Microsoft); *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Investigation No. 337-TA-745 (Motorola); *Certain Mobile Devices & Related Software*, Investigation No. 337-TA-750 (Apple); and *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Investigation No. 337-TA-752 (Motorola)). Apple, Nokia, HTC, Samsung, and Microsoft filed additional complaints in 2011, including *Certain Handheld Electronic Computing Devices, Related Software, & Components Thereof*, Investigation No. 337 TA-769 (Microsoft); *Certain Electronic Devices, Including Mobile Phones, Mobile Tablets, Portable Music Players, & Computers, & Components Thereof*, Investigation No. 337-TA-771 (Nokia); *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music & Data Processing Devices, & Tablet Computers*, Investigation No. 337-TA-794 (Samsung); *Certain Electronic Digital Media Devices & Components Thereof*, Investigation No. 337-TA-796 (Apple); *Certain Portable Electronic Devices & Related Software*, Investigation No. 337-TA-797 (Apple); and *Certain Electronic Devices with Communication Capabilities, Components Thereof, & Related Software*, Investigation No. 337-TA-808 (HTC). Samsung, Motorola, and Nokia filed one complaint each in 2012: *Certain Electronic Devices, Including Mobile Phones and Tablet Computers, & Components Thereof*, Investigation No. 337 TA-847 (Nokia); *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Investigation No. 337-TA-856 (Motorola); and *Certain Wireless Communication Equipment & Articles Therein*, Investigation No. 337-TA-866 (Samsung). Complaints continued into 2013 (*Certain Portable Electronic Communications Devices, Including Mobile Phones & Components Thereof*, Investigation No. 337-TA-885 (Nokia)), when the President vetoed an order excluding Apple’s products, the first time such a veto had been issued in three decades.

remains an important forum for intellectual property rights holders in both low-tech and high-tech industries.

## Trademark Infringement

Although an overwhelming majority of 337 investigations include allegations of patent infringement, the Commission has conducted investigations involving a variety of other causes of action. The most common of the non-patent statutory causes of action is infringement of federally registered trademarks. Trademark infringement was first asserted after passage of the 1974 Trade Act in Investigation No. 337-TA-22, instituted in early 1976.<sup>1019</sup>

The USITC analyzes trademark infringement under a two-pronged test: “first . . . whether [complainants’] mark merits protection, and second, whether [respondents’] use of a similar mark is likely to cause consumer confusion.”<sup>1020</sup> Federal registration is prima facie evidence of validity, ownership, and the exclusive right to use the mark.<sup>1021</sup> The test for trademark infringement is whether the accused mark is “likely to cause confusion, or to cause mistake or to deceive.”<sup>1022</sup>

Trademark infringement frequently is alleged in conjunction with patent infringement. In several recent investigations, however, it has been a stand-alone cause of action.<sup>1023</sup> Trademark investigations have allowed section 337 to reach a range of industries beyond the technology-related industries likely to seek remedies for patent infringement.<sup>1024</sup> Unsurprisingly, trademark investigations often involve other visual IP relating to the products at issue. Thus, many

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<sup>1019</sup> *Certain Reclosable Plastic Bags*, Investigation No. 337-TA-22, notice of institution (January 15, 1976).

<sup>1020</sup> *Certain Handbags, Luggage, Accessories & Packaging Thereof (Handbags)*, Investigation No. 337-TA-754, order no. 16 (initial determination) (public version) at 6 (March 13, 2012) (not reviewed) (quoting *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 115 (2d. Cir. 2006)).

<sup>1021</sup> See 15 U.S.C. § 1057(b); see also *Handbags*, Investigation No. 337-TA-754, order no. 16 at 6.

<sup>1022</sup> *Ibid.*, citing 15 U.S.C. § 1114(1); *Certain Digital Multimeters and Products with Multimeter Functionality*, Investigation No. 337-TA-588, initial determination at 11 (January 14, 2008).

<sup>1023</sup> See, e.g., *Handbags*, Investigation No. 337-TA-754, notice of investigation, 76 Fed. Reg. 24522 (May 2, 2011) (instituting investigation based on claims of infringement of 7 registered trademarks by 14 respondents); *Certain Laundry & Household Cleaning Products & Related Packaging*, Investigation No. 337-TA-891, notice of institution, 78 Fed. Reg. 53479 (August 29, 2013) (instituting investigation based on claims of infringement of 24 registered trademarks); *Certain Footwear Products*, Investigation No. 337-TA-936, notice of institution, 79 Fed. Reg. 68482 (November 17, 2014) (instituting investigation based on claims of infringement of 3 registered trademarks by 32 respondents).

<sup>1024</sup> For example, complainant Fabri-Kal sought exclusion of disposable food service products bearing its registered trademarks (*Certain Food Containers, Cups, Plates, Cutlery, & Related Items, & Packaging Thereof*, Investigation No. 337-TA-835, notice of institution, 77 Fed. Reg. 20846 (April 6, 2012) (terminated on basis of settlement agreements). In a landmark ruling for the fashion industry, the Commission issued a general exclusion order after finding a violation based on infringement of 5 of complainant Louis Vuitton’s registered trademarks (*Handbags*, Investigation No. 337-TA-754, Comm’n op. (Pub. Version) at 1-9 (June 13, 2012)). The ALJ similarly recommended a general exclusion order based on infringement of complainant Converse’s sneaker trademarks (*Certain Footwear Products*, Investigation No. 337-TA-936, Comm’n op. (public version) at 29–34 (July 7, 2016)).

complainants pursue trademark infringement claims in conjunction with trade dress, and design patents.<sup>1025</sup>

## Non-Statutory Intellectual Property Investigations

Unfair acts often concern non-federally registered IP and include, but are not limited to, common law trademark infringement, passing off, trade secret misappropriation, and false designation of origin.<sup>1026</sup> To prevail on a claim of a non-statutory unfair act, however, a complainant must also establish that the act, in either threat or actuality, destroys or substantially injures the domestic industry, or prevents the establishment of a domestic industry.<sup>1027</sup>

Common law trademark infringement may be asserted as a non-statutory unfair act. The cause of action, however, requires an additional element beyond the elements in a claim involving a registered mark. For this cause of action, the complainant must first establish common law trademark rights. To do so, the alleged mark holder must demonstrate its right to use the mark; the mark's inherent distinctiveness or acquired secondary meaning; that the mark has not become generic; and that the mark is not functional. After the right is established, the complainant must also demonstrate a likelihood of confusion.<sup>1028</sup>

Trademark owners may also face infringement of trade dress by their competitors. Historically, only a small number of complainants have sought relief for trade dress violations, but a few

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<sup>1025</sup> See, e.g., *Certain Agricultural Vehicles & Components Thereof*, Investigation No. 337-TA-487, notice of investigation, 68 Fed. Reg. 7388 (February 13, 2003) (instituting investigation based on trademark infringement and dilution claims); *Certain Ink Markers & Packaging Thereof*, Investigation No. 337-TA 522, notice of institution, 69 Fed. Reg. 52029 (December 16, 2004) (instituting investigation based on infringement of two registered trademarks and trade dress); and *Certain Digital Multimeters, & Products with Multimeter Functionality (Multimeters)*, Investigation No. 337-TA-588, notice of institution, 71 Fed. Reg. 661940 (November 13, 2006) (instituting investigation based on infringement of a registered trademark and trade dress).

<sup>1026</sup> See *In re Von Clemm*, 229 F.2d 441, 443–444 (CCPA 1955): “Congress intended to allow [the Commission] wide discretion in determining what practices are to be regarded as unfair.”

<sup>1027</sup> This injury requirement previously applied to statutory IP investigations as well, but was removed in 1988 by the Omnibus Trade and Competitive Act. See 19 U.S.C. § 1337(a)(1); see also *Multimeters*, Investigation No. 337-TA-588, initial determination, at 16–17 (January 14, 2008) (discussing injury requirement as to trade dress).

<sup>1028</sup> See *Certain Endoscopic Probes for Use in Argon Plasma Coagulation Systems*, Investigation No. 337-TA-569, Order No. 20 (May 21, 2007).

recent investigations have included such claims.<sup>1029</sup> Other non-statutory causes of action pursued under section 337 include gray market trademark, passing or palming off, false advertising, and false designation of origin. Gray market goods are genuine, foreign-made goods that bear a foreign-affixed trademark that is the same as the mark that is registered in the United States, but are imported without authorization. In such situations, the broad reach of a general exclusion order makes the USITC an attractive forum for mark holders.<sup>1030</sup>

Other less common non-statutory causes of action pursued under section 337 include passing or palming off, false advertising, and false designation of origin.<sup>1031</sup> Passing off is a somewhat amorphous unfair act, as it has been applied to situations involving unauthorized substitution of one product for another, trademark infringement with an intent to defraud or confuse the buyer, or even non-fraudulent trademark infringement with a likelihood of confusion. At the USITC, however, passing off is used to describe intentional acts of deception: the “essential

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<sup>1029</sup> See *Certain Food Waste Disposers & Components & Packaging Thereof*, inv. no. 337-TA-838, notice of institution, 77 Fed. Reg. 23751 (Apr. 20, 2012) (terminated by withdrawal of the complaint); *Certain Electric Skin Care Devices, Brushes, & Chargers Therefor, & Kits Containing Same*, inv. no. 337-TA-959, notice of institution, 80 Fed. Reg. 36576 (Jun. 25, 2015) (Commission review pending); *Certain Carbon Spine Board, Cervical Collar & Various Medical Training Manikin Devices, and Accompanying Product Catalogues, Product Inserts, Literature & Components Thereof*, inv. no. 337-TA-1008, 81 Fed. Reg. 41349 (June 4, 2016) (pending). See also *Certain Ink Markers*, inv. no. 337-TA-522, Comm’n op. (public version) at 1, 7–8 (Dec. 3, 2007) (issuing general exclusion order excluding “any ink markers or packaging that ‘bear’ the SHARPIE trademark or Sanford’s protected trade dress” and any marks or trade dress “confusingly similar thereto”).

<sup>1030</sup> For example, in *Certain Energy Drink Products*, complainant Red Bull sought relief against imports that violated its trademark and copyrights. The Commission found that numerous unspecified entities were producing and importing gray market energy drinks. The Commission noted that Red Bull had filed multiple cases in federal courts and had identified 250 suspected parties that were engaged in gray market activities across the United States. The Commission issued a general exclusion order—relief that Red Bull could not obtain from its multitude of district court actions, but needed in order to deal with the complaints and notifications Red Bull had received from consumer protection agencies and police enforcement (Investigation No. 337-TA-678, Comm’n op. on remedy, the public interest, and bonding (public version) (September 8, 2010)). Similarly, in *Certain Hydraulic Excavators*, complainant Caterpillar sought relief against the importation of gray market excavators that infringed its trademarks. A pattern of violation was shown by the identification of thousands of gray market excavators within the United States. Caterpillar proved that it could not establish the sources of these infringing products and that multiple foreign manufacturers were involved in the supply chain, resulting in the Commission issuing a general exclusion order prohibiting the importation of the infringing excavators (Investigation No. 337-TA-582, Comm’n op. (public version), at 2 (February 3, 2009)).

<sup>1031</sup> These causes of action were pursued more frequently in the early 1980s than in the past decade. See, e.g., *Certain Hand-Operated, Gas-Operated Welding, Cutting & Heating Equipment & Component Parts*, Investigation No. 337-TA-132 (false designation of origin; passing or palming off) (1983); *Certain Vertical Milling Machines & Parts, Attachments & Accessories Thereto*, Investigation No. 337-TA-133 (passing or palming off; false advertising or unfair use of promotional/advertising material), USITC Publication 1512 (1984); *Certain Marine Hardware & Accessories*, Investigation No. 337-TA-136 (passing or palming off; false advertising or unfair use of promotional/advertising material; false representation of origin) (1983); *Certain Heavy-Duty Staple Gun Tackers*, Investigation No. 337-TA-137 (passing/palming off), USITC Publication 1506 (March 1984); *Certain Caulking Guns*, Investigation No. 337-TA-139 (passing or palming off; false advertising or unfair use of promotional/advertising material; false designation of origin), USITC Publication 1507 (1984); *Certain Copper-Clad Stainless Steel Cookware*, Investigation No. 337-TA-141 (false designation of origin, passing off/palming off, false advertising or unfair use of promotional/ advertising material) (1983).



component in a case of passing off lies in an act of deception, beyond mere copying.”<sup>1032</sup> Complainants may also bring claims of false advertising, which concerns deceptive claims made by respondents about their own product, and is pled under section 43(a) of the Lanham Act.

Although only approximately 40 investigations have involved false advertising—most occurring before 1988—this cause of action has experienced a recent resurgence.<sup>1033</sup> Complainants have alleged false designation or representation of origin in fewer than 40 investigations.<sup>1034</sup>

While trade secret claims constitute a relatively small proportion of section 337 investigations, “the Commission has long interpreted section 337 to apply to trade secret misappropriation.”<sup>1035</sup> In the 1979 investigation *Certain Apparatus for the Continuous Production of Copper Rod*,<sup>1036</sup> the Commission, citing relevant state law, explained that four elements must be proven to establish trade secret misappropriation:

- (1) the existence of a trade secret which is not in the public domain;
- (2) that the complainant is the owner of the trade secret or possesses a proprietary interest therein;
- (3) that the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means;
- and (4) that the respondent has used or disclosed the trade secret, causing injury to the complainant.<sup>1037</sup>

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<sup>1032</sup> *Certain Vacuum Bottles & Components Thereof*, Investigation No. 337-TA-108, Comm’n op. at 28 (November 1982).

<sup>1033</sup> See, e.g., *Certain Light Emitting Diode Products and Components Thereof*, Investigation No. 337-TA 947; See, e.g., *Certain Woven Textile Fabrics and Products Containing Same*, Investigation No. 337-TA 976, notice of institution, 80 Fed. Reg. 79094 (December 18, 2015); *Certain Automated Teller Machines & Point of Sale Devices & Associate Software Thereof*, Investigation No. 337-TA-958, notice of institution, 80 Fed. Reg. 32605 (June 9, 2015); *Certain Motorized Self-Balancing Vehicles*, Investigation No. 337-TA-1000, 81 Fed. Reg. 33548 (May 26, 2016).

<sup>1034</sup> A recent complaint alleges false designation of origin, along with other alleged unfair acts. See *Certain Carbon & Alloy Steel Products*, Investigation No. 337-TA-1002, notice of institution, 81 Fed. Reg. 35381 (June 2, 2016).

<sup>1035</sup> *TianRui Group Co. Ltd. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1326 (Fed. Cir. 2011).

<sup>1036</sup> The first investigation involving trade secrets, instituted in 1977, was *Certain Dot Matrix Impact Printers*, Investigation No. 337-TA-32. However, because the investigation did not reach the hearing stage and no violation was found, the most frequently cited early trade secret investigation is *Certain Apparatus for the Continuous Production of Copper Rod*, Investigation No. 337-TA 52, 43 Fed. Reg. 21951 (May 22, 1978).

<sup>1037</sup> *Ibid.*, 38 (referencing the Restatement of the Law of Torts § 757 and Roger M. Milgrim, *Milgrim on Trade Secrets* (Albany: Bender, 1992), §7.07(1)).

Although in *TianRui*, the CAFC held that a “single federal standard,”<sup>1038</sup> rather than the trade secret law of any state, should be applied in Section 337 investigations, the Commission continues to use virtually the same language in opinions assessing misappropriation.<sup>1039</sup>

Similarly, the definition of “trade secret” that is cited today originated from the Restatement of the Law of Torts § 757, comment b, and was noted over 30 years ago, in the 1984 investigation *Skinless Sausage Casings*:

Any formula, pattern, device or compilation of information which is used in one's [a person's] business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business.<sup>1040</sup>

Furthermore, *Skinless Sausage Casings* frequently is cited for outlining the six factors relevant to determining whether a trade secret exists, and defining what matters are not eligible for trade secret protection (i.e., matters of general knowledge, matters disclosed in patents).<sup>1041</sup>

Perhaps the most significant investigation for trade secret owners seeking remedies for misappropriation at the USITC, and for the development of current USITC trade secret law, was *Cast Steel Railway Wheels*.<sup>1042</sup> After the Commission found a violation of section 337 based on importation of railway wheels manufactured abroad using a trade secret manufacturing process, the respondent TianRui Group appealed to the Federal Circuit.<sup>1043</sup> TianRui argued that (1) the USITC lacked authority to apply domestic trade secret law to conduct in a foreign country, based on the presumption against extraterritorial application of U.S. law; and (2) the

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<sup>1038</sup> *TianRui*, 661 F.3d at 1322.

<sup>1039</sup> See, e.g., *Rubber Resins*, Comm'n op. (public version) at 10 (February 26, 2014) (citing *Skinless Sausage Casings* and the Uniform Trade Secrets Act (UTSA), §1(4)). The elements in *Skinless Sausage Casings* are the same but for the addition of detail to element (1): the existence of a process that is protectable as a trade secret (e.g., that is (a) of economic value, (b) not generally known or readily ascertainable, and (c) that the complainant has taken reasonable precautions to maintain its secrecy).

<sup>1040</sup> *Rubber Resins*, Investigation No. 337-TA-849, initial determination (public version) at 30 (February 26, 2014) (citing *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Investigation No. 337-TA-148/169, USITC Publication 1624, initial determination (July 31, 1984)).

<sup>1041</sup> *Ibid.*, 93–94.

<sup>1042</sup> *Certain Cast Steel Railway Wheels, Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Investigation No. 337-TA-655, Comm'n op. (public version) (March 19, 2010). In the most recent appeal, of *Rubber Resins*, Investigation No. 337-TA-849, the Court simply affirmed the Commission under rule 36 (*Sino Legend (Zhangjiagang) Chemical Co. v. International Trade Comm'n*, case no. 14-1478 (Fed. Cir. December 11, 2015)). On May 3, 2016, the Federal Circuit denied petitions for rehearing and rehearing *en banc* of the *Sino Legend v. ITC* appeal. The Supreme Court denied *Sino Legend's* petition for writ of *certiorari* on January 9, 2017. *Sino Legend (Zhangjiagang) Chem. Co. Ltd. et al. v. Int'l Trade Comm'n et al.*, No. 16-428.

<sup>1043</sup> *TianRui*, 661 F.3d at 1322.

USITC erred in finding a domestic industry when complainant Amsted did not use the asserted trade secret manufacturing process in the United States. The Federal Circuit rejected these arguments and upheld the Commission.

*TianRui's* holdings include:

1. The USITC should apply a “single federal standard,” rather than the trade secret law of any state.
2. The presumption of extraterritoriality does not apply because section 337 addresses importation of articles, an inherently international transaction, and the USITC has authority not because of the foreign contact alone, but because of the importation of the goods that result in harm to a domestic industry.
3. There is no statutory requirement that the domestic industry *use* the asserted trade secrets: the fact that the imported wheels directly *competed* with the complainant’s domestically manufactured wheels was sufficient, in contrast to the “technical prong” requirement applicable in patent cases.<sup>1044</sup>

Although only 45 investigations involving trade secret claims have been instituted since 1972, trade secret misappropriation is currently of heightened interest in the legal community,<sup>1045</sup> likely due to concerns about corporate espionage and cyber theft in the increasingly global economy.<sup>1046</sup> Because trade secrets do not have a clear expiration date like patents, the length of an exclusion order for misappropriation of trade secrets is a Commission determination based on the length of time it would have taken a respondent to engineer the process or product without the trade secret information.<sup>1047</sup>

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<sup>1044</sup> *Ibid.*, 1327.

<sup>1045</sup> The most recent complaint alleging trade secret misappropriation, *Certain Carbon & Alloy Steel Products*, was terminated on February 22, 2017 when U.S. Steel withdrew its trade secret allegations (*Certain Carbon & Alloy Steel Products*, Investigation No. 337-TA-1002, order no. 56 (February 22, 2017)).

<sup>1046</sup> Very few investigations have alleged trade secret misappropriation alone, and the most recent of such cases did not reach the hearing stage. See *Certain Robotic Toys & Components Thereof*, Investigation No. 337-TA-869, initial determination (corrected public version) at 2 (July 9, 2013) (unreviewed) (terminating investigation based on settlement agreement and consent order).

<sup>1047</sup> See, e.g., *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544 (CAFC March 18, 1986); *Certain Electric Fireplaces, Components Thereof, Manuals for Same, Certain Processes for Manufacturing or Relating to Same & Certain Prods. Containing Same*, Investigation No. 337-TA-791/826 (Consolidated), Comm’n op. (public version) at 15–16 (May 29, 2013) (granting a 5-year limited exclusion order based on complexity of trade secret manufacturing process); *Crawler Cranes*, Investigation No. 337-TA-887, Comm’n op. (public version) at 70–74 (May 6, 2015) (granting a 10-year limited exclusion order and cease and desist order due to long development time for the trade secret information). Commissioner Schmidlein provided a lengthy dissent explaining why the appropriate duration of the remedies in *Crawler Cranes* should be 25 years. *Ibid.*, 72–73.

Recently, the Commission determined to review the initial determination in *Certain Crawler Cranes & Components*.<sup>1048</sup> Though the ALJ found misappropriation of only four trade secrets, the Commission determined to review all of the trade secret findings in the initial determination, and following the supplemental briefing, the Commission found that six of the asserted trade secrets were protectable and had been misappropriated.<sup>1049</sup> These secrets included embodiments of products, but also market plans, cost and pricing information, and manufacturing processes and procedures.<sup>1050</sup> Notably, the Commission considered, for the first time in several years, what business practices constitute reasonable efforts to protect trade secrets, what constitutes sufficient specificity to distinguish the trade secret from what is known in the industry, and what is protectable as a trade secret.<sup>1051</sup>

In 2016, President Obama signed the Defend Trade Secrets Act, the first law creating a federal cause of action for trade secret misappropriation.<sup>1052</sup> The Act is largely similar to the Uniform Trade Secrets Act, which has been adopted by all but two states; however, the Defend Trade Secrets Act may require the Commission to redefine the “single federal standard” that has been in use since *TianRui* in 2011. Due to the increased digitization of confidential information, the U.S. Department of Defense has found that every year, “an amount of intellectual property larger than that contained in the Library of Congress is stolen from networks maintained by U.S. businesses, universities, and government departments and agencies.”<sup>1053</sup> As a trade agency that has determined that foreign trade secret misappropriation occurring entirely abroad is subject to its remedial powers, the USITC is uniquely positioned to provide remedies in cases of international trade secret misappropriation.

## Conclusion

In the Commission’s first century, the importance of protecting domestic industries from unfair competition in import trade grew significantly. The USITC’s activities reflect its stated values: independence, objectivity, accuracy, transparency, and timeliness.<sup>1054</sup> The statutory mandate granting the Commission authority to investigate allegations of unfair competition has evolved in response to changes in the U.S. and global economies, and the USITC has adapted accordingly. The Commission’s statutory obligation to complete section 337 investigations at

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<sup>1048</sup> Investigation No. 337-TA-887, notice of review, 79 Fed. Reg. 57566 (September 24, 2014); notice of the Commission’s determination to extend the target date; request for written submissions (December 3, 2014).

<sup>1049</sup> *Ibid.*, Comm’n op. (public version) at 35–67 (May 6, 2015).

<sup>1050</sup> *Ibid.*, 9–10.

<sup>1051</sup> *Ibid.*, 38–41, 45–46, 48–51.

<sup>1052</sup> Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (May 11, 2016).

<sup>1053</sup> Senate Judiciary Committee, *Report to Accompany S. 1890*, 114th Cong., 2d sess., S. Rep. No. 114-529 (April 26, 2016), 3.

<sup>1054</sup> USITC, *Strategic Plan, FY 2014–2018*, 5 (Washington, DC: USITC, 2014), [https://www.usitc.gov/press\\_room/documents/usitc\\_2014-2018\\_strategicplan\\_final.pdf](https://www.usitc.gov/press_room/documents/usitc_2014-2018_strategicplan_final.pdf).

the earliest practicable time, combined with the remedies available, make the USITC an expeditious and effective forum for domestic industries seeking relief from infringing imports. Moreover, the Commission's role in "applying these laws to allegations of unfair trade has remained a mechanism on which U.S. firms can rely to compete effectively."<sup>1055</sup>

In the coming years, the rapid pace of technological development will continue to pose challenges for U.S. IP rights holders facing infringement from imported articles, because changing technology can lead to swift product obsolescence. Congress has identified, among other goals, the following principal negotiating objectives regarding trade-related IP: (1) "to further promote adequate and effective protection of intellectual property rights"<sup>1056</sup> and (2) "to secure fair, equitable, and nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection."<sup>1057</sup> Through its administration of section 337 investigations, the Commission rigorously protects U.S. IP rights from unfair competition. As high-tech products pervade the global marketplace, the Commission's protection of IP rights in international trade through section 337 investigations remains central to the protection of U.S. economic and national security interests.

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<sup>1055</sup> USITC, *Annual Performance Plan, FY 2016–2017*, 2016, 4, [https://www.usitc.gov/documents/usitc\\_2016\\_2017\\_app\\_and\\_2015\\_apr.pdf](https://www.usitc.gov/documents/usitc_2016_2017_app_and_2015_apr.pdf).

<sup>1056</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26 § 102(b)(5), 129 Stat. 319, 114th Cong., 1st sess., June 29, 2015; 19 U.S.C. 4201.

<sup>1057</sup> *Ibid.*, § 2102(4)(B).

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# Part V

## Analysis



# Chapter 13

## Industry and Economic Analysis



**Photo:** A Commission hearing.

**Robert B. Koopman and Michael J. Ferrantino**<sup>1058</sup>

## Introduction

The United States International Trade Commission (Commission) has a long history of providing industry and economic analysis and trade policy advice to Congress and President. In this chapter we provide a brief discussion of the historical legislative requirements for analytical advice the Commission provides Congress and the President on the potential effects of trade policy changes. From the Commission's inception as the United States Tariff Commission through today, Congress has required the Commission to provide information and analysis on the effect of tariffs and other trade barriers (i.e., standards and customs procedures) on specific sectors, and in more recent years on the overall U.S. economy, to both Congress and to the President.

While most of this chapter will deal with more recent statutory requirements for Commission industry and economic analyses, it is important to keep in mind that from its inception the Commission was expected to provide in-depth industry and economic analysis on important trade policy issues of the day. Of the numerous statutes requiring the Commission to provide industry and economic advice, this chapter will focus on three. Section 131 of the Trade Act of 1974<sup>1059</sup> requires the Commission to provide confidential pre-negotiation advice on potential sensitive sectors to the President. Section 2104 of the Trade Act of 2002, as updated by Section 105 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015,<sup>1060</sup> requires the Commission to provide an in-depth assessment of the potential impacts on the U.S. economy of an agreement that has been negotiated but before Congressional ratification. In

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<sup>1059</sup> 19 U.S.C. § 2151.

<sup>1060</sup> 19 U.S.C. § 2151 (amended Pub. L. No. 114-26, 129 Stat. 320 (2015)).



addition, section 332 of the Trade Act of 1930<sup>1061</sup> provides broad authority for the President and Congress to request from the Commission in-depth studies on almost any trade-related issue, and also permits the Commission to self-initiate such studies. This paper consists of 5 parts. In part 1, we provide an overview of why the Commission, an independent agency, was selected to provide such analysis. Clearly the strong political forces surrounding debates on trade had a strong role in the creation of such an independent agency. The next three sections provide overviews of the regular study areas and the role of Commission reports in informing negotiations or public debates and discussions surrounding trade policy developments. Part 2 describes the general trade-related studies, usually produced under section 332 of the Trade Act of 1930. Part 3 provides an overview of the pre-negotiation advice required in Section 131 of the Trade Act of 1974 (and section 221 under earlier acts). Part 4 then reviews the post-negotiation analysis required in Section 2104 of the Trade Act of 2002 and similar sections in subsequent Trade Acts. Conclusions are provided in Part 5.

