



Summary of the U.S. International Trade Commission Centennial Proceedings

John Benedetto, Lauren Gamache, James Holbein, and Craig Thomsen

Abstract

The U.S. International Trade Commission (USITC) marked its centennial anniversary in 2016. This article summarizes the proceedings of the conference that was organized to celebrate that occasion. Distinguished government officials, academics, litigators, and USITC alumni described how the need arose for the creation of such an agency, the problems experienced in launching it, and how it has fulfilled its mission. These discussions addressed both the high points and the trials and tribulations associated with a hundred years of increasingly complex challenges in collecting trade data, maintaining and reorganizing the tariff code, and conducting antidumping, countervailing-duty, safeguard, intellectual property, and fact-finding investigations. The conference presentations summarized here broadly reflect the structure and scholarship found in the forthcoming book, *A Centennial History of the United States International Trade Commission*.

Suggested citation: Benedetto, John, Lauren Gamache, James Holbein, and Craig Thomsen. "Summary of the U.S. International Trade Commission Centennial Proceedings." *Journal of International Commerce and Economics*. September 2017. <http://www.usitc.gov/journals>.

This article is the result of the ongoing professional research of USITC staff and is solely meant to represent the opinions and professional research of the authors. It is not meant to represent in any way the views of the U.S. International Trade Commission or any of its individual Commissioners. Please direct all correspondence to John Benedetto, Office of Economics, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, or by email to john.benedetto@usitc.gov.

Introduction

On September 8, 2016, the U.S. International Trade Commission (USITC) celebrated its centennial anniversary, harking back to the same date in 1916 when President Woodrow Wilson signed into law legislation creating the U.S. Tariff Commission (the original name of the USITC). As part of its celebration, the USITC held a conference featuring past and present USITC Commissioners, employees, and stakeholders who discussed the USITC's history and role. The following paper summarizes the main points of that conference and broadly reflects the structure and scholarship appearing in the forthcoming book, *A Centennial History of the United States International Trade Commission* (hereafter "the Centennial book"). The summaries that follow are the opinions of the speakers. Additional information about the USITC's centennial, including a transcript of the conference, is available on the USITC website.¹

Opening

Conference Introduction

The centennial began with an introduction by Paul Bardos, formerly USITC Assistant General Counsel for Administration and the editor in chief of the forthcoming Centennial book. Bardos welcomed the participants and the audience, and noted that the Centennial book was currently under review and would be available to the public through the USITC website. Additionally, he informed participants that the USITC's *Journal of Commerce and International Economics* would publish a summary of the conference's presentations.

Irving A. Williamson, Chairman, U.S. International Trade Commission

Next, USITC Chairman Williamson described the USITC as an agency that was created in 1916 to be independent, bipartisan, expert, and objective. He stated that the United States had changed greatly since 1916, noting that although the economies of the United States itself and its trading partners are now much more diverse, trade policy remains controversial.

Chairman Williamson went on to say that the USITC was created to serve the President and the Congress; thus, it was appropriate that the first message about the agency's centennial anniversary was a letter from President Barack Obama. In the letter, President Obama stated that the USITC had served 17 Presidents and 50 Congresses, in addition to benefiting U.S. businesses and workers through its efforts to end harmful trade practices and to provide insight into the country's competitiveness. President Obama also commended the dedication and efforts of USITC employees over the years.

After noting that a previous Chairman of the House Ways and Means Committee, Claude Kitchin, had played a key role in establishing the USITC, Chairman Williamson introduced the

¹ See <https://www.usitc.gov/centennial.htm>

Summary of the Proceedings of the USITC's Centennial

first keynote speaker, the current Chairman of the House Ways and Means Committee, Kevin Brady.

Keynote Speakers

Summaries by John Benedetto

U.S. Congressman Kevin Brady, Chairman of the Committee on Ways and Means, U.S. House of Representatives

U.S. Congressman Kevin Brady stated that throughout its 100-year history, the USITC has provided Congress and the President with the tools needed to accomplish their trade policy goals. In his opinion, the ability to conduct international trade free of government interference is the greatest economic freedom—one that allows entrepreneurs to sell their products throughout the world, while allowing consumers to buy what they wish at affordable prices.

Brady described how global commerce has changed dramatically over the past 100 years, raising questions of how to set trade policies that support competition and growth while taking into account all U.S. companies and workers. Answering those questions requires reliable and unbiased information. He noted that the USITC has provided objective analysis in this area as well as impartial administration of U.S. trade remedy laws.

The Congressman particularly emphasized the USITC's role in the recent Miscellaneous Tariff Bill process, noting that the House had voted 415 to 2 to approve an expanded role for the USITC due to congressional confidence in the agency. He explained that the new process will allow tariff relief for U.S. manufacturers while upholding the House's ban on earmarks.

Brady concluded by presenting a framed statement he had placed in the *Congressional Record* to thank the USITC for its work, adding that he had ordered a flag to be flown over the U.S. Capitol in commemoration of the agency's 100-year history.

Sharon Prost, Chief Judge, U.S. Court of Appeals for the Federal Circuit

Chairman Williamson introduced the next panelist, Sharon Prost, by noting that the Federal Circuit U.S. Court of Appeals reviews all appeals of USITC determination in section 337 (intellectual property) cases, as well as any appeals of USITC Title VII (import injury) determinations in the Court of International Trade.

Judge Prost congratulated and thanked the USITC on behalf of herself and her 17 colleagues on the Court of Appeals for the Federal Circuit. She described the fields of trade law and intellectual property enforcement as challenging, given that its practitioners are always "chasing" developments in science, technology, and the global economy.

Everett Eissenstat, Chief International Trade Counsel, U.S. Senate Committee on Finance (Majority)

Everett Eissenstat, the third speaker, focused on the special relationship between Congress and the USITC. He noted that Senator Orrin Hatch, Chairman of the Senate Committee on Finance, along with Senator Ron Wyden, the committee's Ranking Member, would be introducing a statement for the record today commemorating the USITC's Centennial.

Eissenstat stated that in his experience, the most important aspect of an institution is its people. In his view, the USITC has "truly exceptional" personnel, including the Commissioners, economists, policy analysts, and congressional affairs staffers.

Ambassador Michael Froman, U.S. Trade Representative

Ambassador Froman began by stating that the USITC is a manifestation of the frequent bipartisan collaboration between the executive branch and Congress. He recounted how before the existence of the USITC (or its predecessor, the Tariff Commission), all tariff making was researched and analyzed by Congress itself. As part of that process, Congress needed to assess the factual basis of requests concerning tariff policy. One congressman described tariff legislation as responsible for having shortened the lives of other members of Congress, due to the strain of the process.

Froman remarked that over the 100 years of the existence of the USITC, there have been profound changes in the U.S. economy and technology. This country has gone from the days of the Model T and manual typewriters to the modern driverless car and websites, and from the days of a more isolationist policy stance to becoming the world's most open economy. As each of these phases unfolded, the USITC was involved in wrestling with the trade issues surrounding them, whether reporting on trade in particular products, writing about digital trade, handling over 2,000 trade remedy cases, or producing valuable tools such as DataWeb.

Froman noted that the agency's first Acting Secretary, W.M. Stewart, described the then-Tariff Commission as having "no doctrine to preach, and no panacea to prescribe." Froman added that the USITC has continued to take this attitude toward all its work. He pointed in particular to the role played by the USITC at key junctures in U.S. trade history, such as the approval of the Reciprocal Trade Act of 1934. More recently, he said, the World Trade Organization (WTO) and U.S. free trade agreements had helped prevent "protectionist" responses to the 2008 financial crisis. He remarked that the country is at a similar point with the Trans-Pacific Partnership under consideration, and that the USITC's analysis is playing a key role in informing the debate over this proposed agreement.

In conclusion, Froman thanked and congratulated the USITC on its centennial, stating that he looked forward to working with it in the future.

**Jayme White, Chief Advisor, International Competitiveness and Innovation,
U.S. Senate Committee on Finance (Minority)**

Jayme White also congratulated the USITC on its centennial. He stated that the USITC's analysis of the impact of trade agreements on the U.S. economy has been vital to Congress's understanding of whether to negotiate and approve new trade agreements. He added that the 332 reports on new issues (such as digital trade) are also important to the Finance Committee. He stressed that the USITC does essential work in ensuring that imports do not infringe on U.S. intellectual property, and that applying trade remedy laws helps ensure that Americans have confidence in the global trading regime.