## Why an Independent Agency to Conduct Industry and Economic Analysis?

The Tariff Commission was formed when Congress was embroiled in debates over the effects of tariffs on producers, consumers, and workers, besides being a source of government revenue.<sup>1062</sup> Much of the early Tariff Commission analysis was focused on trying to determine the “incidence”—that is, who actually paid the cost of the applied tariff, and studies appeared to rely on changes in consumer prices before and after tariff changes.<sup>1063</sup> One idea which was widespread at the time was that tariffs were paid by foreigners only, and thus placed no burden on the U.S. economy.<sup>1064</sup> These early analyses focused very much on tariff policy related to specific products and industries. The Commission's first Chairman, Frank Taussig, was a Harvard Economics professor and a leading expert of the time on analyzing the effects of tariffs and he was expected to bring a more “scientific” approach to tariff analysis. In the first issue of *The*

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<sup>1061</sup> The Tariff Act of 1930 (Hawley-Smoot Tariff Act or Smoot-Hawley Act), Pub. L. No. 71-361, § 332, 46 Stat. 590, 698 (codified in portions of 19 U.S.C. § 1332) is best known for the Smoot-Hawley Tariff, which imposed a substantial increase in import duties during the early stages of the Great Depression. It is perhaps noteworthy that the lesser-known Section 332 authority of “Smoot-Hawley” has been used in numerous studies of the potential effects of trade liberalization in the subsequent decades. This may warrant a modest revision of the reputation of the Trade Act of 1930 among those who primarily focus on its likely effects in deepening the Depression.

<sup>1062</sup> Karen E. Schnietz, “The 1916 Tariff Commission: Democrats’ Use of Expert Information to Constrain Republican Tariff Protection,” 23 *Bus. & Econ. Hist.* 176 (1994); Revenue Act, Pub. L. No. 64-271, § 700, 39 Stat. 756, 795 (1916).

<sup>1063</sup> *Ibid.*

<sup>1064</sup> The idea that the burden of the tariff is borne by the person who legally remits the tariff is an example of what is known as the “flypaper theory of incidence” in the public finance literature. It has been superseded by the understanding that the burden of the tariff, or indeed any tax, is distributed between the buyer and the seller depending on the particular conditions of supply and demand.

*American Economic Review* in 1911, Taussig published “How Not To Make Tariffs,” a muckraking account associating unusual features in the tariff schedule with the influence of particular members of Congress.<sup>1065</sup> In establishing the Tariff Commission in 1916 the Congressional objective was to insulate tariff policy from the kind of direct political pressures that members of Congress faced from their constituent interests. The Commission was to “apply scientific principles to the study of tariffs and to assist in recommending appropriate levels.”<sup>1066</sup> Under Taussig, the Commission developed quantitative methods to evaluate the potential effects of tariff policy changes on U.S. economic activity. Economic analysis of the effects of tariffs was still nascent in 1916, but increasingly economic tools were being refined and developed that would allow for just such a “scientific” assessment of tariff effects.

These expanded the analysis requested by Congress, reflecting the evolution of Congressional objectives, priorities, and concerns in the trade policy sphere, but continued to focus on objective and complete analysis. The Congressional requests to the Commission have also emphasized timely analysis on these priority issues, as legislation often specifies explicit timelines for delivery, the set of issues to be covered, and, to some extent, the process used to gather information that often includes public submissions, questionnaires, and hearings.

Major shifts in tariff and trade policies that affected the Commission came with the passage of the Tariff Act of 1930 and particularly the Reciprocal Trade Agreement Act of 1934. Section 332 of the Trade Act of 1930 provided statutory authority to the Commission to conduct general fact-finding investigations.<sup>1067</sup> This section has remained an integral part of Congressional trade legislation renewals and the Commission continues to produce important analysis for the President and Congress under this statute. In the Reciprocal Trade Agreement Act of 1934 Congress first authorized the President to engage in bilateral tariff negotiations with other countries, as well as the authority to adjust tariffs.<sup>1068</sup> While this Act was renewed several times, in the 1948 renewal a provision was introduced that required the Tariff Commission to analyze the tariff level below which U.S. industries would be imperilled.<sup>1069</sup> This analysis was known as “peril point” analysis (see Hiscox, 1994, and Baldwin, 1984, for interesting discussions of the role of “peril point” and other provisions) and required the Commission to provide the President with in-depth industry and economic analysis of the potential effects of tariff

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<sup>1065</sup> Frank Taussig, “How Tariffs Should Not Be Made,” *Am. Econ. Rev.*, vol. 1 no. 1, March 1911, 20-32. Taussig also published “The Tariff History of the United States” (1914), and “Some Aspects of the Tariff Question” (Cambridge: Harvard Univ. Press, 1915).

<sup>1066</sup> 1916 U.S. Tariff Commission Established, [https://www.usitc.gov/flash/dynamic\\_timeline.htm](https://www.usitc.gov/flash/dynamic_timeline.htm) (accessed August 2, 2016).

<sup>1067</sup> 19 U.S.C. § 1332.

<sup>1068</sup> Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351).

<sup>1069</sup> Trade Agreements Extension Act of 1948, Pub. L. No. 80-792, 62 Stat. 1053.

reductions possibly subject to negotiations.<sup>1070</sup> It is notable that this statute was introduced in legislation after the signing of the General Agreement on Tariffs and Trade, and signalled the start of a continuing role for the Commission in the context of the multilateral trading system. The “peril point” provisions were often subject to legislative changes (see Hiscox, 1994) and eventually evolved into 1961’s Section 131 probable economic effect analysis.<sup>1071</sup> While section 131 has evolved over time it remains an important element in the Commission’s role to provide advice to the President.

Subsequent legislation not only changed the name of the Commission, from the Tariff Commission to the International Trade Commission in 1974, but also the responsibilities and the mission of the Commission.<sup>1072</sup> These expanded the analysis requested by Congress, reflecting the evolution of Congressional objectives, priorities, and concerns in the trade policy sphere, though continued to focus on objective and complete analysis.<sup>1073</sup>

Over the 100 year history of the Commission, Congress, through legislative action, increased the breadth and depth of the advice it requested. Early requests focused on sector or even product specific effects of potential tariff changes on the US economy. Later legislation, exemplified by section 2104 of the Trade Act of 2002<sup>1074</sup> and section 105 of the Trade Act of 2015,<sup>1075</sup> asked the Commission to provide integrated, comprehensive, economy wide assessments of trade agreements. These assessments now range from analysis of tariffs to non-tariff barriers, to effects on international investment, and to policies affecting trade in services. In addition, the Commission was requested to provide discussions of each chapter in a free trade agreement (FTA) and of each listed Congressional priority in the 2002 Act.

In addition to direct requests from Congress for Commission analysis and reports, Congress has also legislated specific requirements for the President, usually through the United States Trade Representative (USTR) (and its predecessor the Special Trade Representative), to seek formal advice from the Commission on specific trade topics or negotiations. As a result of these various historical legislative requirements the Commission, an objective and independent U.S.

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<sup>1070</sup> See Michael J. Hiscox, “The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization,” 53 *Int’l Org.* 669 (1999); see also Robert Baldwin, “Rent-Seeking and Trade Policy: An Industry Approach,” 120(4) *Rev. of World Econ.* (Weltwirtschaftliches Archiv) 662 (1984) (providing interesting discussions of the role of the “peril point” and other provisions).

<sup>1071</sup> *Ibid.*

<sup>1072</sup> 19 U.S.C. § 2231; 19 U.S.C. §§ 1330–41; 19 U.S.C. § 1337.

<sup>1073</sup> See 19 U.S.C. §§ 1332(d), (g).

<sup>1074</sup> Pub. L. No. 107-210, § 2104, 116 Stat. 933, 1008 (2002) (codified as amended at 19 U.S.C. § 3804).

<sup>1075</sup> 19 U.S.C. § 2151 (amended Pub. L. No. 114-46, 129 Stat. 357 (2015)).

government agency that does not engage in trade policy development nor in negotiations,<sup>1076</sup> finds itself playing an important role in providing advice and analysis to the main trade policy negotiators and legislators in the US government.

The entire history of legislative requirements for industry and economic analysis from the Commission is beyond the scope of this paper.<sup>1077</sup> Instead, we focus on more recent requirements for studies that play a role in informing either trade negotiations or the public discourse on trade more broadly. Where relevant we will try to illustrate, very briefly, how these statutory requirements have been tied to the economic and political interests of the time, and that there is a clear evolution of the requirements for the Commission analysis that reflect Congressional priorities, economic developments, and the public debate on the effects of trade on the United States economy. This evolution illustrates quite clearly how, through both legislative action and internal Commission decision-making, the Commission has worked to keep up with the most pressing trade-related economic issues of the day. Early legislation required the Commission to assess the impact of changing tariffs on specific industries, while later legislation evolved, along with economic techniques to assess the potential impact of broad trade agreements on the overall U.S. economy. These reports and analysis have been used by policy-makers to help make informed decisions related to the impact of changing trade policies on U.S. industries and the broader economy. As trade legislation evolved, Congress asked the Commission to consider factors well beyond tariffs, including the potential effects of non-tariff measures.

The arc of various legislative efforts has essentially defined very specific roles for the Commission to provide analysis and the current set of legislative requirements provides for various Commission studies to be delivered to the President prior to the initiation of formal trade negotiations, through section 131 of the Trade Act of 1974, and for studies to be delivered to Congress and the public, after the successful conclusion of negotiations but prior to Congressional consideration.<sup>1078</sup> In addition there are several statutes that either allow for or require studies that are unrelated to any specific trade negotiation. As mentioned earlier section 332 of the Trade Act of 1974 allows for studies on almost any topic of interest, while several statutes require regular reporting on very specific topics.<sup>1079</sup> For example, section

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<sup>1076</sup> The Commission is a non-voting observer in such interagency policy-making bodies as the Trade Policy Staff Committee and various subcommittees that are formed for special purposes. While not having a decision-making role, this observer status facilitates the ability of the executive branch to request analytical work from the Commission during the policy-making process.

<sup>1077</sup> A good summary of the various requirements over time can be found in John M. Dobson, *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission* (Washington, DC: USITC, 1976); Wendy L. Hansen & Thomas J. Prusa, "The Economics and Politics of Trade Policy: An Empirical Analysis of ITC Decision Making," 5 *Rev. of Int'l Econ.* 230 (1997).

<sup>1078</sup> Trade Act of 1974, Pub. L. No. 93-618, § 131, 88 Stat. 1978, 1994 (codified as amended at 19 U.S.C. § 2151).

<sup>1079</sup> Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 1332).

163(c) of the Trade Act of 1974 (as did its predecessor legislation) requires that “the International Trade Commission shall submit to the Congress at least once a year, a factual report on the operation of the trade agreements program.”<sup>1080</sup> These reports provide Congress with factual information on trade policy and its administration for each calendar year. The reports are to cover “all activities consisting of, or related to, the administration of international agreements which primarily concern trade and which are concluded pursuant to the authority vested in the President by the Constitution” and Congressional legislation.<sup>1081</sup>

Why would Congress ask an independent agency for such analysis when many administration departments have economic analytical capabilities, with staffs of expert economists working to provide their departmental leadership with economic assessments that can inform policy development? It seems likely that these requests derived from the fact that Congress has limited internal resources to conduct such analysis, that it wanted to ensure a source of unbiased analysis, and that such analysis could be targeted to its priorities. As a result, Congress has often relied on summaries of academic research or those parts of administration-based research that the administration chooses to make public.<sup>1082</sup> For instance, in the Trade Act of 2002 Congress called on the Commission to provide a detailed quantitative assessment each time the President enters into a new trade agreement, as well as to review assessments performed outside the Commission.<sup>1083</sup> Many academics, industry associations, and labor representatives provide their own analyses of these agreements. Those analyses are often conducted prior to the conclusion of negotiations and thus make hypothetical assumptions about what might be included in the final agreement. In addition, there are many assessments conducted by Administration economists that are used for internal documents and briefings, in the form of analytical advice for higher level, political departmental leadership. Some of this analysis is made public, but much of it is closely held due to the potentially highly charged political environment surrounding trade, and the policy debates between departments,

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<sup>1080</sup> Pub. L. No. 93-618, § 163(b) 88 Stat. 1978, 2009 (codified as amended at 19 U.S.C. § 2213(c)).

<sup>1081</sup> Pub. L. No. 93-618, § 163, 88 Stat. 1978, 2009 (codified as amended at 19 U.S.C. § 2213)

<sup>1082</sup> In March and July of 1979 the Congressional Budget Office (CBO) wrote two background papers on the potential effects of the Tokyo Round on the U.S. economy. The CBO provides excellent analysis to Congress, but has limited technical resources and generally works to synthesize deeper analysis conducted by other research groups.

<sup>1083</sup> Specifically, Section 2104(f) of the Trade Act of 2002 calls for an assessment examining “the likely impact of the agreement on the United States economy as a whole and on specific industry sectors, including the impact the agreement will have on the gross domestic product, exports and imports, aggregate employment and employment opportunities, the production, employment, and competitive position of industries likely to be significantly affected by the agreement, and the interests of United States consumers.” It also calls for a review of “available economic assessments regarding the agreement, including literature regarding any substantially equivalent proposed agreement, and shall provide in its assessment a description of the analyses used and conclusions drawn in such literature, and a discussion of areas of consensus and divergence between the various analyses and conclusions, including those of the Commission regarding the agreement.” Pub. L. No. 107-210, § 2104(f), 116 Stat. 933, 1012–13 (2002) (codified as amended at 19 U.S.C. § 3804(f)).

between the Administration and Congress, and even within Congress. And any Administration analysis is likely to be viewed by Congress as biased in favor of supporting the Administration's negotiated outcome. Commission analysis is based on the provisions actually negotiated in the agreement and is viewed as unbiased, authoritative, detailed, and timely.

Over time, Congressional legislation has provided increasingly detailed negotiating objectives to the President. These principal negotiating objectives often have reflected the major economic issues facing Congress at that time, as new sectors emerge, or new issues arise in international negotiations. For example, neither services nor intellectual property rights received specific reference as negotiating objectives in Congressional trade legislation in the 1960s, but by the late 1980s were explicitly identified as areas for the President to focus on. In the Trade Act of 1974, Congress specified negotiating objectives for the President to pursue in trade agreements negotiated under the Act, as well as consultation requirements with Congress to ensure that members of Congress and their staff were kept abreast of negotiating progress and the general content of the agreements under negotiation.<sup>1084</sup> In the 1974 Act, the negotiating objectives were described in less than 4 pages of the bill and the consultation requirements took one half a page. Emphasis in this guidance was still very much on tariffs and traditional trade barriers and in the manufacturing and agricultural sectors. (Section 104, 1984).<sup>1085</sup> These trade negotiating objectives and consultation requirements were updated in the 2002 Act which also enhanced Congressional consultations by establishing a Congressional oversight group, through which selected House Ways and Means and Senate Finance Committee members received additional briefings on the state of ongoing negotiations.<sup>1086</sup> In contrast, the 2002 Act Congressional negotiating objectives had expanded to 38 pages (see section 2, Negotiating Objectives of the Act).<sup>1087</sup> In addition to manufacturing and agriculture, the objectives now included services, non-traditional barriers including behind the border barriers, such as technical barriers to trade and lack of transparency, very detailed guidance for WTO negotiations (17 pages) and further objectives for the Free Trade Agreement of the Americas (another 17 pages).<sup>1088</sup> The increase in Congressional "instruction" to the President was very substantial and suggests that Congress wished to ensure that Presidential negotiations were consistent with Congressional priorities. These negotiating objectives were once again updated in the 2015 Trade Act (at 14 pages). A summary of Congressional guidance to the President in the 2015 Trade Act contrasts sharply with the limited focus of the 1937 RTAA renewal which contained little if any Congressional objectives:

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<sup>1084</sup> See Pub. L. No. 93-618, §§ 103–04, 88 Stat. 1978, 1984 (codified as amended at 19 U.S.C. §§ 2113–14).

<sup>1085</sup> Pub. L. No. 93-618, § 104, 88 Stat. 1978, 1984 (codified as amended at 19 U.S.C. § 2114).

<sup>1086</sup> Trade Act of 2002, Pub. L. No. 107-210, §§ 2101, 2107, 116 Stat. 933, 994–1004, 1016–18 (codified as amended at 19 U.S.C. §§ 3802, 3807).

<sup>1087</sup> Trade Act of 2002, Pub. L. No. 107-210, § 2101, 116 Stat. 933, 994–1004.

<sup>1088</sup> Trade Act of 2002, Pub. L. No. 107-210, §§ 2103-2108, 116 Stat. 933, 1004–18.

Since the original fast track authorization in the Trade Act of 1974, Congress has revised and expanded the negotiating objectives in succeeding TPA/fast track authorization statutes to reflect changing priorities and the evolving international trade environment. Since the last grant of TPA in 2002, new issues associated with state-owned enterprises, digital trade in goods and services, and localization policies have come to the forefront of U.S. trade policy and are included in the proposed TPA-2015 as principal negotiating objectives. Under the TPA-2002, the most recent previous authorization, Congress established trade negotiating objectives in three categories: (1) overall objectives; (2) principal objectives; and (3) other priorities. These begin with broad goals that encapsulate the “overall” direction trade negotiations are expected to take, such as fostering U.S. and global economic growth and obtaining more favorable market access for U.S. products and services. Principal objectives are more specific and are considered the most politically critical set of objectives. The proposed TPA-2015 uses a similar structure.<sup>1089</sup>

Between 2002 and 2015 Congressional interest in intellectual property rights increased significantly. Congress added specific references to digital trade in goods and services and cross border data flows, localization barriers, state owned enterprises, and the relationship between the WTO and regional and/or plurilateral agreements.<sup>1090</sup> The evolution of Congressional interest, reflecting the evolution of broader economic developments, not only directed Presidential negotiating efforts but also signaled areas where Congress would require in-depth industry and economic analysis. Many of these new areas, such as digital trade and cross border data flows, often lacked specific, agreed upon definitions and even lacked basic data on how much and to whom such flows were going. The rapidly evolving market circumstances in new sectors where the basic tools of industry analysts and economists such as supply, use, and trade data are not available proves to be very challenging. In Commission industry and economic analysis, particularly post agreement, as well as in the fact-finding studies that can be requested under section 332, these new and emerging sectors are often of priority interest for Congress, the Administration, and the private sector. The capabilities and techniques needed to analyze and assess the impact of these emerging areas on the U.S. economy and the potential impact of trade policy changes on them require the Commission to continuously invest in new skills, new tools, and new capabilities, which the Commission has done in a very efficient manner and has responded to the Congressional requests related to estimating the impact on US exports due to intellectual property infringement and estimating the role of digital trade on the U.S. economy.

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<sup>1089</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015. Pub. L. No. 114-26, § 102, 129 Stat. 320, 320–33 (codified as amended at 19 U.S.C. § 4201).

<sup>1090</sup> Trade Act of 2002, Pub. L. No. 107-210, § 2102, 116 Stat. 933, 994–97.

An interesting aspect of the broader trade debate in the United States is the way the effects of trade policy changes are perceived by pro and anti-trade constituencies. In both factions changes in trade flows are often attributed to policies negotiated in a specific agreement, and these trade flows are thought to have large impacts on the various sectors of the U.S. economy. Those supporting trade liberalization typically will emphasize increases in exports, gains to consumers through lower prices and greater variety, increased competitive effects, improved productivity, and increased jobs and higher wages in exporting sectors. Those opposed to trade liberalization will typically emphasize increased imports, declining employment in import competing sectors, and lower wages for workers. Most professional economists that study trade policy and trade flows recognize that all of these kinds of effects can happen simultaneously, and, critically, that other macroeconomic factors besides trade agreements affect trade flows, employment, wages, and prices. In fact some of these other factors are likely to have more important effects on these economic outcomes than changes in trade policies, or changes in trade flows.

For example, economic growth, often measured as Gross Domestic Product (GDP), is a major determinant of trade growth, with trade typically rising or falling faster than GDP growth. Until recently changes in interest rates, through monetary policy changes aimed at controlling inflation, were thought to be major factors in driving economic growth and therefore trade. Technology also has major impacts on both trade flows and also employment and wages. Recent work on the U.S. labor market suggests that increased imports likely accounted for only 20 percent of manufacturing unemployment between 2000 and 2011, a period of unusually rapidly rising trade for the United States (Autor, *et al.*).<sup>1091</sup> Long term comparisons of the U.S. unemployment rate show it is negatively correlated with the U.S. trade deficit, that is, unemployment declines when the trade deficit rises. In addition domestic and foreign investment and savings are important drivers of trade. Most economists argue convincingly that overall trade balances are largely driven by the balance between domestic saving and investment, and in economies with low (high) domestic savings compared to investment the result is a trade deficit (surplus).

Economists generally agree that the major impacts of trade and trade policy changes are compositional, that is, they affect the overall composition of economic activity between industries and sectors, and that reducing trade distorting barriers and the resulting reallocation of resources across sectors has small positive effects on economic activity in the short term. The larger the initial barriers removed, the larger the net positive economic effects will be, but the cross sector effects will also be larger. As will be shown later in this paper, the United States has relatively small trade barriers. At the Commission the major economic tools used are

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<sup>1091</sup> David H. Autor *et al.*, "The China Syndrome: Local Labor Market Effects of Import Competition in the United States," 103 *Am. Econ. Rev.* 2121 (2013).



econometric models and partial and general equilibrium models. These models attempt to isolate the effect of the variable(s) of interest on other economic indicators. In trade economics the variable of interest is usually some change in trade or trade related policy, such as a change in openness (a tariff increase or decrease) or a change in a non-tariff measure, and to estimate the effect of that change on trade flows, GDP growth, and industrial output, for example. In econometric models one typically will use data that span a number of years (called time-series), across a large number of observational units, for example measuring a large number of individual firms in one time period (called cross-section), or a mix of the two (a large number of firms across a number of years, called pooled data) in order to use statistical analysis and properties to estimate the effects on the variable of interest—for instance how much exports change when foreign tariffs are reduced. The statistical methods allow one to try and control for the effects of other factors that may also affect that variable—in the case of increased exports to another country not only might the tariff change, but the country's economic growth (GDP) may also have changed. The statistical techniques used in econometric models allow one to obtain an estimate of the degree of confidence in the economic relationship (changes in exports due to tariff reductions), but they typically exclude many other potential explanatory variables that might be relevant (for instance were previously unavailable competing products suddenly available in that market, or did consumer preferences change?). Thus, econometric models provide statistical evidence of the size of relationships, but often do so in very general ways and one often has to be aware that some important economic factors could have been left out of the research, which can lead to inaccurate estimates of the policy change.

The other major modeling technique used at the Commission to estimate the impact of a change in trade policy on the US economy, exports and imports, is simulation modelling. In simulation modelling one builds an economic model to simulate the way one thinks a particular market (say the wheat market), group of markets (say wheat, corn, oilseeds and beef), or an entire economy (the U.S. or global economy) works. These models may rely on some econometric estimates of relationships, but largely rely on well accepted economic theory (generally a mathematical equation) of how markets work and then exactly match the theory to observed data, such as the US national income accounts. These models allow for more detailed representations of economic relationships, but they do not allow one to statistically test if the relationship is valid.

The models are fit, or calibrated, to the data collected and then a change is made to the policy variable of interest (for instance, a reduction in U.S. import tariffs on a large number of products) and an estimate of the effects is calculated (on imports, consumption and production), and precisely isolated, of the effect of that policy (tariff reduction) change. These models allow the actual tariffs to be used, and/or allow for simulating the effects of the policy change through a variety of other variables of interest (what might the effect be on

employment or overall national income, how do other sectors (for instance the automobile sector respond to steel tariff reductions). Whether econometric or simulation models are used many other things are usually happening simultaneously in an economy, and either approach will have its strengths and weaknesses in how these other things are treated. However it is important to keep in mind that both approaches attempt to isolate the policy change effect, while real world observed data are affected by many other things simultaneously. Thus in no case are the economic models attempts to predict the future, but rather to provide insights in the potential marginal effect of the policy changes. In the absence of such formal models one would be left to speculation or trend analysis, which can suffer from undisclosed bias in the analyst or lack transparency. While economic models can be complicated they typically clearly state their assumptions, data, and approaches, allowing other specialists to consider those details, or even change the assumptions and re-estimate the potential results. That reproducibility is important and often lacking in informal analysis.

Finally, there are longer term gains from openness, as low trade and investment barriers typically result in faster productivity gains beyond the reallocation effects that can occur in the short term. These dynamic effects of trade liberalization are often difficult to separate out from other positive factors such as well functioning institutions, good infrastructure, and investments in social capital such as education. Recent research has tended to show that countries more open to trade are likely to experience faster longer-run growth, other things being equal. As the Commission begins its second century, and with its state-of-the-art tool kit, it will likely continue to serve as a source of timely, independent, and objective industry and economic analysis on trade related issues to help the President and Congress understand the effects of new industries and economic forces affecting the United States and the dynamic global economy.

## General Trade-Related Fact-Finding Investigations

General trade-related fact-finding reports were first authorized in section 332(g) of the Trade Act of 1930. The language was very general, indicating that “The commission shall put at the disposal of the President of the United States, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information at its command, and shall make such investigations and reports as may be requested by the President or by either of said committees or by either branch of the Congress.”<sup>1092</sup> The Commission has received a large number of requests under this statutory

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<sup>1092</sup> The Tariff Act of 1930 (Hawley-Smoot Tariff Act or Smoot-Hawley Act), Pub. L. No. 71-361, § 332(g), 46 Stat. 590, 698 (codified in portions of 19 U.S.C. § 1332(g)).

provision and the specific study requests typically have reflected the most important trade related issues of the day. Some of the earliest 332 requests related to important topics of the day, such as in 1932 on “Depreciated currency, effect upon imports of wood pulp and pulpwoods” (332-10) and “Depreciated currency” (332-11), evolving to more technical tariff related topics such as reports on American selling price conversion rates<sup>1093</sup> and customs valuations issues<sup>1094</sup>, to studies on the competitiveness of U.S. industries.<sup>1095</sup> In more recent years the Commission has received requests to study digital trade,<sup>1096</sup> trade relations with Cuba<sup>1097</sup> and India<sup>1098</sup>, small and medium sized enterprises,<sup>1099</sup> and intellectual property rights in China.<sup>1100</sup> However, traditional commodities remain important, with a report on the competitiveness of U.S. rice in global markets<sup>1101</sup> and olive oil.<sup>1102</sup> Thus the Commission must not only be prepared to analyze some of the most cutting edge trade related issues in digital trade and intellectual property rights, but also traditional markets for agricultural commodities. To maintain this breadth requires flexibility in capabilities, particularly human capital, but also well thought out and generalizable frameworks for structured analysis. The Commission appears to have been able to address these challenges remarkably well.

The generalized framework that industry analysts and economists follow for Commission fact-finding investigations usually includes elements such as public hearings where interested parties and government officials, including members of Congress, can testify; surveys, including

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<sup>1093</sup> *Products Subject to Duty on the American Selling Price Basis of Valuation; Conversion of Rates of Duty on Such Products to Rates Based on Values Determined by Conventional Valuation Methods*, TC Publication 181, Investigation No. 332-47 (August 1966).

<sup>1094</sup> USITC, *Customs Valuations*, TC Publication 180, Investigation No. 332-48 (February 1966).

<sup>1095</sup> USITC, *Competitiveness of U.S. Industries*, TC Publication 473, Investigation No. 332-65 (April 1972).

<sup>1096</sup> USITC, *Digital Trade in U.S. and Global Economies, Part 1*, USITC Publication 4415, Investigation No. 332-531 (July 2013); *Digital Trade in the U.S. and Global Economies, Part 2*, USITC Publication 4485, Investigation No. 332-540 (August 2014).

<sup>1097</sup> *Overview of Cuban Imports of Goods and Services and Effects of U.S. Restrictions*, USITC Publication 4597, Investigation No. 332-552 (March 2016).

<sup>1098</sup> USITC, *Trade and Investment Policies in India, 2014–2015*, USITC Publication 4566, Investigation No. 332-550 (September 2015).

<sup>1099</sup> USITC, *Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports*, USITC Publication 4125, Investigation No. 332-508 (January 2010); *Small and Medium-Sized Enterprises: Characteristics and Performance*, USITC Publication 4189, Investigation No. 332-510 (November 2010); *U.S.-Korea Free Trade Agreement: Effects on U.S. Small and Medium Sized Enterprises*, USITC Publication 4393, Investigation No. 332-536 (May 2013); *Trade Barriers that U.S. Small and Medium-Sized Enterprises Perceive as Affecting Exports to the European Union*, USITC Publication 4455, Investigation No. 332-541 (March 2014).

<sup>1100</sup> USITC, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, USITC Publication 4199, Investigation No. 332-514 (November 2010); *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy Investigation*, USITC Publication 4226, Investigation No. 332-519 (May 2011).