**Angela Ellard, Chief Trade Counsel and Trade Subcommittee Staff Director,
Committee on Ways and Means, U.S. House of Representatives (Majority)**

Angela Ellard began by acknowledging that the day of the centennial anniversary coincided with another milestone in American history, the 50th anniversary of *Star Trek*. Noting that the USITC is well known on the Hill to both members of Congress and staff, she praised the USITC staff for meeting with Hill staff to explain their findings. She added that she had found in her office a 1936 publication from the Tariff Commission, which described analyses of specific products (including rayon filaments in yarn) similar to current USITC analyses. In closing, she invoked the words of *Star Trek*'s Mr. Spock: "Live long and prosper."

**Jason Kearns, Chief International Trade Counsel, Committee on Ways and
Means, U.S. House of Representatives (Minority)**

Jason Kearns congratulated the USITC for its centennial and noted that the committee's ranking member, Sander Levin, had also congratulated the USITC in a letter. He noted in particular that the USITC had shown flexibility and creative thinking on some concerns that had been raised about 337 investigations. He added that Levin would like to see the USITC incorporate new and creative thinking in its economic analysis. Kearns concluded that he looked forward to working with the USITC to ensure it meets its mission for the next 100 years.

Panel Conclusion

Chairman Williamson thanked the keynote speakers for their presentations. He then asked former Commissioners in attendance to stand and be recognized for their contributions, followed by former staff and then current staff. He then thanked the organizers of the centennial event, including Paul Bardos and USITC Deputy Chief of Staff Alex Hammer.

The Creation of the USITC

Summaries by James Holbein

Panel Introduction

This panel discussed the creation of the USITC, focusing on the era leading up to the founding of the U.S. Tariff Commission during the Wilson presidency. One of the panelists recounted the circumstances at the time when the Commission was created, while the other reviewed tariff policy from the beginnings of the republic. The commentators' anecdotes about several historical personalities, including President Woodrow Wilson, helped illustrate the political and informational needs of the time. All made the point that the USITC was established, from the outset, as an independent, objective, highly expert advisor to both the Congress and the executive branch.

Creation of the Tariff Commission in 1916

Elliott Brownlee, professor emeritus of history at the University of California, Santa Barbara, discussed the political world of 1916 to provide a frame of reference for the founding of the Tariff Commission. Tariffs played an important role in the American economy for more than a century after its founding, given that up until 1913, tariff duties were roughly 40 percent or more on most goods. However, there were no mechanisms or institutions to monitor tariff policy or to provide input to Congress in using its constitutional power to set tariffs.

After Woodrow Wilson won the Presidential election in 1912, he guided the passage of legislation in 1913 that cut tariff rates by one-third. He resisted the idea of having a tariff commission. But the economy soured in the ensuing years, and Wilson wished to prepare for America's entry into World War I. Wilson began to listen to his advisors' view that establishing a tariff commission might mollify some voters who would otherwise be tempted to vote for Theodore Roosevelt in the 1916 election.

President Wilson and House Majority Leader Claude Kitchin worked out a plan to create this tariff commission as part of an ambitious revenue bill. The stated idea was to have an objective fact-finding body that could advise Congress on writing freer trade laws after the war. The concept helped calm opposition to legislation to boost the income tax and otherwise ensure America's preparedness for war. After a great deal of political jockeying in both the Senate and the House, the revenue bill, with the Tariff Commission proposal included, passed both houses and was signed into law on September 8, 1916.

Trade Data Collection in the Early United States

Andrew Reamer, professor of economics at George Washington University, observed that the creation of the Tariff Commission in 1916 was the culmination of 127 years of congressional effort to develop better data about trade.

Tariffs provided nearly all of the federal government's revenues from 1789 to 1860, and half of federal revenues between the Civil War and the creation of the Tariff Commission. Forty-two tariff laws were passed between 1789 and 1916, shaped by a variety of tensions about government revenue needs and about regional interests versus national interests. Tariffs were set by Congress in line-by-line debates that were increasingly lengthy, complex, passionate, and divisive. Underlying the debate was the issue of whether tariffs were primarily for revenue, or should also be part of the "American System" for developing industry using economic policies that included protectionism. Pressures from the competing needs fostered interest in obtaining objective, thorough data to better set tariffs and manage the economy.

In the early period of the nation, Congress had limited success in obtaining adequate statistics to set trade policy. The first and second Census of Manufactures, in 1810 and 1820, were failures because the data-gathering techniques were inadequate. The third census, held in 1840, had better results. Simultaneously, Congress was continually asking for more comprehensive information on imports and exports. Over the next few years, Congress mandated significant changes: it created a management board for the 1850 census, brought in statisticians, and improved management techniques, so the 1850 census of population and manufactures was successful.