<sup>1101</sup> USITC, *Rice: Global Competitiveness of the U.S. Industry*, USITC Publication 4530, Investigation No. 332-549 (April 2015).

<sup>1102</sup> USITC, *Olive Oil: Conditions of Competition between U.S. and Major Foreign Supplier Industries*, USITC Publication 4419, Investigation No. 332-537 (August 2013).

extensive, detailed questionnaires or sometimes phone surveys, of U.S. producers, importers, and consumers; domestic and foreign field visits that often include face-to-face interviews with industry, government, and academic experts; extensive reviews of the academic and business literatures; data collection, compilation and analysis; and the development and application of quantitative techniques. Commission analysis usually incorporates numerous analytical approaches, ranging from statistical, including formal econometric analysis to sophisticated simulation modeling, such as partial and general equilibrium economic models. In order to support its general equilibrium modeling capabilities, the Commission uses both a global database, the Global Trade Analysis Project (GTAP) database, and a more detailed (500 sector) data-base of the U.S. economy in a model called the United States Applied General Equilibrium (USAGE) model. Commission staff have historically developed sophisticated partial equilibrium models capable of examining specific products and tariff changes that are regularly used by outside experts and have a global reputation. The Commission staff also work closely with academics to develop new and innovative approaches to economic modeling, such as the USAGE model, and to data collection, particularly in the areas of tariff and non-tariff barriers.

Many of the staff efforts developed in the context of staff-generated, rather than customer requested, products provide a venue for professional review and comment before the techniques are incorporated into formal Commission reports. These staff products also keep the Commission and trade policy-makers in Congress and the executive branch informed of the latest issues in global trade and economic developments. The array of staff products include staff research papers, short briefing papers known as Executive Briefings on Trade, and academic conference and journal publications. An important data gathering and staff training product is the Industry and Trade Summary series. These reports on select products allow the analyst to gather, and develop where necessary, information on product uses, the role of U.S. and foreign producers in the U.S. and global markets, tariff data and classification of the products being studied; and they also analyze the competitiveness of the U.S. industry. Staff also author articles for an internal, web-based journal *The Journal of International Commerce & Economics*. All of these efforts are aimed at ensuring the Commission staff have the quantitative tools, data, industry knowledge, and economic expertise required to rapidly provide independent and objective answers to the wide range of questions the President and Congress may have, and also inform the public and broader trade policy community.

Some of the section 332 requests the Commission receives are for “one off” studies and some are recurring, where the requestor either asks for series of reports or regularly requests an update of a previous study. A good example of a study for which the Commission has received regular update requests is the *Import Restraints* study. This series assesses the potential impact on the U.S. economy from the removal of all remaining “significant” import restraints, typically relatively high tariffs, and was initiated by Congress in 1993, and then USTR requested

numerous follow up studies. These studies have effectively tracked the on-going liberalization of the U.S. economy since 1993, and they identify those sectors for which significant protection remains. The reports illustrate the relative openness of the U.S. economy, and the USTR often uses the Commission reports as part of its submission to the World Trade Organization's Trade Policy Review Mechanism of the United States. The report includes detailed industry discussions of those sectors currently receiving relatively high tariff protection and then uses a large-scale general equilibrium economic simulation model to assess the direct and indirect effects of the protection provided. Thus one can estimate the "positive" effects on the protected sector, but also the negative effect of the protection on other sectors, consumers, and overall economic welfare. In the Sixth update of *Import Restraints*,<sup>1103</sup> the Commission provided a special chapter on U.S. trade policy since 1934 (the year the Reciprocal Trade Agreements Act was passed). In Figure 3.2 on 64, U.S. trade weighted tariffs on dutiable imports and historical periods, 1930–2008, the Commission traced the arc of tariff changes in this period of U.S. global engagement on trade. Tariffs dropped from a peak of nearly 60 percent in 1932 to approximately 5 percent in 2008.<sup>1104</sup> In the Sixth update the Commission also summarized the results of its previous studies in Box 2.1 on page 10. The Commission analysis shows a steady decline in potential welfare gains from the removal of these restraints, from 0.424 percent of GDP in 1991 to 0.019 percent of GDP in 2013, with a very significant decrease in welfare losses coming with the removal of U.S. protection on textiles and apparel with the ending of the Agreement on Textiles and Clothing under the Uruguay Round.<sup>1105</sup> This series of studies demonstrates the remarkable decline in significant tariff related protection in the U.S. economy and helps illustrate to trading partners the extent of its openness. In addition in the 2002 edition (332-325, 2002) of the report the Commission provided an extensive discussion on labor transitions (chapter 7) that might arise from the liberalization scenarios. As described in the chapter,

The USITC model results in Chapter 2 showed that if all significant U.S. import restraints had been unilaterally removed in 1999, approximately 175,000 FTE workers would be displaced from their current industries and would need to seek employment in industries other than those being liberalized. Approximately 155,000 of these FTE workers would be in the textile and apparel sectors. Potential transition costs of concern

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<sup>1103</sup> USITC, *The Economic Effects of Significant U.S. Import Restraints: Sixth Update 2009*, USITC Publication 4094, Investigation No. 332-325 (September 2009).

<sup>1104</sup> The Commission notes, following Irwin (1998), that the high tariffs in the 1930s were very much affected by the combination of price deflation and the widespread use of specific tariffs, which had the effect of increasing the *ad valorem* rate. Further, the Commission calculated the rates based on dutiable imports, so did not include goods and trade flows for which tariffs are zero. If duty free trade flows were included the average U.S. tariff drops even further.

<sup>1105</sup> Note that years reported for welfare gains are not the years of the studies, but rather the years for which the economic models were based on for the analysis.

to policy-makers include lost income during spells of unemployment, unemployment insurance and other transitional assistance, and potential loss of the value of training and experience for workers who switch industries. On average, workers displaced as a result of unilateral U.S. liberalization of all significant import restraints likely would experience longer spells of unemployment than other displaced workers. Approximately 10 percent of workers displaced due to unilateral liberalization of all U.S. import restraints likely would experience severe wage decreases, defined as wage cuts of more than 20 percent in their new jobs . . . The workers who would be displaced in the event of unilateral trade liberalization likely would be concentrated in the Southeast, particularly in the Carolinas, due largely to the high share of apparel and textile workers among such workers. They would be more likely to leave the labor force after displacement, in part because of the higher proportion of female workers in textiles and apparel and the lower degree of attachment of female workers to the labor force. (See pages 167 and 168).

This analysis, while not a complete estimate of the economic costs of these labor market effects, demonstrates the extent to which the Commission analysis could provide comprehensive analysis of labor market effects. This kind of analysis came out well before the recent important work of Autor, Dorn, and Hanson, on the labor market effects of rapid increases in imports. The Commission updated the analysis in the 2007 edition of the report (332-325, 2007).

Other Import Restraints updates also included special chapters on global supply chains (7th update, 2011)<sup>1106</sup> and the role of services in manufacturing (Eighth update, 2013).<sup>1107</sup> Both special chapters provided in-depth discussions and analysis of two very important trends in the global economy and provided policy makers with important insights on these issues. A significant finding from the Seventh update on global supply chains demonstrated that despite the significant bilateral trade deficit with China, imports from China made up a very small share (approximately 2 percent) of total U.S. consumption, and further that there was significant U.S. value added in its imports from both China and Mexico, and that returned U.S. value added from its exports was among the largest in the world.<sup>1108</sup> The Eighth update illustrated the growing importance of services as a source of comparative advantage for U.S. manufacturing exports, and that therefore, significantly more services are actually exported, and dependent on foreign markets, than traditional trade data would suggest, as their value is embedded in

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<sup>1106</sup> *The Economic Effects of Significant U.S. Import Restraints: Seventh Update 2011*, USITC Publication 4253, Investigation No. 332-325 (August 2011).

<sup>1107</sup> *Economic Effects of Significant U.S. Import Restraints: Eighth Update*, USITC Publication 4440, Investigation No. 332-325 (December 2013).

<sup>1108</sup> USITC Publication 4253, Investigation No. 332-325 (August 2011).

manufacturing goods exports.<sup>1109</sup> The report also demonstrated that increasingly manufacturing is becoming more difficult to separate out from services. All of these section 332 studies used the integrated industry and economic analysis approach that has become the hallmark of Commission research. These studies combine in-depth knowledge of specific industries and sectors, as well as leading edge economic analysis, where the industry experts and economic experts work in an integrated fashion to provide relevant and realistic analysis, a unique feature of the Commission's analytical process. Often such analysis done by academics or industry experts alone may either miss significant real world aspects of the agreement, such as specific tariff cuts actually agreed to, phase-in periods, or entire chapters of the agreement. The latter also often lack the use of leading edge economic tools and data.

Another recent, and important section 332 study, the *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2016 Report*,<sup>1110</sup> is an excellent example of the integrated approach, industry and economic expertise, qualitative and quantitative analysis that exemplifies the Commission approach. The report was requested in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, section 105 (f)(2) requiring the Commission to submit two reports to Congress, one in 2016 and a second not later than mid-2020, on the economic impact of trade agreements implemented under trade authorities procedures since 1984.<sup>1111</sup> The study covered the multilateral Uruguay Round, as well as 15 bilateral and regional trade agreements.<sup>1112</sup> In the study the Commission summarized the provisions in the various agreements, applied various economic modeling approaches from economy-wide to industry specific, a series of industry case studies, and a review of the literature on the effects.<sup>1113</sup> This complex study provided econometric estimates of the effects of agreements on international investment, intellectual property and merchandise trade balances with partner countries. The study included 10 case studies discussing the effects of agreements on products such as pork, motor vehicles, textiles, steel, express delivery, and telecommunications.

## Pre-Negotiation Advice

Since the 1962 Trade Expansion Act,<sup>1114</sup> Congress has required that the Administration receive advice from the Commission, in the form of probable economic effect studies (in the 1962 legislation this was section 221 but since the 1974 Trade Act this requirement has come under section 131) prior to entering into negotiations. These studies are not made public as they

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<sup>1109</sup> USITC Publication 4440, Investigation No. 332-325 (December 2013).

<sup>1110</sup> USITC Publication 4614, Investigation No. 332-555 (June 2016).

<sup>1111</sup> Pub. L. No. 114-26, § 105(f)(2), 129 Stat. 320, 349 (codified as amended at 19 U.S.C. § 4204).

<sup>1112</sup> USITC Publication 4614, Investigation No. 332-555 (June 2016).

<sup>1113</sup> *Ibid.*

<sup>1114</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

contain confidential advice to negotiators. The 1974 Act had the following language (the 1962 Act, and subsequent acts had very similar language) requesting that the Commission provide advice on a list of articles provided by the President that might be subject to negotiation, and that analysis should:

- investigate conditions, causes, and effects relating to competition between the foreign industries producing the articles in question and the domestic industries producing the like or directly competitive articles;
- analyze the production, trade, and consumption of each like or directly competitive article, taking into consideration employment, profit levels, and use of productive facilities with respect to the domestic industries concerned, and such other economic factors in such industries as it considers relevant, including prices, wages, sales, inventories, patterns of demand, capital investment, obsolescence of equipment, and diversification of production;
- describe the probable nature and extent of any significant change in employment, profit levels, and use of productive facilities, and such other conditions as it deems relevant in the domestic industries concerned which it believes such modifications would cause; and
- make special studies (including studies of real wages paid in foreign supplying countries), whenever deemed to be warranted, of particular proposed modifications affecting United States manufacturing, agriculture, mining, fishing, labor, and consumers, utilizing to the fullest extent practicable United States Government facilities abroad and appropriate personnel of the United States.<sup>1115</sup>

In addition, subsection (e) of the statute directed the Commission to hold public hearings.<sup>1116</sup> Thus Congress clearly laid out very specific analytical factors to be considered in determining the probable economic effects on the industries that produced the articles potentially subject to negotiations. Unlike earlier “peril point” analysis the Commission was not to identify specific tariff rates, below which domestic industries might be injured, but instead to analyze the broader economic effects on these industries and describe any significant changes in employment, profits, and capacity utilization. To conduct this analysis, the Commission employs various quantitative and qualitative tools, ranging from formal economic models to in-depth industry knowledge and public hearings. In fact, public hearings, allowing industry representatives and other interested parties to present their views either in person or in written submissions, and allowing the Commissioners to ask questions and delve more deeply into the potential issues has been a hallmark of much of the Commission’s industry and economic analysis. Under the 1962 Act’s section 221 the Commission had 6 months to

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<sup>1115</sup> 19 U.S.C. § 2151(d).

<sup>1116</sup> 19 U.S.C. § 2151(e).



complete its analysis;<sup>1117</sup> by the 1974 Act's section 131 the Commission had only 90 days to conduct the analysis in certain circumstances.<sup>1118</sup>

The evolution of Congressional language from the 1962 Act to the 1974 Act demonstrated increasing interest in barriers other than traditional tariff and import restrictions, and also added consumer effects where the earlier language did not reference consumers. By 1998 Congress had added other subsections to section 131 that allowed, but did not require, the President to request that the Commission, under subsection (c) include in its investigations the effects of modifications of barriers on domestic workers and industry sectors. Another modification in 1988, adding section (d), inserted language that allowed the President, if so desired, to request Commission analysis over a broad array of potential areas, including, for example, examining foreign production, consumption and trade impacts, employment, capacity utilization, prices, wages, and investment.<sup>1119</sup> Section (d) further provides for the possibility of the President requesting special studies covering manufacturing, agriculture, mining, fishing, labor, consumers, services, intellectual property and investment.<sup>1120</sup> However, these particular sections (c) and (d), are discretionary provisions of the statute not required provisions, and thus the President has the option of using them. These provisions have rarely, if ever, been used by the President to request pre-negotiation studies by the Commission. This may be partly due to the complicated analysis that would be required to investigate these issues, and the challenge the President might face in providing specific guidance to the Commission on how to approach the questions without revealing too much about the negotiating strategy, combined with the generally tight timelines the administration faces when starting negotiations. However, these added sections typically align with Congressional statements on principal negotiating areas and thus the Commission has developed substantive expertise and analytical capabilities in these areas and uses those capabilities in the post-negotiation (section 2104)<sup>1121</sup> and discretionary requests (section 332)<sup>1122</sup> studies it conducts. In fact, below we will describe a recent example where the USTR requested a section 332 investigation on the Information Technology Act Expansion, a WTO plurilateral agreement that members recently concluded. This request to the Commission appears to include elements of the discretionary provisions.

Presidential request language typically provides very specific instructions. In a 2013 request from USTR to the Commission it asked for a report on the probable economic effect of providing "duty-free treatment for imports of products from all of the EU member states on (i) industries in the United States producing like or directly competitive products, and (ii)

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<sup>1117</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, § 221(b), 76 Stat. 872, 875.

<sup>1118</sup> See 19 U.S.C. § 2151(b).

<sup>1119</sup> 19 U.S.C. § 2151(d)(2).

<sup>1120</sup> 19 U.S.C. § 2151(d)(4).

<sup>1121</sup> Pub. L. No. 107-210, § 2104, 116 Stat. 933, 1008 (2002) (codified as amended at 19 U.S.C. § 3804).

<sup>1122</sup> Pub. L. No. 71-361, § 332, 46 Stat. 590, 698 (codified in sections of 19 U.S.C. § 1332).

consumers.” The request specified that the Commission “consider each article in chapters 1 through 97 of the Harmonized Tariff Schedule of the United States (HTS) for which tariffs will remain, taking into account implementation of U.S. commitments in the World Trade Organization.” The request further specified that the Harmonized Tariff System (HTS) in effect during 2013 and trade data for 2012 be used in the analysis. It is necessary to specify which version of the HTS to use, as product classifications can change with HTS updates, and to specify which year of trade data should be used, as trade flows can vary substantially from year to year. While seemingly minor details, these criteria are important to ensure that the Commission is conducting its analysis on precisely the parameters the USTR believes will be needed during the negotiations. Further, as conditions in particular industries and product markets can vary from year to year these details are important for the Commission’s industry analysts and economists in preparing their analysis.

The pre-negotiation advice is intended to provide the President’s trade negotiators comprehensive and independent analysis of the potential effects of the negotiations on the U.S. economy and specific industries, and can supplement analysis provided by the potentially affected industries themselves or other U.S. government agencies. The Commission analysis is typically confidential and not made public to allow U.S. negotiators to develop negotiating strategies.

A public example of the kind of advice USTR can request prior to negotiations, though in this case in those discretionary elements in section 131(d), can be found in its request on the Information Technology Agreement Advice and Information on the Proposed Expansion Parts 1 and 2.<sup>1123</sup> USTR asked the Commission to provide advice and information on the draft list of products for ITA expansion in two reports. The Commission’s first report described the uses of “each of the products on the list for both information and communications technology (ICT) and non-ICT purposes.”<sup>1124</sup> USTR also identified the products that U.S. industry and other interested parties view as import-sensitive. In its second report, the Commission provided information about the potential competitive conditions in foreign markets.<sup>1125</sup> The Commission discussed tariffs in major markets, identified major producing countries and leading U.S. export markets, as well as the leading sources of U.S. imports.<sup>1126</sup> The Commission also reported on

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<sup>1123</sup> USITC, *The Information Technology Agreement: Advice and Information on the Proposed Expansion, Part 1*, USITC Publication 4355, Investigation No. 332-532 (October 2012); *The Information Technology Agreement: Advice and Information on the Proposed Expansion, Part 2*, USITC Publication 4392, Investigation No. 332-536 (February 2013).

<sup>1124</sup> USITC, *The Information Technology Agreement: Advice and Information on the Proposed Expansion, Part 1*, USITC Publication 4355, Investigation No. 332-532 (October 2012).

<sup>1125</sup> USITC, *The Information Technology Agreement: Advice and Information on the Proposed Expansion, Part 2*, USITC Publication 4392, Investigation No. 332-536 (February 2013).

<sup>1126</sup> *Ibid.*

potential benefits of the ITA expansion to selected subsectors of the U.S. industry.<sup>1127</sup> The Commission approach was to examine each tariff line identified by USTR. To give some idea of the challenges involved for the analysts we reproduce two paragraphs from the report's scope and approach section, 1-2:

To gather information for the second report, the Commission held a public hearing on November 8, 2012; interviewed industry associations, companies, and other federal agencies with related expertise by telephone, by email, and in person; and reviewed product literature and submissions made to the Commission in response to the Federal Register notice published on August 13, 2012 (appendix B). The Commission received a total of 11 written submissions, which are summarized in appendix D. The views and information contained in the submissions are incorporated into the Commission's report, as appropriate. The Commission also relied on data compiled by the WTO, U.S. Department of Commerce, United Nations, and other statistical sources for information on tariffs and trade.

The list of proposed expansion products transmitted to the Commission from the USTR is based on the 2007 Harmonized Schedule (HS). Because the ITA was signed in 1996, many of the products covered under the originally designated HS subheadings have shifted in the HS schedule to other subheadings. Therefore, the HS subheadings on the proposed product expansion list fall into 3 categories: (1) not currently covered under the existing agreement; (2) fully covered under the existing agreement; and (3) partially covered under the existing agreement. As the focus of this report is the benefits of expansion of ITA product coverage, the examination of overall benefits to U.S. industry in chapter 3 attempts to isolate the products that are not already covered under the existing agreement, and thus represent a true expansion of product coverage.

There were further complications that the Commission needed to address, but it is clear that to provide precise and accurate information to the requestor the Commission had to interpret the language in the request letter, as well as then match that language with available information and map product classification schemes to both complicated agreements as well as changing tariff classification schemes. Additionally, the information technology industry evolves very rapidly, developing new products regularly while many others face quick obsolescence. The analysis required not only deep understanding of the industry and its products, but also the intricacies of tariff classification schemes and how they change over time, and how these products are identified in various country tariff schedules and the WTO Information Technology Agreement.

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<sup>1127</sup> *Ibid.*

Further examples of public advice delivered to policy makers prior to negotiations, though perhaps better described as prospective rather than pre-negotiation advice, include the section 332 studies on a potential (at the time) Free Trade Agreement with Korea<sup>1128</sup> and on an agreement that would include the United Kingdom in the NAFTA agreement.<sup>1129</sup> In both of these studies the Commission conducted comprehensive analyses, including industry-specific and economy-wide analysis as to what might be the effects of such FTAs, very similar to those conducted under section 2104 of the 2002 Trade Act requiring the Commission to provide a comprehensive analysis of actually concluded agreements. Of course the main difference in the analysis in the prospective Korea FTA report and the later report on the actual Korea FTA produced under section 2104 was information on the actual agreement.

## Post-Negotiation Analysis

In the 2002 Trade Act, with section 2104, Congress added the first of a new and very important set of requirements for the Commission. These new statutes required the Commission to provide assessments of the potential effects of agreements that have been negotiated by the President, but before they have been considered by Congress, and to also provide an assessment of all agreements signed under various Trade Acts, Fast Track, or Trade Promotion Authority. In addition to providing pre-negotiation advice the Commission was now being asked to assess the effects of the agreements the President actually negotiated. This was not the first time the Commission had conducted post agreement analysis—Congress had used section 332 over a number of years to ask the Commission to study various GATT agreements, and the USTR requested the Commission to analyze the potential effects of the NAFTA it had signed in 1992; that study was *The Economy-Wide Modeling of the Economic Implications of a FTA with Mexico and a NAFTA with Canada and Mexico*, USITC publications 2508 and 2516.<sup>1130</sup> This study was particularly important for the Commission as it was the first time it used economy-wide modeling in the form of an applied general equilibrium model that allowed the Commission to generate insights on inter industry effects, employment, wages, and an overall economic welfare estimate rather than relying on numerous partial equilibrium affects across industries.

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<sup>1128</sup> USITC, *U.S. Korea FTA: The Economic Impact of Establishing a Free Trade Agreement (FTA) Between the United States and the Republic of Korea*, USITC Publication 3452, Investigation No. 332-425 (September 2001).

<sup>1129</sup> USITC, *The Impact on the U.S. Economy of Including the United Kingdom in a Free Trade Arrangement with the United States, Canada, and Mexico*, USITC Publication 3339, Investigation No. 332-409 (August 2000). This study was little noted at the time since it did not correspond to an active negotiation.

<sup>1130</sup> USITC Publication 2508, Investigation No. 332-317 (May 1992); USITC Publication 2516, Investigation No. 332-317 (May 1992).

Section 2104(f)(2) of the 2002 Trade Act officially required the Commission to conduct public post-agreement, economy-wide assessments.<sup>1131</sup> Two additional provisions asked the Commission to conduct an overall assessment of the Trade Promotion Authority related agreements: one directed the agency to assess the effect of all agreements signed from the Tokyo Round through the Uruguay Round and another provision required an assessment of all agreements signed between August of 2002 and April 2005. The Trade Acts of 2008 and 2016 continued these provisions requiring analysis of the potential effects of all agreements signed under the various legislative authorities for their duration.

In the statute the Commission was directed to assess the impact of an agreement on the U.S. economy as a whole and specific industry sectors, including GDP, exports, imports, aggregate employment and employment opportunities, the production, employment, and competitive position of industries likely to be affected by the agreement and the interests of U.S. consumers.<sup>1132</sup> The Commission was also to conduct a review of the relevant literature to help put its own analysis and economic estimates into the broader context of other analysis.<sup>1133</sup> A limiting factor in the literature review efforts was that the Commission's analysis was usually the first to examine the actual agreement as opposed to the other studies that were making assumptions about what would be included in the agreement. The Commission was expected to complete the analysis and provide it to Congress within 90 days of the agreement being signed.<sup>1134</sup> This requirement for a rapid analysis reflected the importance that Congress placed on the Commission's analysis, as it required receipt of the report before it would consider the Trade Agreement legislation. Congress made clear that the Commission's objective and independent report would play a critical role in informing its deliberations on the agreement.

The Commission has typically provided these assessments arranged chapter by chapter in a manner similar to the actual FTA negotiated by the President. As these chapters also usually reflect the principal negotiating interests of Congress as enumerated in the respective Trade Act it was critical that the Commission develop expertise and capabilities, and to be able to deploy those capabilities to conduct a comprehensive analysis of the agreements in the very short time period of 90 days. These reports typically provide a summary of the agreement as negotiated and, as with reports prepared under section 332 and pre-negotiation requests, they combine extensive qualitative and quantitative analysis.

The reports often focus their quantitative analysis on the market access chapters, which describe the specific tariff and tariff rate quota commitments for goods. Thus partial and/or

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<sup>1131</sup> Pub. L. No. 107-210, § 2104(f)(2), 116 Stat. 933, 1012–13 (2002) (codified as amended at 19 U.S.C. § 3804(f)(2)).

<sup>1132</sup> Pub. L. No. 107-210, § 2104(f)(2), 116 Stat. 933, 1012–13 (2002).

<sup>1133</sup> *Ibid.*

<sup>1134</sup> *Ibid.*

general equilibrium simulation models are used to simulate the potential effects on production, consumption, trade, prices, wages, employment, and overall welfare effects.<sup>1135</sup> Such models are largely accepted by economists as effective to illustrate the likely isolated effects of the changes in those variables. However, it is much more difficult to quantify commitments in services, investment, intellectual property rights (IPR), and various other behind the border non-tariff measures (NTMs), such as regulatory changes related to technical standards or health and safety. The difficulty is that the commitments are not usually quantitative in nature, but reflect changes in legislative or regulatory language that is challenging to translate into the effects in their respective markets. Further, while many economic models contain information about services this information is less detailed and often lacks estimates of the level of protection provided. While investment is also often included in models, like with services there is a dearth of information on foreign direct investment by country and sector, and similarly little quantitative information on impediments to this investment. For IPR there are very few models that explicitly include IPR as a factor in production, and again, information is usually limited. The economics profession has worked to enhance its abilities to identify and quantify various NTMs, including in services and FDI, and while this work has progressed and such estimates could then be included in these economic models the general view is that these estimates are at this point still too uncertain to include in core analysis of effects. It might be useful for the Commission to include analysis examining alternative scenarios with respect to potential reductions in these barriers to illustrate for policy-makers the potential size of the effects in the context of the traditional market access measures. Including such analysis in an integrated framework could usefully put the various negotiated outcomes into context. Efforts to quantify such effects are likely important as many of these areas are ones that reflect both Congressional and Presidential negotiating priorities. The Commission, particularly but not exclusively in its recent study on the economic impact of trade agreements implemented under various trade authorities,<sup>1136</sup> has used econometric analysis to estimate the potential effects of commitments in these NTM areas. A challenge for the Commission, and any economists, in using econometric techniques to estimate effects is that enough time must pass before the techniques can estimate the potential effects, which is essentially impossible given the limited timeframe provided in the statute to deliver the study. Still, while the insights from those analyses are very useful, they perhaps leave policy-makers and other stakeholders wondering about the net overall effects of the agreements.

Congress has also increased its requests for the Commission to conduct more post-agreement assessments. These include more regular assessments of agreements previously entered into,

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<sup>1135</sup> General equilibrium models can report all of these results while partial equilibrium can only provide information on production, consumption, trade and prices.

<sup>1136</sup> USITC, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures*, 2016 Report, USITC Publication 4614, Investigation No. 332-555 (June 2016).

what might be described as deeper assessments related to labor and manufacturing impacts, and numerous other specific provisions. There have been at least 3 such reports. The first, *The Impact of Trade Agreements: Effect of the Tokyo, U.S.-Israel FTA, U.S.-Canada FTA, NAFTA and the Uruguay Round* (TA-2111-1, 2003) was requested in the 2002 Trade Act. As the title indicates the study was a comprehensive assessment of the potential impacts of all trade agreements listed. Congress introduced this section, and has since carried the request through in updated language in 2015 trade legislation, in order to have the Commission provide an in-depth, objective assessment of the agreements negotiated under previous authorities. These studies are complicated undertakings. As stated in the abstract for the TA-2111-1:

Assessing the economic impact of the five specified agreements on the United States is complicated by the difficulty in quantitatively specifying many of the actual policies implemented by the agreements, by the difficulty in disentangling these effects from the many other changes that have taken place over the past 25 years affecting the national economy, and by the difficulty of isolating the effects of the agreements from each other, since their implementation often overlaps.<sup>1137</sup>

As is usually the case the Commission approach was to use several types of analysis and included an extensive review of the literature. Industry case studies, hearing testimony and submissions from interested parties, trend analysis of specific industries, and econometric and economic simulation models were used to provide qualitative and quantitative insights. A similar study was conducted in 2005, *The Impact of Trade Agreements Implemented Under Trade Promotion Authority*, under section 2103(c)(3)(B) of the Trade Act of 2002,<sup>1138</sup> and in 2016 the Commission prepared a report on *The Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2016 Report*<sup>1139</sup> as required under section 105(f)(2) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. With these additional requirements beginning in 2002, and continuing through the 2015 trade legislation, Congress appears to be signalling that it values Commission analysis of all agreements signed, not only immediate assessments prior to Congressional consideration.

The Commission's assessments often can only quantify certain parts of the agreement and, importantly, the Commission's approach is to try and isolate the effects of the agreement, and to ignore other trends affecting trade, such as economic growth, technology and preference changes, and other non-agreement factors. As trade agreements have evolved from largely market access, tariff reduction agreements to broader and deeper economic agreements, often referred to as "economic integration agreements" that address non-tariff, behind the border

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<sup>1137</sup> USITC Publication 3621, Investigation No. TA-2111-1, at iii (August 2003).

<sup>1138</sup> Pub. L. No. 107-210, § 2103(c)(3)(B), 116 Stat. 933, 1007 (2002) (codified as amended at 19 U.S.C. § 3803(c)(3)(B)).

<sup>1139</sup> USITC Publication 4614, Investigation No. 332-555 (June 2016).

issues (often NAFTA is identified as one of the first very deep and broad agreements), this has created challenges for the Commission's quantitative work. Economists have generated a substantial body of quantitative work around the tariff effects and therefore are more confident in those estimates. The economics profession continues to develop new techniques to try and measure behind the border effects in areas such as standards, sanitary and phytosanitary commitments, intellectual property rights, and other effects that affect institutional functioning and quality (See Feenstra (1995), Anderson (2003) and Koopman and Ferrantino (2014)). Certain kinds of economic models used to analyze changes in trade flows, called gravity equations, highlight the importance of these non-tariff effects in trade agreements (see Bergstran and Baier (2007 and 2009) and Bergstrand, Larch, and Yoto (2013)). However gravity models cannot generate sector-specific results, and until recently, have not been able to account for the fact that economies at a particular point in time face constraints on the amount of capital and labor available for use in production. Thus the Commission has focused on providing quantitative assessments of the market access commitments and provided limited analysis of other agreement commitments, either through gravity estimation, trend analysis and/or case study discussions. It is particularly important for economists and Commission researchers to continue to find ways to provide a more completely integrated and comprehensive assessment of the potential economic effects of these agreements, as well as work to put the analysis into the broader context of economic trends driving trade and employment.

While the Commission has invested significantly in developing world class capabilities in qualitative and quantitative approaches to provide a more realistic framework for agreement assessment, its analysis is often taken out of context by both trade supporters and opponents. The very fact that the Commission works to isolate the effects of the agreement from other factors means it is not forecasting trade flows, balances, output, or prices. Many critics have claimed the Commission analysis is wrong because it either underestimated or overestimated various effects in its quantitative analysis by comparing actual trade flows, trade balances, etc. in the years following an agreement. Such a comparison is faulty. If the opponents or proponents of trade were comparing their own isolated estimates of the agreement to the Commission estimates then the comparison would be more relevant. A simple way to understand the faulty comparison is to examine changes in trade flows between the United States and countries for which no agreements have been signed, for example U.S. and EU trade or U.S. and Brazilian trade. With no negotiated trade policy changes trade has grown in both of these examples, due to other factors such as GDP growth, changing comparative advantage, and changes in prices due to other factors (for example, falling prices in weak commodity



markets). As the Commission works to isolate such effects, critics should do the same if they want to conduct a realistic comparison.<sup>1140</sup>

## Conclusions

Over the 100-year history of the Commission, it has been asked to provide in-depth industry and economic analysis by Congress, the President and USTR. While there are numerous legislative requirements, this piece has described why Congress seeks such expert advice from an independent agency, initially to try to remove politics from setting tariffs, and then later, to ensure that Congress and the President have a source of unbiased and objective analysis on possible policy changes. Unlike industry and economic analysts in the Administration Commission analysts have no policy role and are free to provide independent analysis. Unlike academics, Commission analysts have the time and expertise that cuts across both in-depth industry knowledge and knowledge of advanced economic techniques. As a result Commission analysis is usually balanced, detailed, timely, accurate, and relevant.

We see that within 14 years of its founding, in 1930, with the inclusion of section 332 in the 1930 Trade Act that Congress recognized that it and the President could benefit from this kind of expertise to answer important commercial questions of the day. This has led to over 500 studies under this statute for Congress and the President in the intervening 86 years, and increasing use of this statute since the 1970s. Further, Congressionally-required Commission input and advice prior to actual negotiations began with the early “peril point” tariff analysis followed by section 131 probable economic effects advice. Finally, in 2002 Congress required that the Commission provide assessments after agreements were negotiated, but before they were considered by Congress. Congress also instituted an ongoing request for post-implementation assessments of all agreements signed under the various authorities delegating negotiating responsibility to the President. As a result of the evolution of statutory changes we see that Commission industry and economic analysis has been playing an increasingly important role in informing U.S. trade policy based on independence and facts.

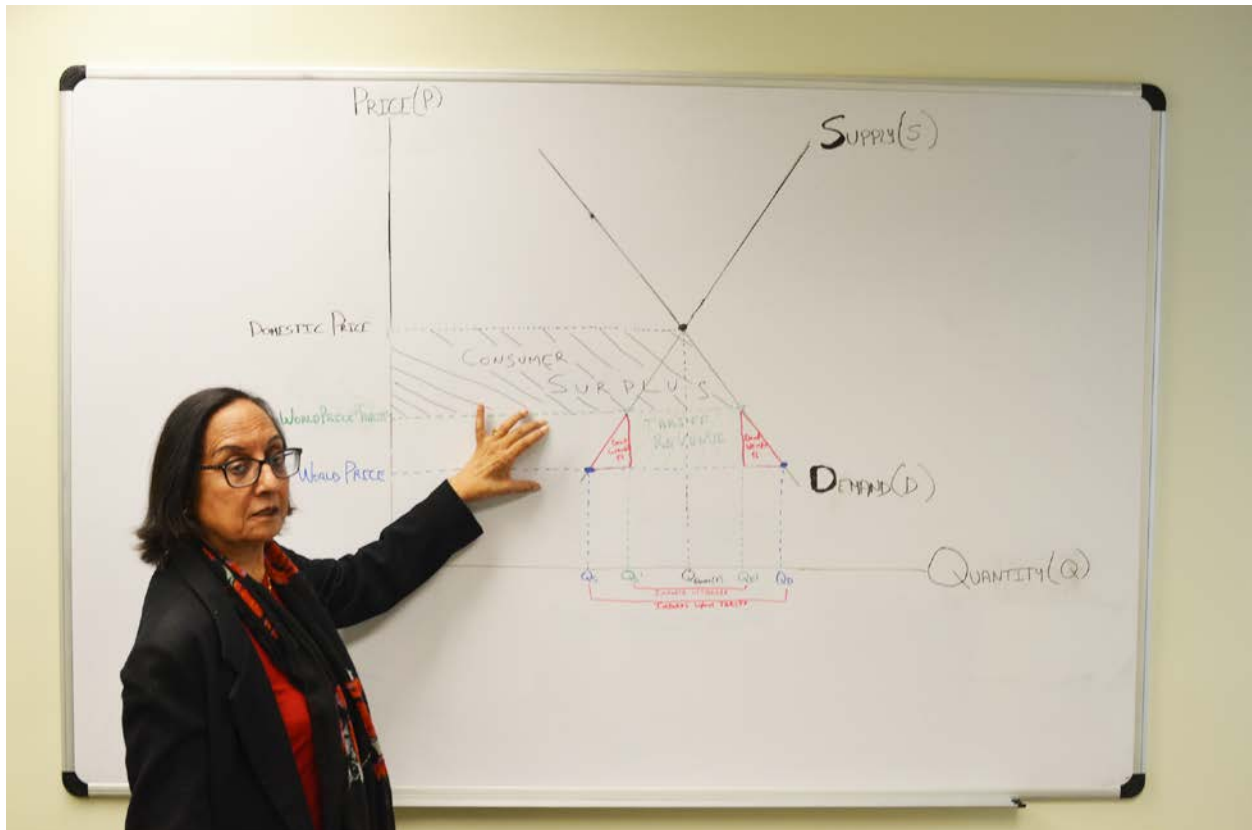
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<sup>1140</sup> The Commission has, through staff work and joint work with academics, conducted various exercises in model validation. One good example relates to NAFTA, see Maureen Rimmer and Peter Dixon, “Identifying the Effects of NAFTA on the U.S. Economy Between 1992 and 1998: A Decomposition Analysis,” Global Trade Analysis Project (April 2015), <http://tinyurl.com/gtap4657>. In this validation work one tries to bring into the modelling framework observed changes in other variables, such as GDP, exchange rates, etc. that occurred in the post implementation period to illustrate the impact on model results. This work illustrates that while estimates such as the Commission generates are imperfect, that they actually perform much better than just assuming trend growth.



# Chapter 14

## Economic Analysis at the U.S. International Trade Commission



**Photo:** Arona Butcher, the Chief of the Commission's Country and Regional Analysis Division, discusses the effects of trade on a domestic U.S. supply and demand curves.

**Michael O. Moore**<sup>1141 1142</sup>

The U.S. International Trade Commission (Commission) has earned a sterling reputation as an impartial source of international trade analysis. A prime example is the production and dissemination of formal economic analysis initiated through Congressional and Presidential requests or even at the Commission's own discretion. The investigations are prized widely for their professionalism, thoroughness, and timeliness and are used extensively in the development and implementation of current U.S. trade policy.

This chapter will examine the history and use of these reports during the Commission's existence, with particular attention to those conducted under the authority of section 332 of the Trade Act of 1930 ("332" reports), which allows the President, Congress, or the Commission itself to request or initiate fact-finding studies on a broad array of international trade topics. This discussion therefore will not touch on other important aspects of the Commission's agenda, including economic analysis necessary for the administration of unfair competition, safeguard, or antidumping and countervailing duty investigations.<sup>1143</sup>

This review makes clear that the patterns and emphases of the Commission's economic analyses reflect the changing nature of U.S. trade policy over the last 100 years. The rapidly evolving U.S. economy and its relationship with the global economy over the past century have coincided with fundamental changes in American trade policy; not surprisingly, the Commission's economic analysis has been transformed as well. In addition, the evolving technical approaches employed by the Commission's staff also reflect the increased complexity of the economic profession in terms of theory, computer modeling, and econometric sophistication.

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<sup>1142</sup> Acknowledgments: I would like to thank Maureen Bryant at the U.S. International Trade Commission Law Library for help in gathering the data for this project. I also greatly benefited from discussion with Robert Rogowsky and Bill Powers about past and current International Trade Commission approaches in economic studies. Any mistakes are of course my own.

<sup>1143</sup> More comprehensive reviews of the Commission's broader role can be found in Robert E. Baldwin, *The Political Economy of U.S. Import Policy*, (Cambridge, MA: MIT Press, 1986); George Bronz, "The Tariff Commission as a Regulatory Agency," *Columbia Law Review* 61, no. 3 (1961): 463–89; and John M. Dobson, *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission* (Washington, DC: GPO, 1976).

We will expand upon these themes below but some details are worth noting up front. First, the Commission focused in its early years on narrowly “defensive” interests, i.e., import competing sectors, especially in agricultural and commodity markets. In more recent years, section 332 studies reflect greater executive and legislative branch interest in broader multilateral and, later, bilateral agreements. These more recent approaches have brought U.S. “offensive” interests (e.g., services, intellectual property, and foreign investment) into the forefront. The Commission’s work also has reflected the public’s (and hence policy-makers’) concerns regarding particular nations (e.g., China or Japan) or specific agreements (the North American Free Trade Agreement, “NAFTA”).

The chapter will also show how the source (i.e., legislative or executive branch) of the greatest number of requests for section 332 reports has changed, and how this mirrors U.S. trade policy development. We will see that while Congress generated the most requests in early decades of the Commission’s existence, the executive branch has taken on a much more important role in recent years. Some of these requests from the Executive Office of the President are mandated by legislation, especially in the last twenty years. But many other presidential 332 requests reflect the priorities of a particular administration. In addition, the increased production of confidential section 332 studies reflects the widespread view among requestors that the Commission produces useful and unbiased trade policy reports on potentially controversial topics.

## A Brief History of USITC Investigations

A broad review of U.S. trade policy history is beyond the scope of this chapter but it is useful to recall its broad outlines.

Prior to 1934, trade policy was determined primarily through direct Congressional decisions about individual product tariff rates as allowed by Article I of the U.S. Constitution, which grants Congress the power to regulate foreign commerce. Congress was sometimes dominated by protectionist interests and sometimes by more liberal traders but tariff rates were frequently the outcome of intense political clashes. In the 1930s Congress passed the Reciprocal Trade Agreements Act of 1934 (RTAA) that allowed President Roosevelt to lower tariffs on his own initiative if trading partners lowered their own barriers. Presidential leadership was also expanded during the immediate post-World War II period as the multilateral trading system took root, with a clear emphasis on trade liberalization on a most-favored nation basis rather than protect U.S. import competing industries.

Presidential prerogatives were institutionalized further in the 1974 Trade Act that established the Office of the U.S. Trade Representative (USTR) within the Executive Office of the President. This trade act also reorganized the old U.S. Tariff Commission into the U.S. International Trade

Commission. In many ways, this name change reflected the evolving nature of the Commission's mandate; no longer would it be focused more narrowly on tariffs affecting individual industries but instead it would analyze the multifaceted new world of global trade and investment.

Broad multilateral agreements culminated with the establishment of the World Trade Organization (WTO) in 1995, which expanded the trade agenda considerably. Not only were the clear majority of trading nations now covered by international agreements overseen by the WTO but those pacts included new commitments on services, copyrights and trademarks, and investment, among other issues.

U.S. Presidents more recently have begun to finalize multifaceted bilateral, regional, and plurilateral trade liberalization agreements such as the U.S.-Singapore Free Trade Agreement, NAFTA and the Trans-Pacific Trade Partnership. Increased globalization of the U.S. economy has resulted in the Commission's investigations delving into more and more complex topics, including global supply chains, intellectual property protections and measuring non-tariff barriers. Nonetheless, Congress delineates broad trade policy goals in the statutes that delegate negotiating power to the executive branch.

The Commission's task as a provider of analysis necessarily has become more complex as trade and trade agreements have become more complicated. Its in-house economic reports have taken on a much more technical nature in the last 25 years. This increasingly technical approach is captured dramatically by comparing two Commission reports: one from the earliest days of the Tariff Commission and another completed in 2014.

In 1918, the early publication *Reports of the U.S. Tariff Commission* (U.S. Tariff Commission, 1918) includes a number of investigations that focused on the competitive pressures of individual U.S. industries vis-à-vis foreign rivals (paper and books, textile dyestuffs, buttons, glass, and silk). The general approach includes reporting simple statistics and comparing certain domestic and foreign production costs. The focus is reactive (i.e., how are U.S. import competing industries threatened by foreigners?), backward-looking (compilation of past data), and descriptive.

Ninety-six years later, Commission staff completed a report on Indian trade and investment policies that reflects a wholly different set of U.S. economic priorities as well as enhanced methodological expertise.<sup>1144</sup> The 2014 report analyzed how U.S. commercial interests are affected by a developing country's policies that did not even have an independent trade policy when the Commission was founded. These interests are much more expansive than those

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<sup>1144</sup> USITC, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, USITC Publication 4501 (Washington, DC: USITC, 2014).

evident in the 1918 reports. For example, the Commission examined the impact of India’s domestic policies and intellectual property rights regime on U.S. exports and outward foreign direct investment in both goods and services sectors. The Commission continued its long-standing practice of including detailed statistics that paint an accurate picture of the current situation, but also included a technically complex simulation of the possible economy-wide effects on the United States of a removal of Indian trade and investment barriers (i.e., a “computable general equilibrium” model or CGE model, about which more below). The report also contains sophisticated econometrics (i.e., statistical analyses of economic data) as well as data from a Commission survey of U.S. firms that is especially useful for issues where public data are not available. In contrast to reports from the early Tariff Commission days, this investigation was “offensive” (i.e., it focused on U.S. firms’ interest in exporting to, and investing in, India), forward-looking (i.e., it includes “forecasts” of possible U.S. benefits), and employed a theory-based analysis. The Commission’s analysis has indeed come a long way.

Many of the Commission’s early economic reports were initiated under section 315 of the Fordney-McCumber Act of 1922. This provision allowed the President to alter U.S. duties to reflect differences in production costs between domestic suppliers and the “principal foreign supplier” of the article in question if the Commission found evidence of such differences. This approach was explicitly protectionist and Republican Presidents of the 1920s unabashedly used their power to limit foreign competition but only if the Commission provided concrete evidence in the section 315 reports. For example, President Calvin Coolidge used this authority in 1927 to increase tariffs on barium carbonate (with Germany as principal competing country), sodium silicofluoride (England), and onions (Spain). Section 315 investigations placed the Commission in a central role as an “impartial” collector of data, but economic analysis with any theoretical structure was absent from these early reports.

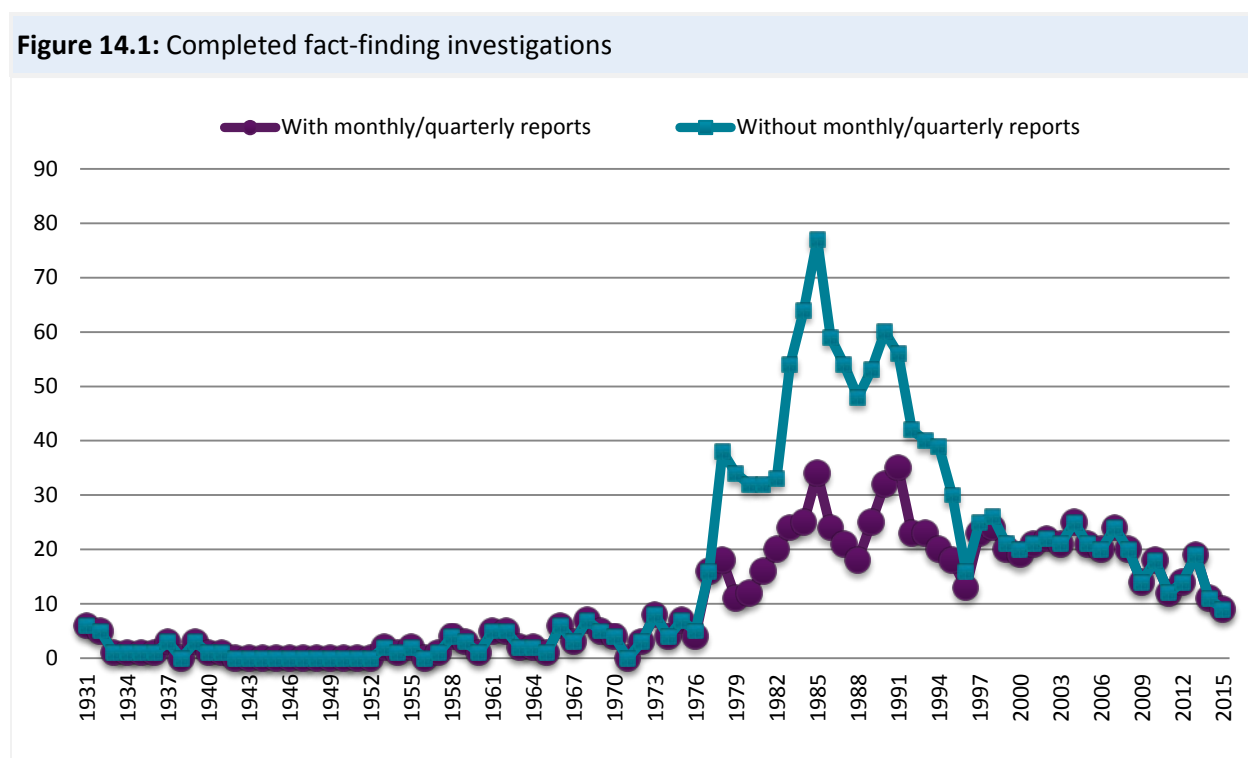
The statutory basis for the Commission’s economic investigation changed importantly in the Tariff Act of 1930. This Act—also known as the Smoot-Hawley Act—is of course best known for enacting dramatic increases in tariffs, but it also allowed the President or Congress to request that the Commission conduct much broader investigations about trade relations than contemplated under earlier statutes. These so-called “Section 332” investigations have been the primary vehicle for the Commission to provide sound and impartial economic analysis to policy-makers and the public since 1930, and are the focus of the discussion below.

## Overall Patterns of Section 332 Use

As of April 2016, the Commission had completed 550 fact-finding section 332 reports. Descriptive statistics provided below will show that the subject matter in these investigations mirrors those of the changing interests and priorities of U.S. trade policy over the decades.

As noted above, this chapter will not include a discussion of other types of Commission investigations (e.g., injury or unfair trade practice determinations). However, the chapter will include treatment of other fact-finding reports similar in structure to section 332 investigations though not technically authorized by that statute. In particular, we include in the statistics both “Section 2104” and “Section 103” reports, both of which were mandated by Congress. The former includes studies of the economy-wide effects of bilateral, regional, and plurilateral free trade agreements under section 2104 of the Trade Act of 2002. The latter are required under section 103 of the North American Free Trade Agreement Implementation Act and involve analysis of changes in rules of origin provisions required for administration of NAFTA and other free trade agreements.

Figure 14.1 shows that the frequency of these fact-finding reports started relatively slowly, reached a peak in the mid-1980s, and then tapered off. In fact, there were only 23 investigations completed in the first 20 years of the process (1931–1951), during which Commission resources were focused on other types of activities and investigations.



Source: U.S. International Trade Commission and author calculations.

Many of the early section 332 reports were focused on an individual industry’s competitive positions with regard to foreign sources (e.g., crude petroleum, sugar, phosphate, and fishing gear), and so were similar in emphasis to the Commission’s pre-1930 investigative activities. One study on the effects of devalued currencies in the 1930s did reflect a broader economic context but even in this instance the ultimate interest was on the devaluations’ effects on



individual industries rather than on the economy as a whole. It is also notable that there were no general economic studies about the impact of the Great Depression on trade, the effect of the Smoot-Hawley Tariff Act on U.S. economic activity, or the effect of expanded presidential trade policy authority in the 1930s. Even the flurry of tariff reductions in the immediate post-World War II period resulted in few section 332 studies.

Of course, the absence of formal section 332 investigations does not mean that the Commission's analytical abilities were not involved in trade policy. Dobson (1976) documents the Commission's critical role in preparing detailed data on possible tariff concessions during the early GATT rounds. The Commission also played a central role in "escape clause" investigations that helped identify possible "serious injury" to domestic industries as a result of trade concessions. But these efforts did not occur under the general fact-finding powers of the Commission and therefore are beyond the scope of this chapter.

Figure 14.1 shows that there was an important uptick in section 332 reports in the mid-1970s that reached a peak during the 1980s. This change reflects the growing importance of trade in the U.S. economy. The increase also coincided with the implementation of new commitments under the Tokyo Round of GATT negotiations after its conclusion in 1979. Perhaps most notably, much of the bulge in section 332 investigations during this period is a result of studies on a handful of industries such as automobiles, steel, and shoes that came under intense pressure from imports, especially from Japan. This pressure manifested itself in a host of new investigations by the Commission, ranging from antidumping material injury decisions to safeguard serious injury investigations. But the House Ways and Means and Senate Finance Committees also asked the Commission to publish high frequency (semi-annually, quarterly, or even monthly) statistical section 332 reports on the status of particular import-sensitive domestic industries.

Many of the studies published in the late 1970s and 1980s were not new fact-finding investigations but instead a constant stream of statistical reports. Nonetheless, the Commission's investigative burden continued to rise in this period. The second series in Figure 14.1 presents the number of section 332 investigations but excludes those for which multiple reports were issued in a single year. The still-evident spike in reports reflects the growing concerns about the rising trade deficits of the mid-1980s combined with mass layoffs in the politically sensitive manufacturing sectors noted above.

There was a drop-off in the simple count of section 332 investigations during the post-1980s period though the number was still much higher than in the pre-1980 period. More notable, however, was the profound change in the way that the Commission conducted economic investigations in the late 1980s. In particular, there was a growing economic sophistication as

well as a profound shift away from simple focus on import-competing sectors. We will return to this issue in a later section.

## Who Requests Section 332 Investigations?

The question arises as to which branch has taken the lead in directing the Commission’s analytical resources for trade policy issues. These section 332 investigations aid requestors by helping frame the debate on trade policy issues, providing analysis to guide policy, and examining the consequences of trade policy actions. Congress, the Executive Branch, or even ITC Commissioners can initiate a section 332 report. Congress may also mandate that the President, or his agent, request an investigation through legislative fiat.

Table 14.1 provides some insight about the dominant institutions in U.S. trade policy. These statistics include the requesting agency for each 332 investigation (as well as 103 and 2104 studies) since 1930.<sup>1145</sup> Note that these data do not include monthly, quarterly, and semi-annual statistical investigations.<sup>1146</sup> The data are split into six data periods: 1) prior to and including the Dillon GATT Round (1930–62); 2) the Kennedy GATT Round (1963–67); 3) the Tokyo GATT Round (1968–79); 4) the Uruguay Round (1980–94); 5) post-WTO and pre-Doha period (1995–2001); and 6) Doha period (2002–15).

**Table 14.1:** Requesting agency for fact-finding investigation

	Senate	House	Legislatively mandated	President	Commission self-initiated	Confidential reports
1930–62	20	19	1	0	6	0
1963–67	2	3	0	3	4	0
1968–79	12	9	4	23	33	10
1980–94	78	55	27	115	67	38
1995–2001	9	20	23	62	24	20
2002–15	20	20	81	119	26	40

Source: U.S. International Trade Commission and author calculations.

Note: This count includes all section 332, 103, and 2104 investigations.

We see clear evidence of Congress continuing to play the preeminent role prior to 1962 in terms of requests for section 332 investigations. Thirty-nine out of 46 studies were initiated

<sup>1145</sup> Note that the information on what agency initiated pre-1994 investigations was obtained from a U.S. International Trade Commission library compilation; post-1994 information was collected from online Federal Register notices.

<sup>1146</sup> The data only specify what agency formally requested an investigation but it is possible that this might hide some of the complexities surrounding the ultimate source of a 332 request. For example, a group of senators might push behind the scenes for the USTR to ask for a study on a politically sensitive matter; an Administration request might have a different political effect than one that originates in Congress. Similarly, Commissioners (or their staff) could contact members of Congress about the types of studies that the Commission might conduct with its available resources.

either by the Senate (20 reports) or the House (19 reports) during this period. Thus, while Congress may have delegated authority to the President to negotiate trade agreements, Senators and House members continued to express their keen interest in trade policy outcomes through these requests made to the Commission. However, the percentage requested by either the House or Senate declines in most subsequent periods and reached a low of 15 percent (or 40 out of 266) for the 2002–15 period.

In contrast, the Executive Office of the President initiated an increasing number of studies in recent decades. There were no Presidential 332 requests prior to 1962 compared to 28 percent from 1968 through 1979 (23 out of 81 cases) and 45 percent from 1995 through 2015 (181 out of 404 cases). These data reflect the increasingly important role of the President in conducting and developing trade policy in recent decades.

At the same time, there has been an important uptick in the number of section 332 investigations conducted as a result of legislative mandates in recent years, especially after the delegation of “trade promotion authority” to President George W. Bush under the Trade Promotion Act of 2002. Congress passed this legislation only after difficult negotiations. In particular, some Congressional leaders (as well as the public) expressed trepidation about the increasing dominance of the President in trade policy. Starting in 1974, the President had received “fast-track” authority that allowed an up or down vote by Congress on the final text implementing the trade agreements for these major initiatives. However, some in Congress believed that this process put the Senate and House at a disadvantage since the only options were to approve the agreement as finally negotiated or reject it completely. The Trade Promotion Act of 2002 therefore included more mandates about Congressional consultations during the negotiation process. In response to Congressional concern about the increasing dominance of the President in trade policy, the Act—among other provisions—also required that the USTR request 332-type investigations on the economy-wide effects of proposed free trade agreements. While USTR or Congress might have chosen to ask for such reports in the past, they became a required part of the process in the 2002 Trade Act. Such mandated investigations are considered separately in Table 14.1, e.g., a formal request by USTR for a fact-finding report that is required by law is not counted in the “President” column.