From 1850 to 1916, the government became more adept at collecting data. A Bureau of Statistics was established in the Treasury Department, as well as a Revenue Commission that analyzed internal revenue but could not analyze tariffs, due to lack of information and the complexity of the task. As data collection and analysis improved, some hired experts repeatedly pushed for lower tariffs, but Congress remained opposed for decades. President Taft created a Tariff Board in 1909, for example, but the board recommended lowering tariffs and Congress cut off its funding. The Tariff Commission was an outgrowth of many decades' debate, research, trial, and error.

Individual Contributions

Professor Doug Irwin, professor of economics at Dartmouth University, described the contributions of a few outstanding individuals in the United States' pre-Commission years:

- David Wells, Special Commissioner of Revenue from 1866 to 1869, studied the nation's tariff code. Wells, who was trusted by tariff proponents (including the American System intellectual Henry Carey), concluded that it needed drastic reform.
- Frank Taussig, a professor of economics at Harvard University, wrote a memo to President Wilson to justify the creation of a Tariff Commission. This memo helped

persuade President Wilson to advocate for the Commission. With the Commission's creation, Professor Taussig became its first chairman.

Robert Enholm, Executive Director of the Woodrow Wilson House, then provided insight into how President Wilson's thoughts and motivations helped in the creation of the Commission. One of the founders of the discipline of political science, President Wilson, like Theodore Roosevelt, was a progressive. As such, he saw himself as looking to increase economic efficiency by using accurate data. In the current data-centric era, this idea seems commonsensical, but the movement to management using data, metrics, and similar tools really began during Wilson's time.

During the question-and-answer period, Brownlee described how there had been reluctance in the Wilson administration to form a tariff commission because anti-tariff Democrats viewed the commission as a way to raise tariffs, while pro-tariff Republicans viewed it as a way to eliminate them. However, in order to appeal to Theodore Roosevelt's constituency of progressive Republicans (who were open to some tariff lowering), Wilson became willing to compromise by creating the Tariff Commission.

Tariff Activities

Summaries by John Benedetto

Panel Introduction

The panel on tariff activities focused on the USITC's work on maintaining and updating the tariff levels of the United States. The panel discussed the history of tariff-making and -recording at the USITC, with particular emphasis on the early years of the Tariff Commission and the negotiations over the creation of the Harmonized Tariff System of the United States (HTS). Commissioner David Johanson introduced the panel on tariff activities by noting that tariffs have been at the center of the USITC's activities since 1917 and that trade practitioners depend on the USITC's maintenance of the HTS. He added that tariff classification and data are "incredibly interesting" because of the window they provide into U.S. trade flows.

The USITC and Tariff Levels in the Early Years

The panel opened with the history of the Tariff Commission in the 1920s. Former Commissioner Alfred Eckes noted that his discussion of this period was based on primary sources, especially the notes of former Senate Finance Committee Chairman Reed Smoot, who was particularly important in the Commission's history. Smoot, who had a detailed knowledge of the tariff code, had initially perceived the Tariff Commission as a political vehicle for Cobdenites (free traders) like the Commission's first chairman, Frank Taussig. Smoot thus had nearly eliminated the

Summary of the Proceedings of the USITC's Centennial

Commission in 1919. However, by 1923 Smoot had grown more comfortable with it, and even arranged for it to acquire additional space in the General Post Office Building. (The Commission and, later, the USITC remained in this building until Senators Russell Long and Bob Dole arranged for a new building in 1987.)

The Commission enjoyed high prestige in the 1920s: Presidents Harding and Coolidge occasionally invited Commissioners to the White House for dinner, and President Hoover spent time personally recruiting Commissioners. It was during this time that the Commission played a key role in the establishment of tariff levels, by making recommendations as to those levels.

However, in 1924, during an investigation into the appropriate levels of sugar tariffs, Commissioners became embroiled in a riotous debate (even involving some Commissioners having to physically separate others) over whether a Commissioner with connections to the sugar industry should be recused from the investigation. This and other examples of turmoil within the Commission led to a Senate investigation, negative publicity, and eventually, Congress granting President Hoover the right to replace all of the Commissioners with six new ones. This pattern repeated itself to an extent in the 1940s, when some Commission staff were becoming involved in trade negotiations. This again attracted the eye of the Senate, which questioned whether this activity was appropriate.