Table 14.1 shows that such legislatively mandated investigations have nearly quadrupled from 1995–2001 to 2002–2015 from 23 to 81 reports.<sup>1147</sup> If this type of request is included in the House and Senate totals for the post-2002 period, we see an equal percentage of Congressional and executive branch section 332 requests. Members of both houses of Congress may be reasserting their traditional prerogatives on trade policy through legislative mandates.

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<sup>1147</sup> Examples include mandated studies required for implementation of the Caribbean Basin Economic Recovery Act and the Andean Trade Preferences Act, among others.

The changing role of the Commission is also evident in the expanded use of confidentiality in section 332-type reports. Reducing tariffs almost necessarily results in economic disruption for some firms and workers. As noted above, as the United States embarked on substantially liberalized trade in the post-war period, policy-makers turned to the Commission to provide impartial analysis about the effects. Beginning in the mid-1970s, policy-makers began to ask for reports on proposed changes that would not be made public; these confidential investigations would help policy-makers weigh the economic and political costs and benefits of altered trade policy for a particular industry with some insulation from outside pressure.

There were no such confidential reports identified by the author until 1976 when the Commission began a series of politically sensitive investigations about the potential impact of unilaterally reducing tariffs for particular industries as part of the Generalized System of Preferences (GSP) Program that was initiated in 1974.<sup>1148</sup> Eighty percent (8 out of 10) of the Commission's confidential reports in the 1970s were focused on the GSP. In subsequent years, the breadth and complexity of confidential reports produced by the Commission expanded dramatically. For example, early negotiations on a possible U.S.-Canada free trade agreement were preceded by a series of confidential section 332 reports.<sup>1149</sup>

The use of confidential Commission-produced section 332 reports has now become an essential part of the process in the development of trade policy options before and during complicated trade policy negotiations. Table 14.1 shows that over 20 such confidential reports were initiated from 1995 to 2001 and 40 from 2002 to 2015 alone. The topics range from analysis of initiatives that have not yet borne fruit (e.g., a free trade agreement with the South African Customs Union, the Free Trade Agreement of the Americas, and the Doha Round) and others that helped inform the USTR about successful free trade agreements with Colombia, Panama, and Korea.

From an institutional standpoint, policy-makers' reliance on the Commission to conduct these confidential studies is a testament to its perceived impartiality and technical competence. In essence, the Commission's economists and industry analysts increasingly have performed a role as an in-house economic think tank that can help guide the government's efforts through domestically difficult political waters and inform positions in complicated international trade negotiations.

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<sup>1148</sup> The public is alerted through *Federal Register* notices that such investigations have been initiated though the complete final reports are generally not available to the broader population. A few are published in redacted form though the lion's share of the study remains classified.

<sup>1149</sup> See USITC, *Probable Economic Effect of Providing Duty Free Treatment for Selected Imports from Canada*, USITC Investigation No. 332-196 (Washington, DC: USITC, 1985), and USITC, *Magnitude of U.S.-Canada Trade and Operations in Selected Service Industries*, USITC Investigation No. 332-235 (Washington, DC: USITC, 1987).

Commissioners also have had the statutory authority to self-initiate section 332 investigations. Self-initiation has remained relatively rare throughout the history of 332 reports: only 10 instances from 1930 to 1967. From 1980 through 2015, only 16 percent of all investigations were self-initiated by the Commission. These reports generally have been on less-sensitive subjects and frequently focused on data gathering. For example, the Commission inaugurated an annual survey of the chemicals industry during its first year of existence, in large part as a result of the disruption of international trade with Germany during World War I. The Commission continued with this annual survey for 78 years until the House Ways and Means Committee requested its termination in 1995.

The example of the annual chemicals survey brings up an important feature of the section 332 investigations. The simple number of reports each year only tells a portion of the story about the Commission's investigative activities: the subject matter of the reports and the techniques used to analyze data are also critical to understanding the growing complexity and importance of the Commission's efforts.

## Subject Matter of Section 332 Requests

An examination of the content of section 332 reports since 1930 makes clear how the focus of Commission investigations has been transformed from “fact-compilation” exercises to “fact-analysis” activities. Moreover, the Commission's reports reflect the changing focus of U.S. trade policy-makers towards the emerging global economy of the 21st century.

Data compiled by the author for 1930–62 reveal a distinct focus on manufacturing and primary products (agriculture and commodities) with 28 percent and 65 percent of cases, respectively. Inspection of individual reports shows that these almost always concerned domestic industries and competitive pressures that they faced from foreign sources. These studies were focused on the impact on individual industries and not the broader U.S. economy.

Commission fact-finding investigations began to focus much less frequently on agriculture and primary commodities in subsequent years, a pattern that reflects the diminishing importance of these sectors in the U.S. economy. During the Kennedy Round (1963–67), only 2 of the total 12 reports (or 17 percent) concerned agriculture or commodities. This pattern continued in subsequent time periods with 19 percent in 1968–79 and 18 percent in 1980–94. There was a jump in the number of investigations that included analysis of agricultural/commodity sectors during 2002–15 when the percentage reached 48 percent (i.e., 128 out of 266 reports). However, these later reports were much less likely to focus on individual products but instead were part of more complex analyses that examined trade agreements' effects on the broader U.S. economy, e.g. NAFTA or the Uruguay Round. These new types of reports clearly became less about a particular agricultural sector's concerns with imports. Indeed, most of the 22

reports in 2002–15 that did focus on individual agricultural commodities concerned only two products: annual reports about imports of tomatoes and peppers that were required under provisions of NAFTA’s implementing legislation. There were also a handful of reports that dealt with agricultural trade with a particular country (e.g. Brazil or India), but these did not focus on a single agricultural product.

The percentage of section 332 investigations on manufacturing industries rose from 28 percent during 1930–62 to 65 percent in 1968–79 and dropped to 38 percent during 1995–2001. Many of the investigations on manufacturing industries were high-frequency statistical reports that focused on sensitive industries. For example, from 1978 through 1980, the President requested an annual and quarterly survey on color television receivers that reflected increased pressure on this sector from East Asia, especially Japan.<sup>1150</sup> The President requested a similar series on iron bolts and screws as well as non-rubber footwear from 1978 through 2000. Similarly, the House Ways and Means Committee called for the Commission to publish monthly reports on the U.S. automobile industry from 1981 through 1984 and the steel industry from 1983 to 1990.

The Commission’s shift away from data collection and monitoring individual import-sensitive sectors is clear from the experience of the steel industry. There were 27 investigations on the steel sector in the 1980–2001 period (excluding monthly and quarterly reports), which was a time of intense economic disruption and turmoil for the industry. By contrast, there were only two section 332 investigations involving the steel industry during 2002–15, both of which were focused on the impact of the 2002 steel safeguard tariffs on steel-consuming industries. In other words, the emphasis of these reports had become the impact of steel import restrictions on “consumers” and not on the challenges to the domestic industry from foreign steel sources.

The most important exception to this trend away from individual manufacturing sector analysis is with regard to the textiles and apparel industry. The number of investigations in this area reached 42 reports in 2002–2015. This continued emphasis reflects an ongoing political sensitivity in this area as well as the establishment of various unilateral preference programs discussed below.

As traditional import-competing sectors have received less attention, the Commission has undertaken far more investigations on issues that are focused on U.S. companies’ activities abroad, most notably services, intellectual property rights, and foreign direct investment. All of these have taken on an increasingly important role in U.S. firms’ engagement abroad. For example, prior to 1980, there was only one section 332 investigation focused on any of these areas; this investigation was initiated by the Senate Finance Committee and completed in

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<sup>1150</sup> See for example USITC, *Color Television Receivers: U.S. Production, Shipments Inventories, Imports, Employment Man-Hours, and Prices, Fourth Calendar Quarter 1977*, USITC Publication 866 (Washington, DC: USITC, March 1978).

1973.<sup>1151</sup> After 1980, the focus on these issues notably increased. For example, the number of service sector reports more than tripled from 20 in 1980–94 to 75 in 2002–15. Similar patterns also are evident for studies that examine foreign direct investment. The increase in the number of reports that focus on intellectual property rights was particularly dramatic, growing from 5 in 1980–94 to 30 in 2002–15. It is important to note that, as with agriculture and manufacturing, relatively few investigations focus on any of these offensive sectors exclusively. Instead, they have become part of the standard analysis of any potential or concluded trade agreement. Commission fact-finding investigations also have looked over the horizon at broader issues that might not be part of a current or prospective policy but that play an increasingly important part in 21st century trade (e.g., a 2014 report on digital trade and a 2013 report on renewable energy services). Many of the Commission’s recent initiatives therefore reflect the growing tendency of U.S. trade policy makers to look not only at those areas that will feel competitive pressure from more imports but also areas where U.S. firms’ opportunities to export and invest abroad that can be affected by foreign goods and investment regimes as well as changes in the global economy.

## What Geographic Areas Are the Focus of Section 332 Investigations?

U.S. multilateral, regional, and bilateral trade negotiations, trade preference programs, and growing anxiety regarding the increasing competitiveness of certain trade partners have been reflected in the geographical focus of recent section 332 investigations.

From 1947 through 1967, there were no section 332 investigations focused explicitly on the GATT system. As noted above, this does not mean that U.S. trade policy was not focused on the establishment and development of the multilateral trading system or that the Commission was not engaged in analysis about this system during the immediate post-war period. Instead, these efforts were conducted outside of the Commission’s formal fact-finding section 332 efforts. This changed importantly in the post-1967 period. From 1968 through 2015, just under 20 percent of section 332 investigations were explicitly about the GATT or the WTO. The focus on multilateral negotiations was particularly intense during the Uruguay Round, with 62 section 332 studies. One of these reports, issued in 1994, analyzed the potential impact of the Uruguay Round Agreements on agricultural, manufacturing, and service sectors, reflecting the increasing complexity of trade agreements.<sup>1152</sup>

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<sup>1151</sup> USITC, *Implications of Multinational Firms on World Trade and Investment, and for U.S. Trade and Labor*, USITC Publication 537 (Washington DC: USITC, January 1973).

<sup>1152</sup> USITC, *Potential Impact on the U.S. Economy and Industries of the GATT Uruguay Round Agreements*, USITC Publication 2790 (Washington DC: USITC, June 1994).

Even as it was undertaking reciprocal opening efforts, the United States also began to extend unilateral preferences to developing countries as part of a broader foreign policy and development strategy. Prominent examples included the Generalized System of Preferences (1974), Caribbean Basin Economic Recovery Act (1984), the Andean Trade Promotion and Drug Eradication Act (1991), and the African Growth and Opportunity Act (2000). Each of these initiatives allowed conditional tariff-free access for U.S. imports of certain goods from developing countries, often including textiles and apparel products. Congressional acquiescence in providing these unilateral preferences was gained, in part, because the enabling legislation required ongoing Commission analysis of the economic impact of these initiatives. In fact, almost one-quarter of all fact-finding investigations published by the Commission in 2000–15 involved unilateral preference programs.

U.S. trade policy priorities began to include regional and bilateral trade agreements during the 1980s and efforts have accelerated more recently. Notably, NAFTA was negotiated in the early 1990s and came into force in 1995. Further, the George W. Bush administration completed a series of bilateral and regional free trade agreements during its first term, including with Singapore, Chile, Australia, and others. Policy-makers have turned to the Commission to undertake economic analyses of these free trade agreements. These have taken the form of the previously discussed confidential studies provided to the USTR during negotiations as well as public reports that helped inform Congress about the potential impact of these agreements on the U.S. economy.

The general public in the U.S. and policy-makers more specifically also have become concerned about the impact of particular countries' trade with the United States, especially a more recent focus on China. This stands in contrast with earlier decades where the focus was more on economic pressures on particular industries rather than general trade pressures arising from specific countries.<sup>1153</sup> Requests for Sections 332 investigations reflect this anxiety. From 1930 to 1979, there were only four instances on a particular country, and all of these involved Canada. From 1980 to 1994, focus continued on Canada (21 reports) but also expanded to Mexico (9 reports), the European Community/Union (11 reports), and Japan (5 reports).<sup>1154</sup> Requests to examine China expanded greatly from only 6 investigations during 1980–2001 to 11 investigations in 2002–15, which far exceeds the number of investigations on any other single country during this period.

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<sup>1153</sup> Earlier reports, e.g., color televisions, were implicitly focused on trade with Japan though this was not the formal area of analysis.

<sup>1154</sup> Note that Canadian and Mexican totals do not include those that were part of a NAFTA investigation.



## Economic Techniques Used in Section 332 Analysis

U.S. trade agreements are far more complex than they were in the 1960s and 1970s. Early trade agreements, conducted under the aegis of the GATT, generally involved reductions of traditional trade barriers, sometimes through mechanistic reduction in tariffs levels by some specific percentage. The Tokyo Round, concluded in 1979, saw negotiators turn their attention increasingly toward non-tariff barriers. U.S. negotiators addressed even more complex issues in the Uruguay Round and in later bilateral free trade agreements. These have included services trade, “behind-the-border” financial market reform, investment protections, and labor and environmental standards, among others. These multifaceted agreements, together with the evolving global economy, have pushed the Commission to use ever more sophisticated economic models to provide useful guidance to the President and Congress.

Fortunately, the increased complexity of the agreements over the last 30 years has coincided with far greater technical capacity of the economics profession. In addition, falling computer costs have allowed much more intricate and interconnected questions to be addressed. The Commission also made important investments in establishing greater internal capacity to analyze these more involved policy questions, especially since the late 1980s, most notably through hiring highly skilled Ph.D. economists from top universities.

Examination of the techniques used in 332 publications makes clear the Commission’s dramatic transformation from an agency that collects and reports data to one that conducts state-of-the-art economic analysis. For about the first 60 years of the Commission’s existence, 332 investigations most frequently used simple description, cost accounting concepts, or compilation of trade statistics. The Commission’s analytical approach began to change profoundly during the 1980s and early 1990s. Most importantly, the Commission began to employ various simulation approaches to examine and answer policy questions. These models are not “forecasts” per se, but examinations of “counterfactuals,” i.e., an examination of what economic conditions might have been with alternative policies in place.

Early approaches—outlined by Commission economists Donald Rousslang and John Suomela in a staff research paper<sup>1155</sup>—examined a single industry in isolation (i.e., “partial equilibrium”). For example, a report on the Caribbean Basin Economic Recovery Act examined a “simulated” U.S. economy in which the tariff concessions for Caribbean nations were not in place, i.e., one

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<sup>1155</sup> Donald Rousslang and John Suomela “Calculating the Consumer and Net Welfare Costs of Import Relief,” USITC Staff Research Paper no. 15, July 1985.

with higher tariffs.<sup>1156</sup> The Commission used this model to examine a range of possible outcomes on consumers, producers, tariff revenue, and net U.S. welfare.

These partial equilibrium models provide important insights into the impact of policies on individual sectors and continue to be used when the focus of an investigation is on a particular industry. However, this class of models does not consider critical linkages across sectors. For example, if one industry contracts due to trade liberalization, resources may move to other expanding industries. Liberalization in intermediate products can lower production costs in a wide spectrum of domestic industries. The overall impact of a policy therefore will include “general equilibrium” (i.e., interconnected economy-wide) effects reflecting the adjustment of workers, capital, and intermediate inputs to new incentives arising out of trade policy changes.

The economics profession began to develop more complicated “computable general equilibrium” (CGE) models in the 1970s and 1980s that operationalized these theoretical concepts of cross-sectoral effects. This coincided with improved computer technologies that could efficiently run these very elaborate models of the entire economy. The Commission followed suit by developing in-house capabilities to examine counterfactuals with CGE models.<sup>1157</sup> In recent years, CGE models have become the Commission’s standard approach to the examination of broad-based trade policies.

In 1991, the Commission published the first in a series of analyses (*The Economic Effects of Significant U.S. Import Restraints*) that used a CGE model to examine the costs of trade protection in particular industries on the overall U.S. economy using detailed sectoral information.<sup>1158</sup> Subsequent versions of this report continued to use refined versions of this same approach, all of which help U.S. policy-makers to understand the interaction of trade protection and the implications on U.S. firms and consumers.

The Commission now routinely employs CGE models to analyze the potential effects of multilateral, plurilateral, and bilateral trade agreements. Examples include analyses of completed negotiations such as the Uruguay Round and the U.S.-Korea free trade

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<sup>1156</sup> USITC, *Caribbean Basin Economic Recovery Act Impact on U.S. Industries and Consumers*, USITC Publication 2225 (Washington DC: USITC, September 1989).

<sup>1157</sup> See USITC, *An Introduction to the ITC Computable General Equilibrium Model (Addendum to the Economic Effects of Significant Restraints)*, USITC Publication 2423 (Washington, DC: USITC, August 1991), for a discussion of the broad concepts and uses of CGE models.

<sup>1158</sup> USITC, *The Economic Effects of Significant U.S. Import Restraints, Phase III (Services with a Computable General Equilibrium Analysis of Significant U.S. Import Restraints)*, USITC Publication 2422 (Washington, DC: USITC, September 1991).

agreement.<sup>1159</sup> The Commission also has used this class of simulation models to analyze the potential impact of policy changes.<sup>1160</sup>

The Commission's CGE models have begun to play a critical role in increasing policy-makers' understanding of the spillover effects of complex international trade agreements. Non-specialists, especially policy-makers and interested non-economists, sometimes interpreted earlier ITC-generated CGE outcomes as predictions of what the future might look like if a particular policy is enacted. Commission economists have understood this tendency and have inserted cautionary language to encourage appropriate use of the results. This language emphasized that these models were simulations of what an economy would look like in a particular base year if an alternative set of policies were in place.

As agreements have become more complicated, policy-makers' needs and expectations have grown. The CGE studies allow for nuanced and complex linkages across sectors, and indicate which sectors might expand or contract as a consequence of a trade policy change. Some outside critics have questioned the value of these models, pointing out that traditional CGE models hold some critical factors constant in order to solve the model. Most notably, early Commission CGE models held overall national employment constant (while allowing reallocation across sectors) or held the overall level of capital constant (abstracting from both inward and outward foreign direct investment). Given the growing importance of employment and outsourcing in trade politics, there has been strong pressure on Commission staff to adjust the models accordingly. Commission economists continue to work to include these important variables into their analysis, which would further inform decisions by the President and Congress. An important new analytical approach can be found in a 2016 report on the Trans-Pacific Partnership that tried to address a number of the issues that have been criticized in earlier investigations.<sup>1161</sup> In particular, this ambitious report includes a dynamic CGE model that allows the aggregate U.S. labor supply and capital stock to change over time and includes the impact of removing non-tariff measures on services and foreign direct investment.

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<sup>1159</sup> See USITC, *Potential Impact on the U.S. Economy and Industries of the GATT Uruguay Round Agreements*, USITC Publication 2790 (Washington DC: USITC, June 1994) and more recently USITC, *U.S.-Korea Free Trade Agreement: Potential Economy-Wide and Selected Sectoral Effects*, USITC Publication 3949 (Washington, DC: USITC, September 2007).

<sup>1160</sup> USITC, *The Economic Implications of Liberalizing APEC Tariff and Non-Tariff Barriers to Trade*, USITC Publication 3101 (Washington, DC: USITC, April 1998).

<sup>1161</sup> USITC, *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, USITC Publication 4607 (Washington, DC: USITC, May 2016).

## Conclusions

The International Trade Commission has played, and continues to play, a central role in U.S. trade policy. One particularly important function is to provide unbiased analysis of current and future economic conditions that are affected by U.S. trade policy that are in place or under consideration.

During its 100-year history, the Commission's economic analysis has undergone a dramatic transformation. In its early decades, the Commission's analysis essentially consisted of collecting data on import-competing sectors. This required a heavy reliance on compiling statistics on trade, domestic employment, profits, and production, usually without a formal structure to help guide the analysis. Over the last 25 years, the Commission's efforts in general fact-finding investigations have become more technically sophisticated as the trade policy initiatives by the President have become ever more complex. The Commission's studies—both those that are confidential and those made generally available to the public—have helped guide the President and Congress in the formulation of sound U.S. trade policy that is not just subject to current political winds.

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# Chapter 15

## Industry and Economic Analysis for Congress



**Photo:** The U.S. Capitol Building.

**Thelma J. Askey**<sup>1162</sup>

The relationship between Congress and the U.S. International Trade Commission (USITC) is one of the most critical, not only for ensuring that the role of Congress in international trade matters is maintained but also that Congress makes informed and intelligent decisions as it implements trade policy and codifies it in statute. USITC industry and economic analysis activities include advice on the effects of trade negotiations, analysis on other trade issues, and technical assistance.

The USITC's role in providing assistance to Congress continues to evolve. Recently, the Commission was tasked with new responsibilities with respect to miscellaneous tariff bills, and has been developing a process for carrying out these responsibilities.<sup>1163</sup>

## Background: Role of Congress in Trade Negotiations

The role of Congress with respect to the negotiation and implementation of international trade agreements derives from its enumerated powers under the Constitution to regulate foreign commerce and to impose and collect duties. Consequently, any change in tariffs or other import restrictions is governed under authorities delegated by Congress through statute, including appropriations. To insure that laws and authorities enacted by Congress are faithfully executed in accordance with legislative intent, Congress has included provisions in trade laws specifically limiting and circumscribing their application. Also, Congress has preserved its oversight role in trade negotiations by including in the legislation procedures for consultation with and notification to Congress before submission of a draft bill by the President.

The roles of Congress and the President in developing trade policy became more formalized under the Trade Act of 1974 (Public Law 93-618, January 3, 1975, 19 U.S.C. § 2101), which specifically granted authority to the President to enter into reciprocal trade agreements affecting both the traditional changes in tariffs and other U.S. laws necessary to ensure the effective implementation of trade agreements. Inevitably, implementation legislation also incorporated changes in statute deemed necessary to mitigate the effects of entering into such

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<sup>1162</sup> Former Commissioner Askey is President of the Rockhardt Group Global Strategies, and was Director of the Trade Subcommittee of the House Committee on Ways and Means.

<sup>1163</sup> A number of sources were used in the preparation of this chapter, including USITC publications and discussions with Congressional staff.



trade agreements. Prior to this formalization, changes to U.S. tariffs were concluded by the President through tariff proclamation authorities first granted to the President by Congress through the Reciprocal Trade Agreements Act of 1934. The formalization of Congress' role in 1974 was undertaken very deliberately to address two concerns that had emerged as trade between the United States and its trading partners expanded. First, Congress established its preeminence over trade matters under Article I, Section 8 of the U.S. Constitution rather than of the President under the treaty authorities of Article II, Section 2. Second, key members of the House of Representatives (House) wanted to clarify and assert the role of the House under Article I, Section 7, in originating all legislation that raised revenue.

To understand the concerns of Congress about its participation and role, one need only look at the evolution of multilateral trade agreements since the General Agreement on Tariffs and Trade (GATT) that was signed by 23 nations in Geneva on October 30, 1947; an agreement which affected \$10 billion in trade. The rising importance of international trade for the United States became increasingly apparent when President John F. Kennedy requested authority from Congress to cut all U.S. tariffs by 50 percent in an attempt to form the basis for a new round of multilateral negotiations that would seek to reduce the high level of tariffs that existed in the U.S. and among major trading partners. Congress approved the Trade Expansion Act of 1962 (Public Law 87-794, October 11, 1962) giving the President the authority to seek and, through proclamation authority, implement certain reciprocal tariff cuts as well as for the first time introducing trade adjustment assistance (TAA) as a necessary complement to trade concessions that may for a time adversely affect American workers and U.S. economic interests. On June 30, 1967, 66 nations representing 80 percent of world trade signed the trade agreement, commonly known as the Kennedy Round agreement, which achieved about \$40 billion worth of tariff cuts. Although primarily a tariff-cutting exercise, these negotiations also attempted to delve into trade remedies (antidumping) and preferential treatment for developing countries.

The expansion of the scope and competence of multilateral negotiations continued apace. Negotiations under the Tokyo Round (1973–79) between 102 countries achieved tariff concessions worth \$300 billion of world trade but also expanded to include non-tariff measures such as subsidies and countervailing measures, and “framework” agreements. The Uruguay Round Agreements (1986–94) were signed by 111 countries in Marrakesh on April 14, 1994,<sup>1164</sup> and for the first time achieved a significant protocol with respect to trade in services. The agreement also covered agricultural subsidies, non-tariff measures, dispute settlement, and intellectual property rights. This Round established the World Trade Organization (WTO), which superseded the organization commonly referred to as the GATT. It incorporated further tariff reductions of about 40 percent and continued preferential treatment for developing countries.

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<sup>1164</sup> Based on WMCP-111-6 at 305, there were 125 participants in negotiations but originally 111 countries that signed.

The Doha Development Round, inaugurated in November of 2001 by 159 countries, began with an ambitious agenda to address tariffs, non-tariff measures including trade facilitation, agriculture, labor standards, environmental protection measures, competition, investment, transparency and patents. However, the Doha Round has been stalled for a number of years leading to much uncertainty about the future of multilateral trade talks. A number of negotiations for plurilateral agreements, including the expanded Information Technology Agreement and Environmental Goods Agreement, have continued among those countries, including the United States which are willing to discuss trade liberalization, in the absence of progress on the multilateral front.

The litany of ever expanding multilateral trade agreements informs the increasing interest by Congress in asserting its authority, participating in the process on a hands-on, continuing basis, and controlling the implementation and post-implementation requirements. However, it was the experience in the Kennedy Round where Congress believed it had had insufficient control and oversight over the negotiations that triggered the Trade Act of 1974 with its detailed authorities and multifaceted requirements. With this Round, it became clear that trade agreements would expand beyond simple tariff-cutting exercises. Also, importantly, Congress refused to implement the Kennedy Round agreement fully, particularly with respect to some tariffs and antidumping measures. Therefore, clear conflict emerged between the President and the willingness of Congress to approve unpopular measures through the legislative process, as well as incorporating provisions not part of the agreement (such as trade adjustment assistance), and the ability of the United States to honor the commitments it made in order to conclude the negotiations.

Thus, an important debate emerged as to whether these broader agreements should be considered as treaties, requiring advice and consent of the Senate by a two-thirds vote, and have the effect of supplanting current law without enactment of legislation. This would acknowledge the expanding nature of trade agreements beyond mere tariff changes and would avoid the increasing complexities of the legislative process. Congress also had growing concerns that it was not always kept fully informed of the scope of trade negotiations and the priorities and objectives of the U.S. negotiating position, the details of emerging deals, or the impact of any changes on constituencies or the economy in general. Also, Congress felt pressure to address their restive constituencies about the benefits and adverse effects domestically of increasingly global trade agreements.

Not surprisingly, the House Ways and Means Committee took the lead in constructing and drafting the Trade Act of 1974. The House had the most to lose because, as revenue measures, trade agreements must start the implementation process in the House, as opposed to treaties which constitutionally require only Senate approval. Furthermore, additional measures (such as TAA designed to mitigate adverse effects and essential to gaining support from Members)

would not be included under treaties approving trade agreements but would need to be pursued simultaneously and separately through regular legislative procedures.

## Informational Relationship between Congress and the USITC

Certainly from the 1974 Trade Act onward, particularly as major multilateral and bilateral trade agreements were negotiated by Presidents and considered by Congress, Congress increasingly relied on the USITC as the key source for independent data collection and economic analysis; the USITC's reports and as a procedural and substantive centerpiece of Congress' consideration of these agreements. The reliance did not focus on Congress' understanding of just trade agreements, but increasingly provided a strong reference point for understanding the effects on the U.S. economy and workers of a range of Congressional and executive actions, from legislation such as miscellaneous tariff bills to the various trade laws that determine injury from fairly and unfairly traded goods and the protection of patents and trademarks to general fact-finding investigations, under statutes such as section 332 of the Tariff Act of 1930, on any matter involving tariffs or international trade.

The content and types of free trade agreements that are analyzed by the USITC have undergone significant evolution over time. Although the Kennedy Round of multilateral trade negotiations had aspirations of covering a range of trade activities beyond tariffs (such as agriculture, services, and the impact of subsidies and injurious imports), Congress had no appetite for the expansion of jurisdiction of international trade governing bodies (originally the General Agreement on Tariffs and Trade (GATT), and later the World Trade Organization (WTO)) such issues were not taken up until first the Tokyo Round and then the Uruguay Round. No longer the purview of tariffs alone, trade agreements first began to expand into agriculture, subsidies and dumping; now such agreements also tackle a wide range of issues including services, trade facilitation, regulatory environment, labor rights, and environmental protection, making the USITC's analysis all that more complex.

## USITC Mandate/Jurisdictions

The broad mandate of the USITC, as outlined in the statute, is to administer U.S. trade remedy laws and to provide the President, the U.S. Trade Representative (USTR), and Congress with independent analysis, supported by substantive data and information, on the effects of various trade agreements (e.g., changes in trade barriers including tariffs and non-tariff barriers, effects on U.S. industries and consumers, U.S. employment, U.S. exports and imports, and U.S. competitiveness in general). With respect to the Congressional mandate, the primary analytical function of the USITC is to provide support after the conclusion of trade negotiations and

during the Congressional consideration and passage of legislation to implement such agreements. However, the attention by the Congressional oversight committees begins long before trade agreements are concluded and signed. Congress begins looking at data collected and analyzed by the USITC at the earliest stages, including reviewing information provided by the USITC to USTR in formulating U.S. objectives and approaches to any potential negotiation.

Another mandate of the USITC which is closely followed by Congress is the administration of U.S. trade remedy laws, particularly the countervailing duty and antidumping duty laws (title VII of the Tariff Act of 1930, as amended), the safeguard laws (sections 201–04 of the Trade Act of 1974, as amended) and unfair trade practice laws primarily related to patent and trademark violations (section 337 of the Tariff Act of 1930, as amended). The research and analytical capabilities of the USITC strongly inform the confidence Congress has in the successful implementation of these trade remedy laws. The USITC's internal investigations and analysis are critical in the Commission's determinations of any injury to U.S. industry and consumers under these laws. It is imperative that Congress have confidence that the USITC has performed independent and impartial analysis. The Congressional oversight committees follow closely both the information and analysis performed by the USITC professionals, but also the application of this information by the Commissioners as they make determinations regarding injury in individual cases brought under these statutes.

Congressional views are not uniform with respect to how U.S. trade remedy laws are to be applied by the Commission in its determination of injury. The implementation of trade remedy laws by the USITC in individual cases can generate a discussion among lawmakers, petitioners, Commissioners, and even foreign trade partners about the "intention" of Congress regarding such laws at the time of enactment. This discussion can put some pressure on the information gathering and analytical processes conducted by the USITC professionals. For example, some view the nature of injury as more narrowly focused on the direct impact on U.S. industry by imports in a quantitative and static manner. Others want a more qualitative and dynamic analysis in order to take into account the impact of import competition over time and in a broader economic context. Again, confidence in the precision and objectiveness of USITC data collection and analyses becomes crucial to Congressional confidence in the effectiveness of the application of the trade remedy statutes.

USITC investigative activities can be grouped into several general areas: advice on the effects of trade negotiations, investigations of injury caused by subsidized or dumped goods, investigations of unfair practices in import trade, development of uniform statistical data, and analysis of matters related to the U.S. tariff schedules. Congress has played a key role in structuring these studies, and has closely monitored and relied on the information provided to it by the USITC that they provide. Such information, analysis, data collection, and advice on trade policy, the effects of bilateral and multilateral trade negotiations on the U.S. economy

and its industries and workers, and the effective application of U.S. trade laws is crucial to Congressional support and implementation of these policies and objectives.

Statutory authority for the USITC's investigative responsibilities is primarily provided by the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974, the Trade Agreements Act of 1979, the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988, the Uruguay Round Agreements Act (1994), and the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. Although these statutes provide very specific direction to the USITC with respect to supporting trade negotiations and U.S. trade laws, in practice Congress has a continuous line of communication to the USITC for information on trade policy development, the initiation and conduct of trade negotiations, the implementation of trade agreements and other initiatives in the statute, and actions taken under various trade laws and programs.

One of the most critical responsibilities of the USITC is to provide to Congress assessments of trade agreements negotiated under fast-track/trade promotion authority procedures, first included in the Trade Act of 1974. The Trade Expansion Act of 1962 had earlier required that the USITC (then known as the Tariff Commission) submit an annual report to Congress "on the operation of the trade agreements program."<sup>1165</sup> However, the USITC's role as provider of factual information to Congress has significantly expanded in the decades that followed. Under the Trade Act of 1974, the USITC produced a number of reports relating to bilateral agreements. These included a 2006 report on a U.S.-Colombia Trade Promotion Agreement, and 2007 reports on the U.S.-Korea Free Trade Agreement and the U.S.-Panama Trade Promotion Agreement. The results of a study on the Trans-Pacific Partnership (TPP) negotiations, issued in May 2016, were highly anticipated by lawmakers particularly because the analysis would include the impact of the new and expanded rules on SPS, intellectual property, state-owned enterprises, etc.

Congressional access to USITC advice and information comes additionally in several forms. First, the USITC submits formal reports to Congress at the request of the two oversight committees: the House Committee on Ways and Means and the Senate Finance Committee. Additionally, Members and staff occasionally meet with USITC staff with regard to particular trade matters.

Congress may request formal reports from the Commission on trade policy, trade impacts, and a wide variety of trade-related issues under section 332 of the Tariff Act of 1930. Such Congressional requests come in the form of written requests from either the Ways and Means Committee or the Finance Committee.<sup>1166</sup> Members outside the oversight committees who are

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<sup>1165</sup> Section 402(b).

<sup>1166</sup> Either branch of Congress may also request investigations and reports. 19 U.S.C. § 1332(g).

interested in a particular USITC study must petition the chairs of either of these two oversight committees. Public reports of the studies and investigations requested by Congress are typically available to the public. The USITC also provides technical assistance to Congressional requesters, often on short notice.

When reviewing the history of section 332 reports requested by and that have been issued to Congress since the enactment of the Tariff Act of 1930, one sees an increasing complexity, intensity, and number of issues that are reflected in the rising importance of international trade to the U.S. economy and the nature of trade negotiations themselves. From 1930 to the launch of the Kennedy Round in 1962, Congress requested less than 20 section 332 studies of the USITC. By the time the Uruguay Round talks began, that number had more than doubled. During the Uruguay Round negotiations, requests for section 332 studies more than tripled. The trend continues. The sophistication of these studies has also increased, with the USITC having to increasingly look to quantify tariff and non-tariff barriers on areas like intellectual property and services trade barriers. Although there was a study requested in 1931 on *Labor Used in Producing Coal in Russia*, most of the studies were narrowly confined to one product (e.g., whiskey, wool, fluorspar, and hardboard) or on the tariff rates themselves (e.g., *Tariff Rates of 50 Percent or Higher*, 1973). However, following the Kennedy Round, Congressionally requested 332 studies more often focused broadly on the overall effects of certain trade actions, and typically had a significantly wider scope. These studies included *Implications of Multinational Firms for World Trade and Investment and for U.S. Trade and Labor* (1973), *Nature and Extent of Tariff Concessions Granted in U.S. Agreements* (1974), *Study of the Economic Effects of Terminating the Manufacturing Clause of the Copyright Law* (1983), *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements* (1985), and *The Impact of Increased U.S.-Mexico Trade on Southwest Border Development* (1986), among many others.

The 332 studies also reflected concerns regarding serious stresses faced by particular sectors of the U.S. economy because of rising U.S. imports and globalization. For example, *Monthly Reports Providing Information on the U.S. Auto Industry* (1981), *Monthly Report on Selected Steel Industry Data* (1986), and *Effects of the Steel Voluntary Restraint Agreements on U.S. Steel Consuming Industries* (1989) reflected Congressional concerns regarding import sensitive sectors. These studies often have reflected the importance of certain bilateral trade relationships. These studies include *Pros and Cons of Initiating Negotiations With Japan to Explore the Possibility of a U.S. Japan Free Trade Area Agreement* (1988), *Prospects for Future U.S. Mexican Trade Relations* (1990), *Survey of Views on the Impact of Granting Most Favored Nation Status to the Soviet Union* (1990), *Rules of Origin Issues Related to NAFTA and the North American Automotive Industry* (1991), *The Effects of Greater Economic Integration Within the*

*European Community in the United States (1994), and Likely Impact of Providing Quota-free Entry to Textiles and Apparel from Sub-Saharan Africa (1997).*

In recent years, the USITC completed its largest studies to date with respect to trade relations with India: *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy (2014)* and *Trade and Investment Policies in India, 2014–15 (2015)*. An even more recent study was *Overview of Cuban Imports of Goods and Services and Effects of U.S. Restrictions*, Investigation No. 332-552, USITC Publication 4597 (March 2016). Without a doubt, section 332 studies have become much more than a tool for understanding sectoral or product specific trade effects, having expanded into an essential element in Congress' understanding of broad economic, trade, and foreign policy strategies.

Throughout the century since its founding, the USITC has provided assistance to Congress on a wide variety of trade issues. As a nonpartisan agency, the USITC provides objective and expert analysis. The Ways and Means Committee and the Finance Committee rely heavily on the USITC's work, and the agency is widely admired as a nonpartisan and objective source. Importantly, the confidence in the USITC has not changed as Administrations change, but has increased steadily over time.





# Chapter 16

## Industry and Economic Analysis for the Executive Branch



**Photo:** The Winder Building, headquarters of the Office of the U.S. Trade Representative.

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## “Scientific” Determination of Tariff Rates: The Need for Objective, Credible Information

For over 150 years, tariffs were the major source of revenue for the Federal government, and Congress was directly responsible for making tariff policy and establishing rates of duty for imported articles.

Between 1789 and 1910, Congress passed more than 225 laws and joint resolutions on tariff matters.<sup>1168</sup> Information on tariffs and on individual industries was obtained through hearings, and setting tariff rates was a contentious and partisan issue.<sup>1169</sup> After enactment of the Revenue Act of 1913,<sup>1170</sup> support grew for the establishment of an independent, bipartisan agency that would, at a minimum, engage in fact-finding on issues related to tariffs and competitive conditions for U.S. industries.<sup>1171</sup>

Non-partisanship, independence, and objectivity were seen as essential to injecting economic analysis and fact-finding into the debate on tariffs in general and in regard to individual industries and consumers.<sup>1172</sup> Information and advice received from “scientific investigations” conducted by a bipartisan body with quasi-judicial authority would be more credible than past practice.<sup>1173</sup> Thus, in Title VII of the Revenue Act of 1916 (Revenue Act), Congress established

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<sup>1168</sup> *Tariff Acts Passed by the Congress of the United States (1789–1909)* (Washington, DC: GPO, 1909).

<sup>1169</sup> Karen E. Schnietz, “The 1916 Tariff Commission: Democrats’ Use of Expert Information to Constrain Republican Tariff Protection,” *Business and Economic History*, 23, no. 1 (1994), 177–80.

<sup>1170</sup> C.16, 38 Stat. 114 (October 3, 1913).

<sup>1171</sup> In 1916, both the Democratic and Republican Party platforms supported the establishment of an independent agency. See, Gerhard Peters and John T. Woolley, *The American Presidency Project*; —Democratic Party Platform of 1916 (June 14, 1916); Republican Party Platform (June 7, 1916). online at <http://www.Presidency.ucsb.edu>, (accessed April 2016).

<sup>1172</sup> There were some short-lived experiments in obtaining advice from bodies appointed by the Executive Branch. These were the Tariff Commission, the Department of the Treasury (1882) (appointed pursuant to an Act of May 15, 1882 (22 Stat. 64); the Tariff Board (1909–12) (appointed pursuant to the Tariff Act of 1909 (36 Stat. 11)); Cost of Production Division, Bureau of Foreign and Domestic Commerce, Department of Commerce (1913–16) (established under the Appropriations Act of August 23, 1912. 37 Stat. 407).

<sup>1173</sup> Schnietz, “The 1916 Tariff Commission,” 1994, *supra* note 1168.

an agency known as the Tariff Commission(Commission)<sup>1174</sup> that would possess these characteristics. The Commission’s politically-balanced structure<sup>1175</sup> and mandate to provide information, analysis and advice to both Congress and the Executive Branch would help ensure that neither Branch dominated the substance of the Commission’s reports or advice.

While the Commission experienced cuts in appropriations at times,<sup>1176</sup> and struggled during those times to carry out its mission with scarce resources, Congress has consistently relied on the Commission’s expertise and objectivity over the last 100 years, and expanded the Commission’s role in providing information, reports, and advice on trade matters to the Executive Branch.<sup>1177</sup> On only one occasion has Congress acted to limit the Commission’s interaction with the Executive Branch. In the Trade Agreements Extension Act of 1948, Congress expressly prohibited the Commission or any of its staff from participating “in the making of decisions with respect to the proposed terms of any foreign trade agreement or in the negotiation of any such agreement.”<sup>1178</sup> That was a significant departure from previous practice, in particular during the negotiations leading to the General Agreement on Tariffs and Trade (GATT 1947). Within a year, Congress repealed this prohibition in the Reciprocal Trade Agreement Extension Act of 1949.<sup>1179</sup>

This Chapter reviews the various authorities that establish the Commission’s mandate to provide information, reports, and advice to the Executive Branch, and looks at how this mandate has evolved. Next, the Chapter discusses in broad terms how the Commission provides information, reports, and advice to the Executive Branch. The Chapter then offers a brief conclusion.

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<sup>1174</sup> Congress changed the name of the Tariff Commission to the U.S. International Trade Commission (USITC) in the Trade Act of 1974. Use of the term “Commission” in this Chapter refers to the Tariff Commission prior to 1975 and the U.S. International Trade Commission after that date.

<sup>1175</sup> Section 700 of the Tariff Act of 1916, Ch.463, 39 Stat. 756 (September 8, 1916).

<sup>1176</sup> *E.g.*, U.S. Tariff Commission *Annual Report* submitted to Congress November 29, 1919, 5–6 (appropriations cut by one-third).

<sup>1177</sup> See discussion in section II below.

<sup>1178</sup> Section 3(c) of Pub. L. No. 80-792, 62 Stat. 1053. During that period, the Commission reported that it attended meetings of interagency committees involved in ongoing trade negotiations as observers. I *Commission’s Annual Report* submitted to Congress January 3, 1950, 13.

<sup>1179</sup> Section 2 of the Reciprocal Trade Agreement Extension Act of 1949 (68 Stat. 698) repealed Pub. L. No. 80-792 and section 5 of that Act amended section 350 of the Tariff Act of 1930 (19 U.S.C. 1354) to restore the references to the President seeking advice from the Commission and certain other agencies.

## Evolution of the Commission's Mandate

### The Revenue Act of 1916

Congress, having established the Commission in the Revenue Act,<sup>1180</sup> directed the Commission to undertake investigations and provide reports and economic analysis to Congress and the President. Section 702 of the Revenue Act vested the Commission with the responsibilities of investigating the administration and fiscal and industrial effects of the customs laws, specific tariff-related issues, and the operation of customs laws, including the effect of those laws on the industries and labor of the United States, and submitting reports of its investigations. Similarly, section 704 of the Act granted the Commission the authority to investigate tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, economic alliances, the effect of export bounties and preferential transportation rates, the volume of importations compared with domestic production and consumption and conditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production.<sup>1181</sup>

Only section 703 of the Revenue Act specifically refers to the President and directs the Commission to

put at the disposal of the President of the United States, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information at its command, and shall make such investigations and reports as may be requested by the President or by either of said committees or by either branch of the Congress, and shall report to Congress on the first Monday of December of each year hereafter a statement of the methods adopted and all expenses incurred, and a summary of all reports made during the year.<sup>1182</sup>

A review of the Commission's annual reports between 1917 and 1921 reveals that the Commission immediately began providing information and advice under sections 702 and 704 of the Act and initiated investigations under its own authority or at the request of Congress under these authorities. The Commission did not institute any investigations under section 703.<sup>1183</sup> While the President did not make any requests for information under section 703, he did designate the Commission as the responsible agency for the collection of statistical

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<sup>1180</sup> Section 700 of the Tariff Act of 1916, ch.463, 39 Stat. 756 (September 8, 1916).

<sup>1181</sup> *Ibid* §§ 702 and 704. As discussed in previous chapters, these sections are the precursors of several types of trade-related investigations, including those concerning antidumping and countervailing duties.

<sup>1182</sup> *Ibid.* § 703.

<sup>1183</sup> *Commission Annual Report* submitted to Congress November 15, 1917; November 26, 1918; November 29, 1919; December 6, 1920; and December 5, 1921.

information regarding certain chemical commodities and the preparation of a census of domestic production.<sup>1184</sup>

## The Tariff Act of 1922

The Tariff Act of 1922<sup>1185</sup> (the 1922 Act) significantly changed the interaction between the Commission and the Executive Branch. In section 315, Congress authorized the President to take several different actions including implementing a so-called “flexible tariff” based on the concept of using the tariff to equalize the cost of production of domestic articles and imports from the principal competing country.<sup>1186</sup> A Commission investigation of the differing costs of products needed to be completed before the President could proclaim any change in the relevant tariff.<sup>1187</sup>

Section 317 of the 1922 Act authorized the President to proclaim new or increased duties if he determined that a foreign country was engaged in discrimination against U.S. commerce. Discrimination was described broadly to include both direct and indirect discrimination through “law, or administrative regulation, or practice.”<sup>1188</sup> Under section 317(g), the Commission was required to “ascertain and at all times to be informed whether any of the “discriminations against the commerce of the United States . . . are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the Commission to bring the matter to the attention of the President, together with recommendations.”<sup>1189</sup> To assist the President and Congress in administering the law, the Commission was directed “to ascertain information on cost of production for domestic and imported products” and “all other facts which will show the differences in or which affect competition between articles of the United States and imported articles in the principal markets of the United States.”<sup>1190</sup>

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<sup>1184</sup> The designation of the Commission was in preparation for the implementation of section 500 of the Revenue Act, which authorized the President to remove an increase in duties on certain chemicals under specified conditions. *Commission Annual Report* submitted to Congress on November 15, 1917 at 13–14.

<sup>1185</sup> Pub. L. No. 67-318, 36 Stat. 11, ch. 356.

<sup>1186</sup> *Ibid.* at section 315. This section also authorized the President to increase or decrease duties (within a 50 percent limit) or impose a duty based on the American selling price (also subject to a 50 percent limit). *Ibid.*

<sup>1187</sup> *Ibid.* § 315(c) para.2.

<sup>1188</sup> *Ibid.* § 317(a). This concept of discrimination appears to foreshadow the approach taken in Article III of GATT 1947 in relation to national treatment.

<sup>1189</sup> 1922 Act at section 317(g).

<sup>1190</sup> *Ibid.* § 318(a).

Between 1922 and 1929, the Commission conducted numerous investigations and submitted reports under various provisions of the 1922 Act, in particular, section 315.<sup>1191</sup> The requirements for these investigations and reports to provide advice or recommendations to the President expanded on the concept of having the Commission provide a “scientific and factual basis” for the President’s exercise of delegated authority. As discussed below Congress has included this type of requirement in several subsequent statutes, including the Bipartisan Congressional Priorities and Accountability Act of 2015 (TPA 2015).

Soon after the Commission began issuing reports under the provisions of the 1922 Act, questions were raised regarding the Commission’s powers and duties. On March 27, 1923, the Attorney General issued an opinion on the Commission’s actions in regard to an investigation of the duty on Logs of Fir, Spruce, Cedar, or Western Hemlock. In that opinion, the Attorney General stated that “the 1922 Act has not changed the status of the Tariff Commission and the powers and duties of that tribunal remain limited to the ascertainment and report of facts,”<sup>1192</sup> thus, confirming the legitimacy of the Commission’s action in that investigation and more generally under section 315.

In 1923, the Commission made a report to the President “On the Relation of the Tariff on Sugar to the Rise in Price of February-April 1923.” This report was in response to a request from President Harding sent in a telegram to the Commission on March 27, 1923. The request and the Commission’s summary do not state the basis for the President’s request (possibly section 703 of the Revenue Act) and the brevity and informality of the request stands in contrast to the formal and more detailed letters that convey requests for Commission reports under more recent statutes.<sup>1193</sup>

## The Tariff Act of 1930

Congress undertook a major revision of U.S. tariff law in 1930, which resulted in the Tariff Act of 1930 (the so-called Smoot-Hawley tariff).<sup>1194</sup> Congress replaced section 703 of the Revenue Act

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<sup>1191</sup> *Commission Annual Report* submitted to Congress December 2, 1929. In that report, the Commission stated that since 1922, it had completed 183 reports and special surveys. Forty-eight reports covering 56 articles had been completed under section 315 of the 1922 Act; 5 reports under section 316 (unfair methods of competition); 18 under section 317 involving complaints of discrimination against U.S. commerce; and 97 under the general powers conferred under the Revenue Act and section 318 of 1922 Act (self-initiated). The Commission also states that it provided 15 formal reports to the President and the Department of State on tariff matters (authority for those reports is not mentioned). *Ibid.* at 9. In addition, the report mentions numerous minor and less formal investigations; responses to requests for information; and reports to various government officials. A table providing details is provided. *Ibid.* at 10. These matters appear akin to the “technical assistance” that the Commission provides to Congress and the Executive Branch.

<sup>1192</sup> *Commission Annual Report* submitted to Congress December 3, 1923, Appendix V, 83.

<sup>1193</sup> *Ibid.*, Appendix IV at 55–71.

<sup>1194</sup> 19 U.S.C. 1300 *et seq.*

with section 332(g) of the Tariff Act of 1930,<sup>1195</sup> which carried forward the Commission's mandate to provide all information at its command to the President, the Committee on Ways and Means of the House of Representatives (House Ways and Means Committee), the Senate Committee on Finance (Senate Finance Committee) and either House of Congress on request.<sup>1196</sup> In 1930, the Commission conducted its first investigations under section 332 based on two Senate resolutions.<sup>1197</sup> This began a tradition that continues today of the Senate Finance Committee and the House Ways and Means Committee requesting investigations and reports pursuant to section 332.<sup>1198</sup>

In 1940, the Executive Branch made its first request for an investigation under section 332,<sup>1199</sup> but it was not until 1965 that the President and the Special Representative for Trade Negotiations began to request Commission investigations under section 332 on a regular basis.<sup>1200</sup> Since then, the President and the U.S. Trade Representative (USTR) have requested the Commission to conduct numerous fact-finding investigations ranging from those involving

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<sup>1195</sup> 19 U.S.C. 1332(g). While section 332 included several provisions found in prior Acts relating to the Commission's responsibilities, section 332(g) is the provision that the Executive Branch relies on today in requesting reports and analyses from the Commission.

<sup>1196</sup> The President delegated his function under section 332(g) to the U.S. Trade Representative in section 5.301 of Executive Order 12661 of December 27, 1988 (54 Fed. Reg. 799).

<sup>1197</sup> *Commission Annual Report* submitted to Congress December 1, 1930, 2–3.

<sup>1198</sup> *E.g.*, Investigation No. 332-540, *Digital Trade in the U.S. and Global Economics, Part 2*, USITC Publication 4485 (Washington, DC: USITC, August 2014) (requested by the Senate Finance Committee); Investigation No. 332-543, *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, USITC Publication 4501 (Washington, DC: USITC, December 2014) (requested by the House Ways and Means Committee and Senate Finance Committee); Investigation No. 332-524, *Brazil: Competitive Factors in Brazil Affecting U.S. and Brazilian Sales in Selected Third Country Markets*, USITC Publication 4310 (Washington, DC: USITC, April 2012) (requested by the Senate Finance Committee); Investigation No. 332-526, *Business Jet Aircraft Industry: Structure and Factors Affecting Competitiveness*, USITC Publication 4314 (Washington, DC: USITC, May 2012) (requested by the House Ways and Means Committee); *Overview of Cuban Imports of Goods and Services and Effects of U.S. Restrictions*, USITC Publication 4597 (Washington, DC: USITC, March 2016) (requested by the Senate Finance Committee).

<sup>1199</sup> *Products of Puerto Rican Needlework Industry*, Investigation No. 332-024, (no publication) (requested by the Wage and Hour Division).

<sup>1200</sup> *E.g.*, Investigation No. 332-046, *Textured Yarns*, USTC Publication 0166 (Washington, DC: USTC, December 1965)(request from the President); Investigation No. 332-047, *Products Subject to Duty. . . Based on Values Determined by Conventional Valuation Methods*, USTC Publication 0181 (Washington, DC: USTC, July 26, 1966) (request from the Special Trade Representative); Investigation No. 332-049, *Probable Economic Impact of Concessions on Certain . . .* (Completed on October 3, 1966—Confidential); Investigation No. 332-054, *Mink Fur Skins*, USTC Publication 0242 (Washington, DC: USTC, April 1968) (request from the President). In the Trade Act of 1974, the title of the Special Trade Representative for Trade Negotiations was changed to the United States Trade Representative (USTR) and the office was made part of the Executive Office of the President. See 19 U.S.C. 2171 (originally enacted as section 141 of the Trade Act of 1974).

specific industries, such as textiles, non-rubber footwear, and mushroom industries,<sup>1201</sup> to those addressing the competitive conditions facing U.S. industries generally.<sup>1202</sup> The President and the USTR also have requested reports regarding the operation of the Generalized System of Preferences (GSP) program and other preference programs. On some issues, such as those involving the General Agreement on Trade in Services, USTR has asked the Commission to provide a series of reports.<sup>1203</sup>

## From the Reciprocal Trade Agreements Act to Trade Promotion Authority: The Trade Agreements Program

The Reciprocal Trade Agreements Act (RTAA), enacted in 1934, amended the Tariff Act of 1930 to authorize the President to enter into foreign trade agreements and “to proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.”<sup>1204</sup>

While this authority was subject to a 50-percent limitation on the amount by which the President could increase or decrease a particular duty, Congress did not need to enact legislation to approve any agreement that complied with the conditions and procedures in the RTAA. Moreover, the proclaimed duties or other import restrictions were to apply on a most-favored nation basis.<sup>1205</sup>

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<sup>1201</sup> Investigation No. 332-055, *Textile and Apparel Industries*, USTC Publication 0226 (January 1968) (request from the President); Investigation No. 332-056, *Nonrubber Footwear*, USTC Publication 0276 (Washington, DC: USTC, January 1969) (request from the President); USTC Investigation No. 332-072: *Mushrooms*, USITC Publication 0580 (Washington, DC: USTC, May 1973) (request from the President).

<sup>1202</sup> Investigation No. 332-065, *Competitive Position of U.S. Industries*; Three reports were issued: USTC Publication 0473 (Washington, DC: USTC, April 1972); 0737 (Washington, DC: USITC, August 1975); 0738 (Washington, DC: USITC, August 1975) (request from the President).

<sup>1203</sup> *E.g.*, Investigation No. 332-78, *Certain Articles Being Considered For Removal From The List of Articles Eligible for Duty-Free Treatment under the U.S. Generalized System of Preferences (GSP)*, Investigation Nos. 332-78 and TA-503(a)-2 (September 1976) (request from the President); Investigation No. 332-81, *Probable Economic Effects of Designating Certain Articles as Eligible for the U.S. Generalized System of Preferences (GSP)*, Investigation. Nos. 332-81 and TA-503-(a)(3) (January 1977) (request from the Special Trade Representative); Investigation No. 332-267, *General Agreement on Trade in Services: Examination of South American Trading Partners’ Schedule of Commitments*, USITC Publication 3007 (Washington, DC: USITC, December 1996) (requested by USTR); Investigation No. 332-376, *General Agreement on Trade in Services: Examination of the Schedules of Commitments Submitted by Asia/Pacific Trading Partners*, USITC Publication 3011 (Washington, DC: USITC, January 1997) (requested by USTR). A comprehensive list of Commission investigations conducted under section 332 is at [https://www.usitc.gov/research\\_and\\_analysis/332\\_commission\\_publication.htm](https://www.usitc.gov/research_and_analysis/332_commission_publication.htm).

<sup>1204</sup> Pub. L. No. 93-316, 48 Stat. 943, § 350(a)(2).

<sup>1205</sup> *Ibid.*



Section 4 of the RTAA required the President to provide the public with reasonable notice of the intention to negotiate an agreement and an opportunity for interested persons to provide views to the President, or to such agency as the President may designate. Before concluding an agreement, the President was required to seek information and advice with respect to the proposed agreement from the Commission, the Departments of State, Agriculture and Commerce, and other sources as appropriate.<sup>1206</sup>

The RTAA established the foundation for what has evolved into trade promotion authority (TPA) procedures, which are discussed in the following section. Requirements to have an agreement approved and implemented using TPA procedures have become much more complex than those in section 4 of the RTAA, as the agreements have become more complex. Hence, the Commission's role in providing advice to the Executive Branch in connection with these trade agreements is also more complex.