The USITC and the HTS

Jan Summers of the Office of Tariff Affairs and Trade Agreements (TATA) described the importance of the HTS in the U.S. trade system. As Summers pointed out, the Centennial book covers in detail the transition from the older systems of recording tariffs to the more useful structure of the current tariff schedules in the HTS. More generally, she described the HTS as having brought greater clarity and predictability to trading activity for businesspeople and policy makers. One example of TATA's history of working to ensure the HTS is comprehensive is the fact that TATA provided a special tariff line for objects returned from space, because such objects were retrieved using a robot manipulator arm made in Canada.

Eugene Rosengarden, the former director of the Office of TATA, described the changes in the HTS over the last 62 years. Congress passed the Tariff Simplification Act of 1954, requiring the USITC to compile logically consistent tariff schedules. Rosengarden evoked the daunting challenges associated with this work, which was completed in 1960, led by the "brilliant technician" Russ Schumacher and the "rather amazing" Bill Hart of the Office of the General Counsel.

In 1973, negotiations were established to modernize the tariff nomenclature at the World Customs Organization, which was still using 1930s nomenclatures from the League of Nations and did not yet include the United States. The negotiators scrutinized each line and all possible product divisions and subdivisions, with every negotiating country having a vote. This technical work took seven years, and then another year was needed to work out the necessary umbrella agreement. Next, the negotiated Harmonized System (HS) came back to the USITC so that a new

Summary of the Proceedings of the USITC's Centennial

U.S. tariff schedule could be prepared in compliance with the HS—a monumental job. The ensuing USITC report weighed 11 pounds and included not only the newly harmonized nomenclature but also cross-references to the previous U.S. tariff system. Finally, in 1989, the new system became part of U.S. law.

Rosengarden stated that he had always felt that if the United States, Europe, Canada, Australia, and Japan used the HS system, then the rest of the world would as well. He concluded that indeed it has, and noted that 200 countries now do so. He described the HS as having facilitated trade negotiations, placed U.S. imports and exports under the same classification, and assisted U.S. exporters that sell to multiple countries.

Finally, Rosengarden attributed the USITC's success in fulfilling its various missions as due in part to the organizational culture of the agency. At the USITC, employees work across the organizational chart, in concert with employees from other offices. This culture stems in part from the reorganization of the agency under Chairman Will Leonard.

Next, Barbara Norton, formerly of the Office of Economics, discussed her role in the 1980s reviewing the then-new HS. The review drew on resources across the USITC as well as with other agencies. The process involved a line-by-line review of the HS, negotiations with trading partners to ensure that there was a balance of concessions, and then writing up the implementing legislation. USITC staff worked with industries that were concerned about potential changes in the duties on both imported and exported products. Negotiations with trading partners were pursued in depth, and since much of the work was done before the age of widespread computer use, a great deal of it had to be carried out using handwritten notes.

She concluded that the process succeeded, in the end, at facilitating trade and trade negotiations, and attributed the success to numerous dedicated employees at the USITC as well as employees from other agencies detailed to the USITC during this time.

Other Issues

Former USITC Secretary Ken Mason was the last speaker on the panel. He opened by joking that, despite what some stories said, he was not at the signing of the Tariff Act of 1930 because he had been at a dental appointment that day. More seriously, he noted that he had worked in the Commission's Agricultural Division, among other positions at the agency, and had negotiated tariff classification changes in Geneva in 1963, with trading partners who thought that the United States was using the classification changes to abrogate its treaty obligations.

When the presentations ended, Commissioner Johanson asked how the HTS could be further improved. Rosengarden noted that approximately 25 years ago, the USITC produced a report on the accuracy of U.S. trade data. He suggested that a self-initiated USITC study on the accuracy of import data might be helpful.

Johanson asked panelists if they could discuss how new technology is brought into the HTS. Rosengarden stated that tariff classification is always behind technology, and never can catch up

because the tariff analysts do not know what is happening out in laboratories. He added that the European Union often wants to see at least \$50 million in world trade before they agree to a new tariff line for a good.

An audience member asked whether any panelists foresaw a time in which data are collected on value-added trade flows directly. Rosengarden answered that while he has no idea what will happen, there are several problems with measuring value added: there are many different techniques for valuation, many different ways companies want to book profits, and many related-party issues.