Beginning in 1934, the Commission became immersed in providing the advice called for in section 4 of the RTAA.<sup>1207</sup> The overall trade negotiating committee structure consisted of: the Executive Committee on Commercial Policy; the Committee on Trade Agreements; the Committee for Reciprocity Information; and country, commodity and special committees. Representatives of the Commission served on all of these committees and members of the Commission served as the Chairman and Vice Chairman of the Committee for Reciprocity Information.<sup>1208</sup>

Trade negotiations between 1934 and the beginning of World War II (WWII) were normally bilateral. Between 1934 and 1947, the United States concluded and put trade agreements into effect with 29 countries.<sup>1209</sup>

On November 9, 1946, the Department of State announced the intention of the United States to enter into trade-agreement negotiations with certain foreign countries; these negotiations commenced in the spring of 1947. The Commission contributed to this effort by producing

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<sup>1206</sup> *Ibid.*, § 4.

<sup>1207</sup> *Commission Annual Report* submitted to Congress January 8, 1935, 10–13. (“Procedure and Work Under the Trade Agreements Act”). This report includes detailed information on the Commission's role during the early phase of implementation of the RTAA.

<sup>1208</sup> *Ibid.* The President established the Committee for Information Reciprocity in Executive Order 6750 (June 1934).

<sup>1209</sup> *USTC, Operation of the Trade Agreements Program*, 1<sup>st</sup> Report (June 1934–April 1948), Publication 160 (Washington, DC: February 1947), part II, table 1, 38, [https://www.usitc.gov/research\\_and\\_analysis/332\\_commission\\_publication.htm](https://www.usitc.gov/research_and_analysis/332_commission_publication.htm). As indicated in this table, as of the end of 1947, commitments under GATT 1947 superseded the relevant bilateral agreement. During WWII the Commission worked with other agencies on the war effort providing information on commodities production and distribution. *Commission Annual Report* submitted to Congress December 1, 1941, 4–5 and subsequent annual reports through the year 1945 (submitted to Congress January 3, 1946). The annual report for 1945 includes a general discussion of its work for war agencies and preparation for the end of WW II, 1–8.

3,000 pages of information on possible U.S. concessions. Twenty-seven Commission staff served as members of or assistants to the U.S. delegation, and a Commission attorney served as a legal advisor to the U.S. delegation. In addition, five Commissioners served as members of the delegation for various periods.<sup>1210</sup>

Since the initial negotiations on a multilateral trade agreement in 1947, there have been seven additional “rounds” of negotiations under the auspices of the GATT.<sup>1211</sup> The Commission has provided advice to Executive Branch negotiators during each of these negotiations. Congress has approved the results of these negotiations through special statutory procedures. These procedures are known as “fast-track” or “trade promotion authority” (TPA).

## Recent Trade Promotion Authority Legislation

As of June 29, 2015, the requirements to use TPA procedures for the approval and implementation of trade agreements are set forth in TPA 2015. Most recent experience, however, is under TPA 2015’s predecessor statute, the Bipartisan Trade Promotion Authority Act of 2002 (TPA 2002).

In tariff negotiations conducted pursuant to TPA procedures, section 131(a)(1) of the Trade Act of 1974 Act (1974 Act) requires the President to seek advice from the Commission<sup>1212</sup> on the probable economic effect of the reduction or elimination of the tariffs under consideration on industries producing like or competitive articles and on consumers.<sup>1213</sup> The Commission is required to provide its advice within 6 months after receipt of a request,<sup>1214</sup> and receipt of the Commission’s advice or expiration of the 6-month period is a prerequisite for making a formal

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<sup>1210</sup> See *Commission Annual Report* submitted to Congress January 2, 1948, 13–16 for information on the operation of the trade agreements program committees during this period. In the last stages of WWII, discussions on global economic institutions began. Although an International Trade Organization was not established, the framework set out in GATT 1947 provided a multilateral basis for tariff and non-tariff negotiations and rules between 1948 and 1995.

<sup>1211</sup> The GATT was never established formally as an international organization. “CONTRACTING PARTIES” undertook joint action under GATT 1947, including implementation of decisions to conduct tariff negotiations. Individual Contracting Parties (member governments) applied the GATT 1947 provisionally.

<sup>1212</sup> 19 U.S.C. 2151(a)(1). Section 131-134 of the 1974 Act apply to agreements covered under section 103 of TPA 2015. See section 110 of TPA 2015. In Executive Order 13701 of July 17, 2015 (80 Fed. Reg. 43901), the President delegated this function to the USTR. Under TPA 2002, the President had delegated the corresponding function to the USTR. Executive Order 13277 of November 19, 2002 (67 Fed. Reg. 7305).

<sup>1213</sup> 19 U.S.C. 2151(a)(1) and (b). Section 131(a)(1) also applies to negotiations to provide tariff compensation under section 123 of the 1974 Act. The maximum time allotted to the Commission to provide its advice in such cases is 90 days after receipt of the request.

<sup>1214</sup> 19 U.S.C. 2154.

offer in the negotiations to modify tariffs.<sup>1215</sup> Similarly, section 105(a)(2)(B)(III) of TPA 2015 requires the President to request advice from the Commission on the probable economic effects of a tariff reduction on import sensitive agricultural products before initiating tariff negotiations on those products.<sup>1216</sup> While the President is required to seek the Commission's advice regarding tariff modification, seeking advice on possible modifications of non-tariff matters is discretionary.<sup>1217</sup> The USTR has sought such advice in connection with the multilateral negotiations on trade in services.<sup>1218</sup>

In addition to seeking advice from the Commission in connection with the initiation of negotiations, not later than 90 calendar days before the day on which the President enters into (signs) a trade agreement that is subject to TPA procedures, the President is required to provide the Commission with the details of the agreement as it exists at that time and request the Commission to prepare and submit an assessment of the agreement to the President and Congress.<sup>1219</sup> The Commission must submit this report not later than 105 calendar days after the President enters into the trade agreement.<sup>1220</sup>

Finally, if the President seeks extension of TPA procedures beyond July 1, 2018, the President is to inform the Commission, which is then required to submit a report to Congress no later than June 1, 2018. That report is to include the Commission's analysis of the economic impact on the United States of all trade agreements implemented between June 29, 2015 and the date on which the President seeks extension of trade promotion procedures.<sup>1221</sup>

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<sup>1215</sup> The USTR's letter to the Commission requesting advice in accordance with section 131 of the Trade Act of 1974 and section 2104 of TPA 2002 normally requests that the Commission provide its advice as soon as possible. The Commission's notice in the *Federal Register* setting out the schedule for the investigation includes the date that Commission intends to submit its report to the USTR. Since the advice is intended as guidance for ongoing negotiations, key elements of these reports are classified for national security reasons and in no event is any business confidential information submitted to the Commission made public.

<sup>1216</sup> 19 U.S.C. 3804(b)(2)(iii) and 19 U.S.C. 4204(a)(2)(B)(III).

<sup>1217</sup> 19 U.S.C. 2151(a)(2).

<sup>1218</sup> See Request from Ambassador Kirk to the Commission of January 15, 2013 regarding the negotiations on the Trade in Services Agreement (TISA).

<sup>1219</sup> 19 U.S.C. 4204(c)(1). In practice, negotiators provide the Commission with information as soon as possible and update it as negotiations conclude. Under recent free trade agreements, the Commission has faced challenges in producing a report within the strict statutory time frame.

<sup>1220</sup> *Ibid.*, (c)(2). Under TPA 2002, the Commission was provided a maximum of 90 calendar days to submit its report to Congress and the President. In connection with several reports submitted under this provision, the Commission submitted its report significantly in advance of that deadline. This permitted the submission to Congress of a bill implementing the relevant agreement more quickly.

<sup>1221</sup> 19 U.S.C. 4202(c)(3)(B). A similar provision is in TPA 2002 (19 U.S.C. 3803(c)(3)(B)) and the Commission issued its report in May 2005. See Investigation No. TA-2103-1, *The Impact of Trade Agreements under Trade Promotion Authority*, USITC Publication 3780 (Washington, DC: USITC, May 2005).

## Other Requirements for Commission Reports and Advice to the Executive Branch

In the 1974 Act, Congress authorized the President to designate certain articles as eligible for duty-free treatment under the GSP program, subject to certain conditions, including receipt of advice from the Commission.<sup>1222</sup> Similarly, under the African Growth and Opportunity Act (AGOA), the President is authorized to provide duty-free treatment to certain import sensitive articles under the GSP program if, after receiving advice from the Commission, the President determines that the relevant article is not import-sensitive in the context of imports from sub-Saharan African countries.<sup>1223</sup> In addition, when determining whether to grant a waiver of a competitive need limitation<sup>1224</sup> under Title V of the 1974 Act, which covers both GSP and AGOA, the President must receive advice from the Commission regarding whether any industry in the United States is likely to be adversely affected by such waiver.<sup>1225</sup>

In the Omnibus Trade and Competitiveness Act of 1988 (1988 Act), Congress approved and implemented the International Convention on the Harmonized Commodity Description and Coding System (Convention).<sup>1226</sup> In section 1205 of the 1988 Act, Congress tasked the Commission with keeping the Harmonized Tariff Schedule of the United States (HTS) under

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<sup>1222</sup> 19 U.S.C. 2463(a)(1) and (e). Under section 503(f) (19 U.S.C. 2463(f)), the requirements and procedures of sections 131 through 134 of the 1974 Act apply to advice on designation of articles as eligible for preferential treatment under Title V of the 1974 Act.

<sup>1223</sup> 19 U.S.C. 2406(A)(b)(1).

<sup>1224</sup> Competitive need limitations (CNLs) are quantitative ceilings on benefits under the GSP program for each product and beneficiary developing country (BDC). The GSP statute, 19 U.S.C. 2461 *et seq.*, provides that a BDC is to lose its GSP eligibility if a CNL is exceeded and no waiver is granted. The President is authorized to grant a waiver of a CNL under 3 circumstances: (1) in response to a petition and giving great weight to certain statutory criteria; (2) if the article at issue was not produced in the United States on January 1, 1995; or (3) total imports from all countries under the program are *de minimis* (an amount set annually according to statute).

<sup>1225</sup> 19 U.S.C. 2463(d). In a similar vein, under the Caribbean Trade Partnership Act (CBTPA), the Commission must provide its advice on whether fabrics and yarns should be made eligible for preferential treatment under that Act. See CBTPA, 19 U.S.C. 2713(v)(II)(bb) (a so-called “short-supply” provision). Under 19 U.S.C. 2704, the Commission is also required to submit to Congress and the President biennial reports regarding the economic impact of the Caribbean Basin Economic Recovery Act. The Commission issued its latest report on September 30, 2015. Investigation No. 332-227, *Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries* (Washington, DC: USITC, September 30, 2015).

<sup>1226</sup> 19 U.S.C. 3003.

review and with recommending certain types of modifications to the HTS.<sup>1227</sup> Under section 1206 of the 1988 Act, the President is authorized to proclaim modifications to the HTS based on the recommendations by the Commission, if the President determines that the modifications are in conformity with United States obligations under the Convention and do not run counter to the national economic interest of the United States. Prior to proclaiming any modifications, the President must submit a report to the House Ways and Means Committee and the Senate Finance Committee that sets forth the proposed modification and the reasons for the modification.<sup>1228</sup> The President may proclaim a modification to the HTS after the expiration of a layover period of at least 60 legislative days. Recommendations to amend the HTS to implement the most recent amendments to the Convention are, as of this writing, in the layover process before the House Ways and Means and Senate Finance committees.<sup>1229</sup>

The Uruguay Round Agreements Act (URAA) authorized the President to proclaim certain modifications to tariffs and rules of origin, subject to compliance with the “consultation and layover” provisions set out in section 115 of the URAA. Section 111(b), for example, authorizes the President to proclaim the modification or staged reduction of any duty in any tariff category that was the subject of reciprocal duty elimination, i.e., a sector subject to “zero-for-zero” negotiations (such as toys) or harmonization (such as chemicals) during the Uruguay Round negotiations, provided that the United States agrees to the modifications in a multilateral negotiation under the auspices of the World Trade Organization (WTO).<sup>1230</sup> Section 115 of the

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<sup>1227</sup> *Ibid.* at 3005. While most of the investigations and reports involve recommendations to implement amendments to the Convention adopted by the World Customs Organization, the Commission has initiated two investigations at the request of Customs and Border Protection and has addressed technical corrections to the HTS in its investigations and recommendations. See Investigation No. 1205-8, *Certain Footwear: Recommendations for Modifying the Harmonized Tariff Schedule of the United States*, USITC Publication 4178 (Washington, DC: USITC, 2010) and the Addendum to this Report, USITC Publication 4217 (Washington, DC: USITC, 2011); Investigation No. 1205-11, *Recommended Modifications in the Harmonized Tariff Schedule to Conform with Amendments to the Harmonized System Recommended by the World Customs Organization, and to Address Other Matters*, USITC Publication 4556 (Washington, DC: USITC, July 2015). Section 1205 of the 1988 Act sets out procedures for a transparent process and requirements for submission of Commission recommendations to the President.

<sup>1228</sup> 19 U.S.C. 3006. In addition to the long “layover” period under section 1206, any modifications proclaimed under section 1206 cannot take effect before the 30<sup>th</sup> day after the proclamation is published in the *Federal Register*. Other tariff modifications subject to layover periods are based on calendar days and can enter into effect within 15 days after a proclamation is signed.

<sup>1229</sup> The target date for making the majority of the proposed changes to the HTS is January 2017, *Ibid.* A second set of modifications, which are discussed in Investigation No. 1205-12, *Proposed Commission Recommendations to the President to Modify the Tariff Nomenclature in Chapters 3, 44, and 63 of the Harmonized Tariff Schedule*, USITC Publication 4593 (Washington, DC: USITC, February 2016), have a target date of January 1, 2018 for implementation.

<sup>1230</sup> 19 U.S.C. 3521 (b)(1).

URAA (Consultation and Layover Requirements) requires the President,<sup>1231</sup> *inter alia*, to obtain advice from the Commission on the proposed actions.<sup>1232</sup> Consistent with section 111(b), the Commission has provided advice under Section 115 regarding, *inter alia*, the effects of implementation of the Information Technology Agreement, additions to the pharmaceutical appendix to the HTS, and the elimination of duties on most distilled spirits.<sup>1233</sup> The TPA 2015 expressly provides that the authority set out in section 111 of the URAA is not affected, and thus is available to implement the results of tariff negotiations in the relevant sectors.

The longstanding approach of authorizing the President to proclaim changes in certain tariff-related matters, conditioned on compliance with “consultation and layover” provisions, is also embodied in legislation implementing agreements that have been approved pursuant to TPA procedures. Each of the implementing bills enacted under the procedures in TPA 2002, for example, includes a section setting forth consultation and layover requirements that apply under provisions authorizing the President to proclaim modifications to tariffs, including the acceleration of tariff cuts, and changes to certain rules of origin.<sup>1234</sup>

As an example, section 201(b) of the United States-Chile Free Trade Agreement Implementation Act (Chile Implementation Act)—one of the many implementing bills enacted under TPA 2002—authorizes the President to modify the staging of any duty treatment set forth in Annex 3.3 of

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<sup>1231</sup> The President has assigned responsibility under section 115 to request advice from advisory committees and the Commission, submit reports to the House Ways and Means and Senate Finance Committees, and consult with these committees to the USTR. Presidential Memorandum to the United States Trade Representative of September 29, 1995 (60 Fed. Reg. 52061) (October 4, 1995).

<sup>1232</sup> 19 U.S.C. 3524 (1)(B). The President must also obtain advice from the appropriate private sector advisory committees and submit a report to the Ways and Means Committee and Senate Finance Committee that sets out the proposed action, reasons for the action, and the advice received from the Commission and the advisory committee. The President must consult with these committees and wait at least 60 calendar days after submitting the required report before proclaiming an action. *Ibid.* at (2) through (4).

<sup>1233</sup> *E.g.*, Investigation No. 332-380, *Advice Concerning the Proposed Modification of Duties on Certain Information Technology Products and Distilled Spirits*, USITC Publication 3031 (Washington, DC: USITC, 1997); Investigation No. 332-376, *Advice Concerning the Addition of Certain Pharmaceutical Products and Chemical Intermediates to the Pharmaceutical Appendix to the Harmonized Tariff Schedule of the United States*, USITC Publication 3011 (Washington, DC: USITC, 1997). (Additional USITC reports on proposed updates to the pharmaceuticals appendix are found at USITC Publication 3167 (Washington, DC: USITC, 1999); USITC Publication 3883 (Washington, DC: USITC, 2006); and USITC Publication 4181 (Washington, DC: USITC, September 2010)). The Statement of Administrative Action provides some further examples of sectors that could be subject to section 111 of the URAA.

<sup>1234</sup> *E.g.*, section 103 of the United States-Singapore Free Trade Agreement Implementation Act (19 U.S.C. 3805 note) referenced in sections 201(b) and 202(o) of that Act; section 104 of the United States-Panama Trade Promotion Agreement Implementation Act referenced in sections 201(b) and 202(o) of that Act; and section 104 of the United States-Korea Free Trade Agreement Implementation Act referenced in sections 201(b) and 202(o) of that Act. Authority to proclaim tariff modifications and changes to rules of origin subject to compliance with consultation and lay-over requirements is also in the North America Free Trade Agreement (NAFTA) Implementation Act and requests for advice on modifications to NAFTA rules of origin have been frequent. *E.g.*, *Probable Economic Effect of Certain Modifications to the North American Free Trade Agreement Rules of Origin*, Investigation No. 103-27 (November 2013) for the most recent Commission report.

the United States-Chile Free Trade Agreement (USCFTA), subject to compliance with the consultation and layover provisions set forth in section 103 of the Chile Implementation Act.<sup>1235</sup> Similarly, section 202(o)(2)(A) of that Act authorizes the President to proclaim modifications to the rules of origin in Annex 4.1 to the USCFTA.<sup>1236</sup> Thus, in accordance with section 103 of the USCFTA, the Commission provided advice to the President on accelerating tariff elimination for certain vegetables and grape juice under the USCFTA,<sup>1237</sup> and on modifications of the rules of origin under that Agreement.<sup>1238</sup> On both issues, the President subsequently proclaimed the proposed modifications.<sup>1239</sup>

## Dispute Settlement

As described in previous chapters, the Commission has investigative responsibilities for administering various U.S. trade laws, including those relating to antidumping, subsidies, countervailing duties, and safeguards. Commission actions under U.S. law may be subject to dispute settlement in the WTO to the extent that those actions constitute a measure covered under a WTO agreement.

The Commission's role in the context of dispute settlement is an important one, albeit one that is not often in the spotlight. Although USTR is the lead agency representing the United States in the context of WTO dispute settlement,<sup>1240</sup> the Commission plays an active role in helping to defend the actions that it has taken and in determining "compensation" owed to or by the United States if a measure that has been found to be inconsistent with a WTO obligation is not brought into compliance. In addition, in certain disputes involving U.S. obligations under the WTO Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the USTR may request that the Commission provide an advisory opinion on whether it can take action under the relevant U.S. law that would render the

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<sup>1235</sup> 19 U.S.C. 3805 note, section 201(b).

<sup>1236</sup> *Ibid.*, section 202(o)(2)(A). This authority does not apply to chapters 50 through 64, except to the extent provided for in subparagraph 202(o)(2)(B).

<sup>1237</sup> Investigation No. 332-498 and Chile FTA-103-020, *Certain Vegetables and Grape Juice: Probable Economic Effect of Accelerated Tariff Elimination for Certain Goods of Chile*, USITC Publication 4017 (Washington, DC: USITC, June 2008).

<sup>1238</sup> Investigation No. Chile FTA-103-019, *Probable Economic Effect of Certain Modifications to the United States-Chile Free Trade Agreement Rules of Origin*, USITC Publication 4042 (Washington, DC: USITC, October 2008).

<sup>1239</sup> Proclamation 8214 of December 27, 2007 (73 Fed. Reg. 1439).

<sup>1240</sup> 19 U.S.C. 2171(c)(1)(C) and (D). The Commission's *Annual Report* typically includes a table describing trade litigation, including that before the WTO. *E.g.*, *The Commission's Annual Report for Fiscal Year 2000*, USITC Publication 3445, 105-07, which, in addition to table V listing litigation, includes a chart showing the number of pending cases and the proportion that involve GATT/WTO issues, AD/CVD, section 337, or Administrative issues for FYs 1995 through 2000.

Commission's action "not inconsistent" with the relevant findings of the WTO dispute settlement panel or Appellate Body.<sup>1241</sup>

## The Process of Providing Reports and Advice to the Executive Branch

### Formal Commission Investigations

The Commission implements its mandates to provide facts, information, and advice to the Executive Branch through formal investigations. The Commission also supports the trade policy making process through informal expert assistance provided by Commission staff to USTR and other agencies.<sup>1242</sup> All Commission reports and assessments must be accurate, objective, and provided in a timely fashion.

The framework for formal investigations to provide reports to Congress and the Executive Branch is set out in statutes and Commission regulations. Section 131(b) of the 1974 Act, for example, sets a maximum time period of 6 months for an investigation under that section. In some cases, such as in section 105 of TPA 2015, the statute identifies elements that need to be part of the investigative process, such as a review of current literature.<sup>1243</sup> The Commission's regulations set out specific procedures that apply in its non-adjudicative investigations, which include an opportunity for submissions from the public, and, in most cases, a hearing.<sup>1244</sup>

The request for a report or advice shapes the investigation and Commission staff often works with USTR staff to help ensure a clear understanding of the issues that the Commission is being asked to address; formulate specific questions that need to be answered; determine the number and timing of reports, and establish whether the report and the material associated with the preparation of the report will be released to the public.<sup>1245</sup> Ultimately, however, the USTR determines the content and details of the request.

The Commission uses investigative teams in fact finding and probable economic effect investigations that include trade analysts, economists, experts in tariff nomenclature or

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<sup>1241</sup> 19 U.S.C. 3538. The Commission also has a role in disputes under chapter 19 of NAFTA, assisting in the defense of its decisions covered under the antidumping, subsidy, and countervailing duty provisions of that Agreement.

<sup>1242</sup> Commission reports are reviewed and approved by the Commission, constitute official Commission views, and require considerable time to produce and submit. Technical advice received from Commission staff can be obtained more quickly, but cannot be cited as Commission advice.

<sup>1243</sup> Section 105(c)(2) and (3).

<sup>1244</sup> See 19 CFR sections 201 and 205.

<sup>1245</sup> Often USTR requests advice from the Commission on proposed or ongoing negotiations or other matters that must be classified consistent with Executive Order 13026 of December 29, 2009. In those instances, classified material is confidential and not released to the public.



particular service sectors as appropriate, and attorneys. Commission staff employs various methods to gather information for a particular investigation, including public hearings, and surveys and questionnaires sent to U.S. producers, service suppliers, importers, and consumers, with follow-up by telephone interviews and other means. Commission staff may also conduct interviews with industry, academic, and other experts. In most investigations Commission staff engage in secondary research and domestic fieldwork, and in some investigations foreign fieldwork. Fact-finding investigations also typically involve data compilation and analysis and the use of statistical, econometric, and simulation analyses. As U.S. industries have become more globalized, and as the subject matter of fact-finding and probable economic effect investigations has evolved to include important non-tariff issues such as regulatory effects and the protection of intellectual property, the Commission has had to develop additional and new methodologies.<sup>1246</sup>

In response to requests from the Executive Branch in recent years, the Commission has submitted reports on a wide range of issues, including trade barriers affecting small and medium-sized enterprises, environmental and related services, investment performance in sub-Saharan Africa, remanufactured goods, renewable energy and related services, and many other issues.<sup>1247</sup> Similarly, Commission reports on the probable impact of free trade agreements previously mandated under section 2104 of TPA 2002, and now under section 105 of TPA 2015), must address both tariff and non-tariff issues and more recent reports include quantitative and qualitative assessments of non-tariff as well as tariff issues.<sup>1248</sup> On May 18, 2016, the Commission submitted its report under section 105 of TPA 2015 with regard to the potential effects of the Trans-Pacific Partnership (TPP) Agreement on the U.S. economy.<sup>1249</sup> In light of the number of signatories, the nature and number of commitments, and the size and scope of the

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<sup>1246</sup> E.g., Investigation No. 332-514, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, USITC Publication 4199 (amended) (Washington, DC: USITC, November 2010) at "Chapter 6: Frameworks for Assessing the Quantitative Effects of Intellectual Property Infringement and Indigenous Innovation Policies in China on the U.S. Economy."

<sup>1247</sup> Investigation No. 332-54, *Trade Barriers that U.S. Small and Medium-Sized Enterprises Perceive as Affecting Exports to the European Union*, USITC Publication 4455 (Washington, DC: USITC, March 2014); Investigation No. 332-533, *Environmental and Related Services*, USITC Publication 4389 (Washington, DC: USITC, March 2013); Investigation No. 332-542, *AGOA: Trade and Investment Performance Overview*, USITC Publication 4461 (Washington, DC: USITC, April 2014); Investigation No. 332-525, *Remanufactured Goods: An Overview of the U.S. and Global Industries, Market and Trade*, USITC Publication 4356 (Washington, DC: USITC, November 2012); Investigation No. 332-534, *Renewable Energy and Related Services: Recent Developments*, USITC Publication 4421 (Washington, DC: USITC, September 2013).

<sup>1248</sup> In the past, the evaluation of the effect of non-tariff measures was more qualitative than quantitative, but this is evolving as methodology improves. See e.g., Investigation No. TA-2104-24, *U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects*, USITC Publication 3949 (Washington, DC: USITC, September 2007) at "Introduction: Scope and Approach of the Report."

<sup>1249</sup> Investigation No. TPA-105-001, *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, USITC Publication 4607 (Washington, DC: USITC, May 2016).

economic relationship between the United States and the TPP economies, this report is the most complex and significant report of its kind.

In obtaining information for its reports and advice, the Commission must maintain a working relationship with companies and workers that enables it to gather as much information as possible, respect confidentiality, and is transparent and accessible. As noted above, the Commission uses surveys, questionnaires, hearings, field-work, and outreach to individual sources to gather information for its investigations. Obtaining information from companies can present challenges, as a company may have concerns that providing information could adversely affect its relationship with its foreign or domestic customers and competitors. In addition, a company could have concerns about its ability to do business in another country, if the foreign government considers that the information that the company provides (or the Commission's decision) harms the country's interests.

## **Informal Technical Assistance to the Executive Branch**

Many of the reports and advice that the Commission provides to the Executive Branch are required under various statutes and are conducted under formal procedures and time frames. In some cases, however, the question posed does not merit a formal investigation, and the Commission provides information on an informal basis. For example, Commission staff frequently provide factual information in response to questions from other government agencies. These Commission responses can be provided in person, via phone and email, or in the form of short papers or spreadsheets. The Commission is represented on the Trade Policy Staff Committee (TPSC), and through its participation in the TPSC, the Commission staff provides briefings on Commission reports and responds to agencies' questions regarding those reports. Although the Commission does not engage in policy-making, it benefits from being aware of trade issues of concern to other agencies. It can provide current information, anticipate future needs, and work to develop necessary expertise to address those concerns.

## **Conclusion**

Although the Commission's responsibilities and procedures to provide information and analysis to the Executive Branch have evolved over the past 100 years, the core principles of transparency, objectivity, and responsiveness to the needs of those requesting and receiving its advice have remained constant. Starting with the Revenue Act and carrying through to the enactment of TPA 2015, Congress has authorized the Executive Branch to exercise specific authorities upon receipt of reports and recommendations from the Commission. That action has and continues to exhibit a confidence in the Commission's expertise in providing non-

partisan, objective information and analysis in a timely fashion. The Executive Branch has accepted and worked with the condition of receiving information and advice from the Commission, and considers the Commission and its staff to be an invaluable resource to the President, USTR, and other agencies that make and implement U.S. trade policy.



# Conclusion

Paul R. Bardos



As was stated in Chapter 1, the Commission sought to focus on its mandate for independence, lack of partisanship, and objectivity as a theme of this book. The chapters that followed have illustrated in various ways how the need for an agency like the Commission led first to its creation with a narrow mission, then to the addition of many responsibilities, and finally to the methods the agency adopted to carry out its mandate.

During the United States' first century, Congress repeatedly sought, without success, to create a source of useful information on which to base the setting of tariffs. In 1916, despite misgivings on the part of the President and members of Congress, the U.S. Tariff Commission was established to provide such information. Over the ensuing hundred years, the agency was given more and more tasks as its usefulness became apparent.

At first the Commission's primary responsibility, tariff activities have continued up to the present day in spite of the reduction of U.S. tariffs to relatively low levels. Well after the agency's creation, it began conducting investigations concerning imports that were alleged to be dumped or subsidized; this practice has continued, involving industries producing a wide range of products. The agency also carried out safeguard investigations; although few such proceedings have occurred in recent years, they were a mainstay of Commission activities for many years, and may become so again (a number of cases have been filed recently). An early mandate to investigate unfair practices eventually made the Commission into an important forum for the litigation of intellectual property rights. Both Congress and the executive branch have sought and continue to seek the Commission's assistance in the study of a wide range of international trade issues, leading to the agency's development of the capability to perform increasingly sophisticated industry and economic analysis.

Now that the Commission has completed its first century, there is hope that the next hundred years will not soon see the agency's demise. The continued high rate of complaint filings under section 337 of the Tariff Act of 1930 and the recent increase in petition filings under title VII of that Act show that holders of U.S. intellectual property rights and members of domestic industries still find value in participating in Commission proceedings. Congress and the U.S. Trade Representative continue to request that the Commission conduct studies on issues of increasing complexity. The very recent addition of new responsibilities concerning miscellaneous tariff bills reflects Congress' belief that the Commission is not only useful because of its operations of long standing, but is also capable of making additional contributions to the effectiveness of United States international trade policy.



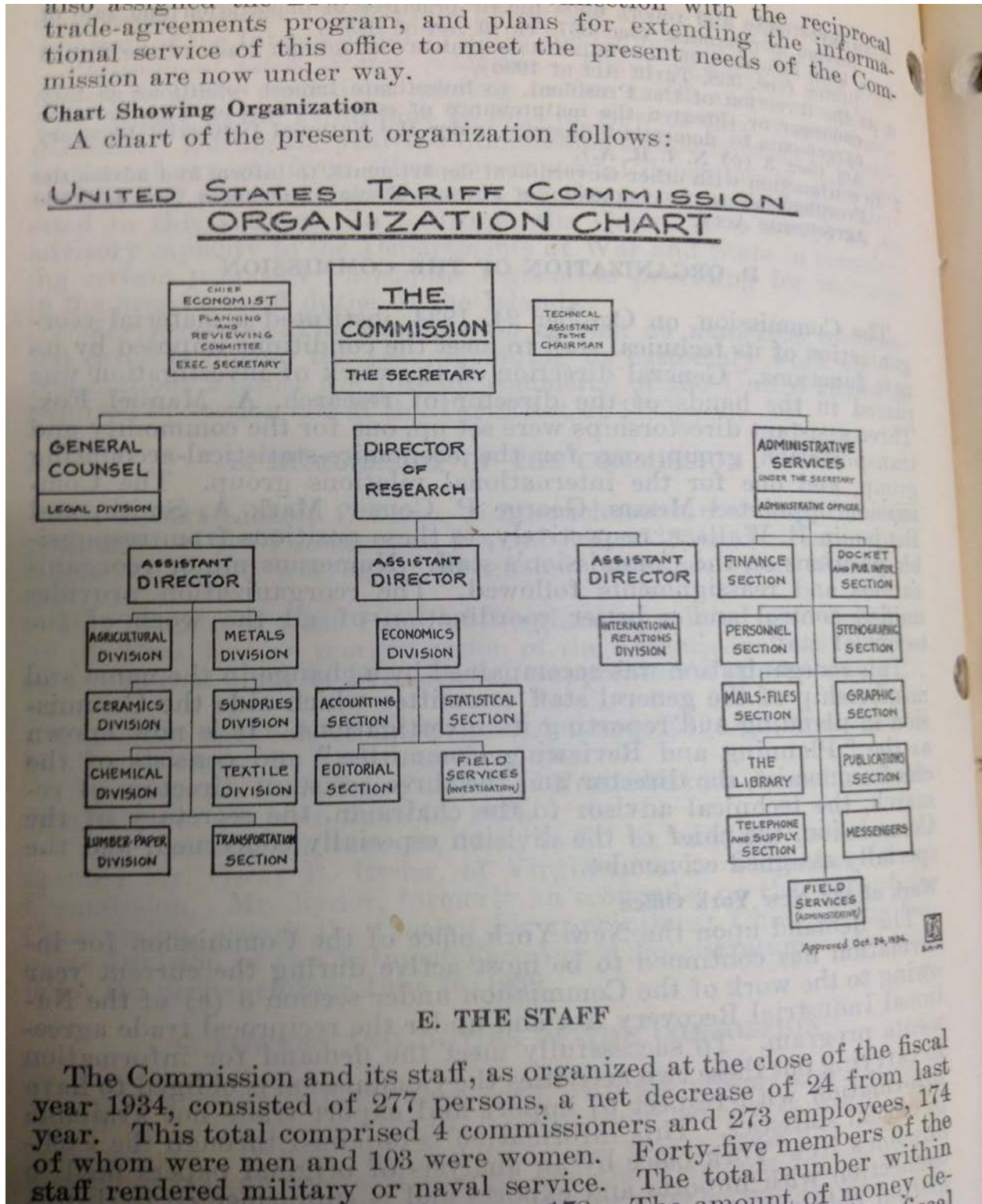


# **Appendix A**

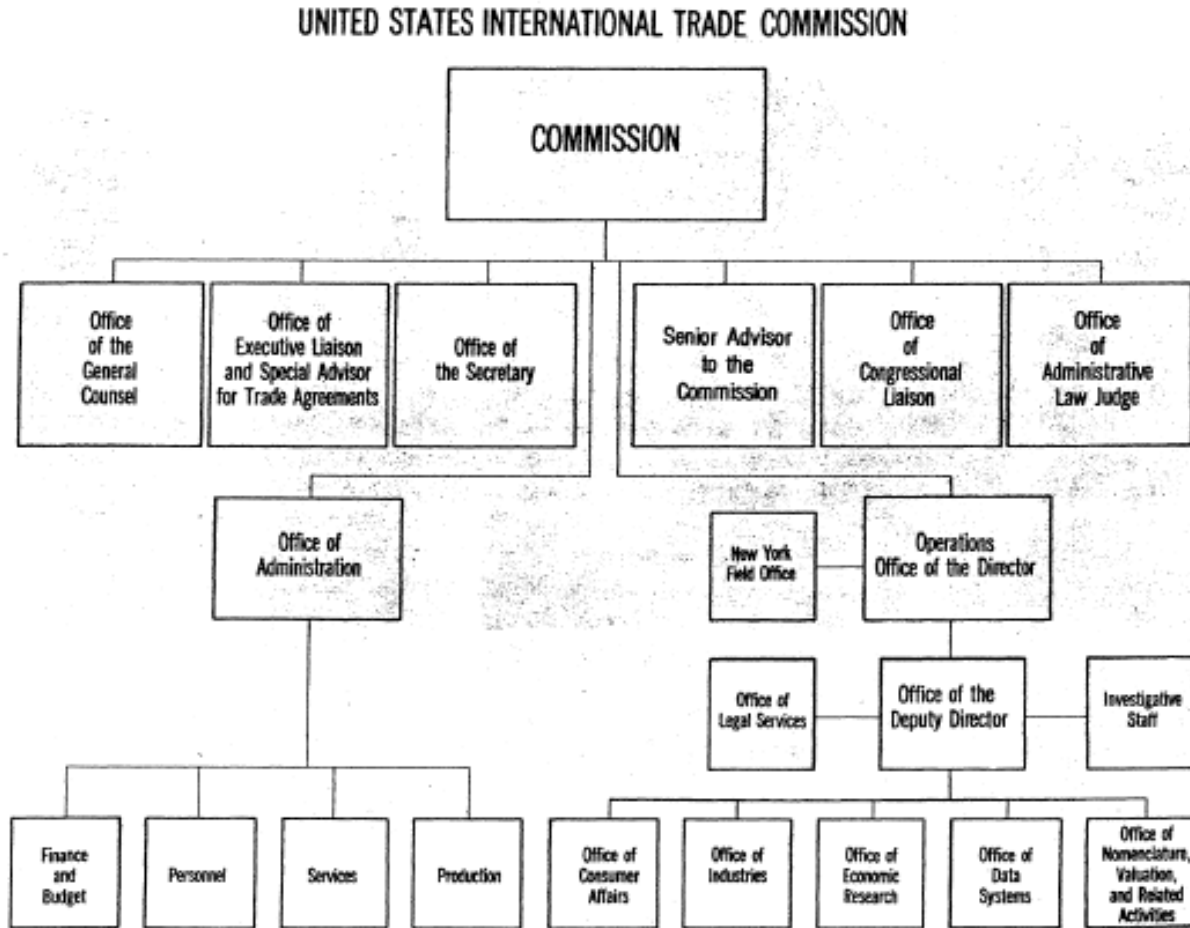
## **Organization Charts for the Commission from 1934, 1977, and 2016**



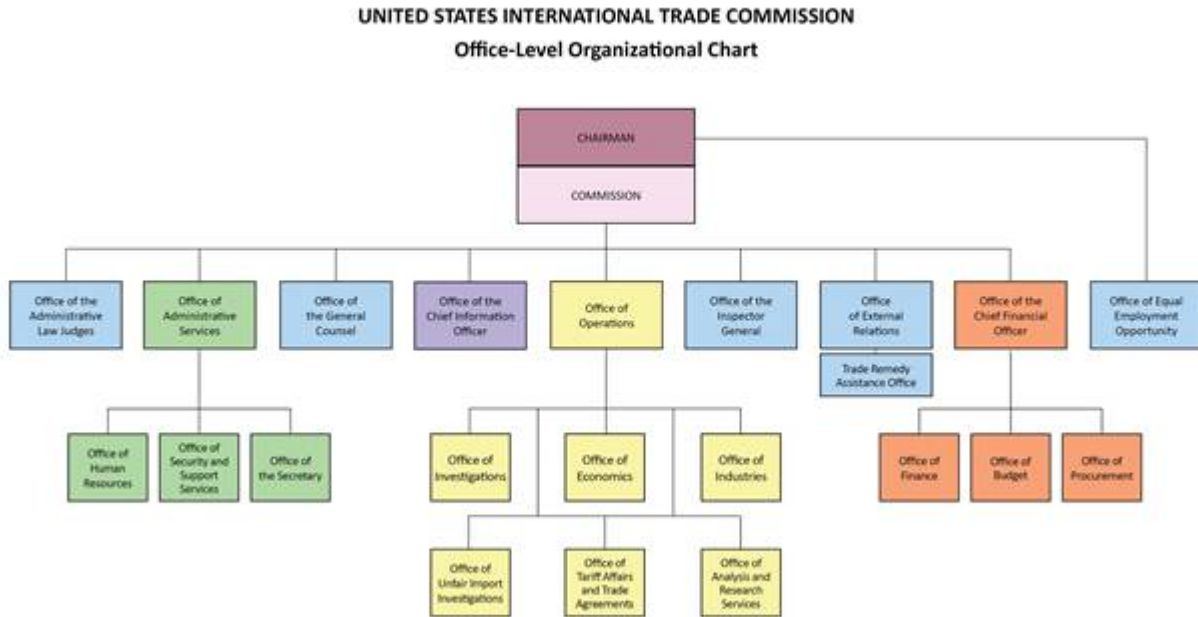
The 1934 chart is from USTC, *Eighteenth Annual Report of the United States Tariff Commission June 30, 1934* (Washington, DC: GPO, January 2, 1935), 18.



The chart from 1977 is from U.S. International Trade Commission, Annual Report Fiscal Year 1977 (Washington, DC: Government Printing Office, 1978), 28.



The 2016 chart appears in U.S. International Trade Commission, *Annual Performance Plan, FY 2016-17*, and *Annual Performance Report, FY 2015* ( February 9, 2016), 7.





# **Appendix B**

## **The Commissioners who have served on the U.S. Tariff Commission or the U.S. International Trade Commission, from 1917 to 2017**





The list is maintained by the Office of the Secretary to the Commission

Number	Commissioner	Party Affiliation	State	Entered on Duty	Ended Service
86	Schmidlein, Rhonda K.	Democrat	MO	4/28/2014	N.A.
85	Kieff, F. Scott	Republican	IL	10/18/2013	6/30/2017
84	Broadbent, Meredith M.	Republican	VA	9/10/2012	N.A.
83	Johanson, David S.	Republican	TX	12/8/2011	N.A.
82	Pinkert, Dean Arthur	Democrat	VA	2/26/2007	2/28/2017
81	Williamson, Irving A.	Democrat	NY	2/7/2007	N.A.
80	Aranoff, Shara L.	Democrat	MD	9/6/2005	4/4/2014
79	Pearson, Daniel	Republican	MN	10/8/2003	10/18/2012
78	Lane, Charlotte R.	Republican	WV	8/27/2003	12/7/2011
77	Devaney, Dennis M.	Republican	MI	1/16/2001	12/20/2001
76	Okun, Deanna Tanner	Republican	ID	1/3/2000	8/8/2012
75	Askey, Thelma J.	Republican	TN	8/7/1998	1/16/2001
74	Koplan, Stephen	Democrat	VA	8/4/1998	2/6/2007
73	Hillman, Jennifer A.	Democrat	IN	8/4/1998	2/23/2007
72	Miller, Marcia E.	Democrat	IN	8/5/1996	9/6/2005
71	Bragg, Lynn M.	Republican	MD	3/31/1994	3/2/2003
70	Watson, Peter S.	Republican	CA	12/17/1991	10/31/1996
69	Nuzum, Janet A.	Democrat	VA	11/26/1991	2/2/1997
68	Crawford, Carol T.	Republican	VA	11/22/1991	1/3/2000
67	Newquist, Don E.	Democrat	TX	10/18/1988	1/31/1998
66	Cass, Ronald A.	Democrat	MA	1/20/1988	6/16/1990
65	Brunsdale, Anne E.	Republican	DC	1/3/1986	3/7/1994
64	Rohr, David B.	Democrat	MD	3/27/1984	8/5/1996
63	Liebeler, Susan W.	Independent	CA	4/20/1984	10/7/1988
62	Lodwick, Seeley G.	Republican	IA	8/12/1983	12/16/1991
61	Haggart, Veronica A.	Republican	DC	3/23/1982	6/16/1984
60	Frank, Eugene J.	Republican	PA	9/22/1981	10/23/1982
59	Eckes, Alfred E., Jr.	Republican	VA	9/21/1981	7/2/1990
58	Calhoun, Michael J.	Independent	DC	2/1/1980	9/10/1982
57	Stern, Paula	Democrat	DC	10/16/1978	1/27/1987
56	Alberger, Bill	Democrat	OR	10/20/1977	6/16/1982
55	Minchew, Daniel	Democrat	GA	10/8/1974	9/30/1978
54	Ablondi, Italo H.	Democrat	NY	7/25/1972	10/10/1978
53	Parker, Joseph O.	Republican	VA	8/9/1971	12/31/1979
52	Bedell, Catherine	Republican	WA	7/12/1971	11/30/1981
51	Mize, Chester L.	Republican	KS	1/25/1971	3/17/1971
50	Young, J. Banks	Democrat	VA	1/6/1971	7/1/1974
49	Moore, George M.	Republican	MD	8/26/1969	1/16/1981
48	Newsom, Herschel D.	Republican	IN	11/21/1968	7/2/1970
47	Leonard, Will E., Jr.	Democrat	LA	10/29/1968	6/10/1977
46	Metzger, Stanley D.	Democrat	DC	11/9/1967	7/11/1969
45	Clubb, Bruce E.	Republican	VA	7/3/1967	6/16/1971
44	Kaplowitz, Paul	Democrat	DC	1/26/1966	6/16/1967
43	Thunberg, Penelope H.	Independent	MD	8/3/1965	6/16/1970
42	Fenn, Dan H., Jr.	Democrat	MA	10/18/1963	6/21/1967
41	Culliton, James W.	Independent	IN	12/5/1962	6/16/1968
40	Dorfman, Ben	Democrat	DC	11/2/1961	7/6/1965
39	Overton, J. Allen, Jr.	Republican	WV	5/1/1959	5/31/1962

Appendix B: The Commissioners who have served on the U.S. Tariff Commission or the U.S. International Trade Commission, from 1917 to 2017

Number	Commissioner	Party Affiliation	State	Entered on Duty	Ended Service
38	Dowling, William E.	Democrat	MI	8/22/1955	6/15/1963
37	Jones, J. Weldon	Democrat	TX	6/20/1955	6/16/1961
36	Sutton, Glenn W.	Democrat	GA	9/1/1954	6/16/1972
35	Schreiber, Walter R.	Republican	MD	8/5/1953	6/16/1964
34	Talbot, Joseph E.	Republican	CT	7/15/1965	4/30/1966
34	Talbot, Joseph E.	Republican	CT	4/15/1953	6/16/1965
33	Gregg, John P.	Republican	OR	8/30/1946	10/29/1952
32	Barnes, George Z.	Republican	IL	9/1/1944	8/8/1945
31	McGill, George	Democrat	KS	2/4/1949	6/16/1954
31	McGill, George	Democrat	KS	8/22/1944	6/16/1948
30	Edminster, Lynn R.	Democrat	IL	7/1/1942	6/16/1955
29	Brown, Fred H.	Democrat	NH	8/7/1940	6/16/1941
28	Fox, Abraham M.	Republican	NY	7/27/1937	5/26/1941
27	Grady, Henry F.	Democrat	CA	4/30/1937	8/7/1939
26	Sears, William J.	Democrat	FL	4/30/1937	6/16/1937
25	Durand, E. Dana	Republican	MN	12/8/1935	6/16/1952
24	Stevens, Raymond B.	Democrat	NH	7/1/1937	5/18/1942
24	Stevens, Raymond B.	Democrat	NH	8/20/1935	3/31/1937
23	Ryder, Oscar B.	Democrat	VA	6/13/1934	2/28/1955
22	Collier, James W.	Democrat	MS	3/28/1933	9/28/1933
21	Crisp, Charles R.	Democrat	GA	10/7/1932	12/30/1932
20	Ornburn, Ira N.	Democrat	CT	2/15/1932	6/16/1933
19	O'Brien, Robert L.	Republican	MA	2/15/1932	6/30/1937
18	Coulter, John J.	Republican	ND	9/17/1930	6/16/1934
17	Fletcher, Henry P.	Republican	PA	9/17/1930	11/30/1931
16	Clark, Frank	Democrat	FL	4/12/1928	9/16/1930
15	Dixon, Lincoln	Democrat	IN	9/29/1930	9/16/1932
15	Dixon, Lincoln	Democrat	IN	3/10/1927	9/16/1930
14	Lowell, Sherman J.	Republican	NY	7/6/1926	9/16/1930
13	Brossard, Edgar B.	Republican	UT	9/20/1950	4/30/1959
13	Brossard, Edgar B.	Republican	UT	7/22/1925	6/16/1950
12	Baldwin, A. H.	Republican	NY	6/22/1925	7/3/1926
11	Dennis, Alfred P.	Democrat	MD	3/16/1925	8/29/1931
10	Glassie, Henry H.	Democrat	MD	3/8/1923	3/4/1927
9	Burgess, William	Republican	NJ	7/6/1921	6/1/1925
8	Marvin, Thomas O.	Republican	VA	3/11/1921	9/16/1930
7	Page, Thomas	Democrat	VA	9/17/1930	1/13/1937
7	Page, Thomas	Democrat	VA	2/21/1918	2/28/1923
6	Costigan, Edward P.	Republican	CO	3/26/1917	3/14/1928
5	Culbertson, William S.	Republican	KS	3/26/1917	5/17/1925
4	Kent, William	Independent	CA	3/26/1917	3/1/1920
3	Lewis, David J.	Democrat	MD	3/26/1917	3/4/1925
2	Roper, Daniel C.	Democrat	SC	3/26/1917	9/26/1917
1	Taussig, Frank W.	Independent	MA	3/26/1917	8/1/1919

**Appendix C**  
**Commissioners of the U.S. Tariff**  
**Commission or U.S. International**  
**Trade Commission who have served as**  
**Chairman or Vice Chairman, 1917–**  
**2017**



The list is maintained by the Office of the Secretary to the Commission.

Term start	Term end	Chairmanship succession			
		Commissioner	Chairman #	Party	#
3/30/1917	7/31/1919	Taussig, Frank W.	1	Independent	1
1/15/1920	1/15/1922	Page, Thomas	2	Democrat	7
1/15/1922	1/14/1930	Marvin, Thomas O.	3	Republican	8
1/15/1930	9/16/1930	Brossard, Edgar B.	4	Republican	13
9/16/1930	11/30/1931	Fletcher, Henry P.	5	Republican	17
12/1/1931	6/30/1937	O'Brien, Robert L.	6	Republican	19
7/1/1937	5/18/1942	Stevens, Raymond B.	7	Democrat	24
7/28/1942	3/5/1953	Ryder, Oscar B.	8	Democrat	23
3/5/1953	4/30/1959	Brossard, Edgar B.		Republican	13
5/5/1959	6/16/1961	Talbot, Joseph E.	9	Republican	34
11/2/1961	6/16/1965	Dorfman, Ben	10	Democrat	40
1/26/1966	6/16/1967	Kaplowitz, Paul	11	Democrat	44
11/9/1967	6/16/1969	Metzger, Stanley D.	12	Democrat	46
7/22/1969	6/17/1970	Sutton, Glenn W.	13	Democrat	36
1/25/1971	3/17/1971	Mize, Chester L.	14	Republican	51
7/12/1971	6/16/1975	Bedell, Catherine	15	Republican	52
6/16/1975	12/16/1976	Leonard, Will E., Jr.	16	Democrat	47
12/17/1976	6/16/1978	Minchew, Daniel	17	Democrat	55
6/17/1978	6/19/1978	Moore, George M. *	18	Republican	49
6/19/1978	12/31/1979	Parker, Joseph O.	19	Republican	53
1/1/1980	6/16/1980	Bedell, Catherine		Republican	52
6/17/1980	6/16/1982	Alberger, Bill	20	Democrat	56
6/17/1982	6/16/1984	Eckes, Alfred E., Jr.	21	Republican	59
6/17/1984	6/16/1986	Stern, Paula	22	Democrat	57
6/17/1986	6/16/1988	Liebeler, Susan W.	23	Independent	63
6/17/1988	6/27/1988	Eckes, Alfred E., Jr. *		Republican	59
6/28/1988	3/27/1989	Brunsdale, Anne E. *	24	Republican	65
3/28/1989	6/16/1990	Brunsdale, Anne E.		Republican	65
6/17/1990	12/12/1991	Brunsdale, Anne E. *		Republican	65
12/13/1991	6/16/1994	Newquist, Don E.	25	Democrat	67
6/17/1994	6/16/1996	Watson, Peter S.	26	Republican	70
6/17/1996	8/5/1996	Rohr, David B. **	27	Democrat	64
8/5/1996	6/16/1998	Miller, Marcia E.	28	Democrat	72
6/17/1998	6/16/2000	Bragg, Lynn M.	29	Republican	71
6/17/2000	6/16/2002	Koplan, Stephen	30	Democrat	74
6/17/2002	6/16/2004	Okun, Deanna Tanner	31	Republican	76
6/17/2004	6/16/2006	Koplan, Stephen		Democrat	74
6/17/2006	6/16/2008	Pearson, Daniel R.	32	Republican	79
6/17/2008	6/16/2010	Aranoff, Shara L	33	Democrat	80
6/17/2010	6/16/2012	Okun, Deanna Tanner **		Republican	76
6/17/2012	6/16/2014	Williamson, Irving A.	34	Democrat	81
6/17/2014	6/16/2016	Broadbent, Meredith M	35	Republican	84
6/17/2016	6/16/2018	Williamson, Irving A. **	35	Democrat	81
1/14/2017	6/16/2018	Schmidtlein, Rhonda K.	36	Democrat	86

\*Acting Chairman

\*\* Chairman by operation of law

Appendix C: Commissioners of the U.S. Tariff Commission or U.S. International Trade Commission who have served as Chairman or Vice Chairman, 1917–2017

The list is maintained by the Office of the Secretary to the Commission.

<b>Vice-Chairmanship succession</b>				
<b>Term start</b>	<b>Term end</b>	<b>Commissioner</b>	<b>Party</b>	<b>#</b>
3/30/1917	9/26/1917	Roper, Daniel C.	Democrat	2
2/21/1918	1/4/1920	Page, Thomas	Democrat	7
5/1/1921	1/14/1922	Marvin, Thomas O.	Republican	8
1/15/1922	5/17/1925	Culbertson, William S.	Republican	5
7/22/1925	7/22/1930	Dennis, Alfred P.	Democrat	11
9/29/1930	1/13/1937	Page, Thomas	Democrat	7
1/16/1937	3/31/1937	Stevens, Raymond B.	Democrat	24
7/1/1937	8/7/1939	Grady, Henry F.	Democrat	27
8/8/1939	6/30/1942	Ryder, Oscar B.	Democrat	23
8/4/1942	8/3/1953	Edminster, Lynn R.	Democrat	30
8/8/1953	5/4/1959	Talbot, Joseph E.	Republican	34
5/12/1959	6/16/1961	Overton, J. Allen, Jr.	Republican	39
10/14/1964	6/16/1965	Fenn, Dan H., Jr.	Democrat	42
6/17/1966	6/16/1969	Sutton, Glenn W.	Democrat	36
8/9/1971	6/16/1974	Parker, Joseph O.	Republican	53
8/7/1974	6/16/1975	Parker, Joseph O.	Republican	53
6/16/1975	12/16/1976	Minchew, Daniel	Democrat	55
12/17/1976	6/16/1978	Parker, Joseph O.	Republican	53
6/19/1978	6/16/1980	Alberger, Bill	Democrat	56
6/17/1980	6/16/1982	Calhoun, Michael J.	Independent	58
6/29/1984	6/16/1986	Liebeler, Susan W.	Independent	63
6/17/1986	6/16/1988	Brunsdale, Anne E.	Republican	65
6/28/1988	3/27/1989	Brunsdale, Anne E.	Republican	65
3/28/1989	6/15/1990	Cass, Ronald A.	Democrat	66
6/17/1990	6/16/1992	Brunsdale, Anne E.	Republican	65
6/17/1992	6/16/1994	Watson, Peter S.	Republican	70
6/17/1994	6/16/1996	Nuzum, Janet A.	Democrat	69
8/5/1996	6/16/1998	Bragg, Lynn M.	Republican	71
6/17/1998	6/16/2000	Miller, Marcia E.	Democrat	72
6/17/2000	6/16/2002	Okun, Deanna Tanner	Republican	76
6/17/2002	6/16/2004	Hillman, Jennifer	Democrat	73
6/17/2004	6/16/2006	Okun, Deanna Tanner	Republican	76
6/17/2006	6/16/2008	Aranoff, Shara L.	Democrat	80
6/17/2008	6/16/2010	Pearson, Daniel R	Republican	79
6/17/2010	6/16/2012	Williamson, Irving A.	Democrat	81
6/17/2014	6/16/2016	Pinkert, Dean A.	Democrat	82
8/11/2016	6/16/2018	Johanson, David S.	Republican	83

# **Appendix D**

## **Administrative Law Judges who have served at the U.S. International Trade Commission, 1976–2017**





The list was compiled from information provided by the Commission's Office of the Administrative Law Judges.

<b>Name</b>	<b>Years of Service</b>
Myron R. Renick	1976-77
Donald K. Duvall	1979-84
Janet D. Saxon	1984-95
John J. Mathias	1984-90
Paul J. Luckern	1984-2011
Sidney Harris	1984-2007
Charles E. Bullock	2002-Present
Debra Morriss	1998-2001
Delbert Terrill	2001-05
Robert Barton	2005-07
Carl C. Charneski	2007-11
Theodore R. Essex	2007-17
Robert K. Rogers, Jr.	2008-13
James Gildea	2008-14
David P. Shaw	2011-Present
Thomas B. Pender	2011-Present
Sandra (Dee) Lord	2013-Present
MaryJoan McNamara	2015-Present