Import Injury Proceedings

Summaries by Craig Thomsen

Panel Introduction

The panel on import injury proceedings highlighted the history of three types of trade remedies—antidumping, countervailing duty, and safeguards—tracing them from their establishment under the heading of “unfair competition” in the Revenue Act of 1916, through their evolution into part of a recognized temporary trade enforcement mechanism in the 1995 Uruguay Round of the General Agreement on Tariffs and Trade (GATT), into the present day. The panel further explained how the number of both antidumping and countervailing duty investigations that were completed increased (as did the associated litigation stemming from the investigations), while far fewer safeguard investigations have been undertaken. In addition, panelists who have worked both for and with the USITC reflected on how USITC practices have changed in the last 50 years, especially with respect to increasing formality. Panelists also lauded the USITC for being a model of openness and rigor in import injury proceedings.

Antidumping and Countervailing Duty Investigations

Former USITC Director of the Office of Investigations Lynn Featherstone opened the panel with a discussion of how the USITC came to be involved in antidumping investigations. Although both antidumping laws and the Commission were established in the Revenue Act of 1916, the Commission was not involved in adjudicating those laws at that time. The first antidumping law with a provision for administrative determinations was the Antidumping Act of 1921, but the Commission did not make those determinations until 1954. When that Act was repealed in 1979, Title VII was added to the Tariff Act of 1930, providing an alternative vehicle under which the USITC could investigate antidumping proceedings.

The first countervailing duty law, however, preceded these antidumping laws by decades. This law was enacted in 1890, and applied only to sugar imports. However, the Tariff Act of 1897 extended the coverage of the law to all dutiable imports. The USITC's role in countervailing duty investigations began in 1974, with authority under section 303 of the Tariff Act of 1930. In

1979, countervailing duty provisions were consolidated into the Title VII amendments to this Act.

Featherstone presented statistics showing how the number and the affirmative determination rate of antidumping investigations have increased over time. During the 25 years that the USITC operated under the Antidumping Act of 1921 (between 1954 and 1979), the agency completed 225 antidumping investigations, in which it made affirmative determinations 46 percent of the time. In the 35 years between 1980 and 2014, the USITC completed 1,257 antidumping and 545 countervailing duty investigations, making affirmative determinations in 55 percent of the antidumping cases and 44 percent of the countervailing duty cases.

Not all of the duties that went into effect due to affirmative determinations have remained in place. This is due to changes enacted as part of the 1995 Uruguay Round Agreements Act, which requires a review of all orders in place every five years. These “sunset” reviews require an investigation akin to original investigations. Although the USITC has voted to revoke the duties on only 17 percent of these reviews, a number of cases have been either suspended or terminated by the Department of Commerce, thus revoking more duties. As of the end of 2015, 265 antidumping and 63 countervailing duties were in place in the United States.

Besides increasing the USITC's investigative workload, these laws increased its litigation workload as well. Former USITC General Counsel Jim Lyons stated that both the Tokyo Round Agreements Act of 1979 and the Uruguay Round Agreements Act of 1995 spurred far-reaching changes to the processes for carrying out antidumping and countervailing duty investigations, including provisions for investigative time limits, investigative processes, and transparency requirements. The 1979 Tokyo Round Agreements Act spurred the 1980 Customs Court Act, which established and gave jurisdiction to the Court of International Trade. Also in the 1980s, the Federal Circuit Court of Appeals was established and tasked with additional responsibilities to review USITC determinations. This solidification of a path by which litigants could challenge the USITC's determinations led to a quadrupling of the litigation caseload at the USITC.

Lyons further stated that since many of these decisions can affect economically powerful industries, there are large sums of money at stake based on the outcome of each determination. Despite the number of legal challenges, Lyons noted that the USITC has a remarkable record in its ability to sustain its determinations. The USITC has completed more than 2,000 antidumping and countervailing duty investigations in 60 years, and, though the number of determinations that it must defend in appellate courts has increased, its determinations have rarely been remanded.

Safeguards

Along with conducting a large number of antidumping and countervailing duty investigations, the USITC is tasked with playing a similar role in U.S. safeguard investigations. Kara Reynolds, an economics professor at American University who twice interned at the USITC, described the role of the USITC in safeguard investigations, pointing out how they differ from antidumping and countervailing duty investigations. Safeguard investigations serve as a safety net against a

surge of imports to the United States. Instead of targeting specific countries, relief is imposed on a near-global basis, but only if a higher threshold of injury is reached and if the imports are a substantial factor causing or threatening to cause that injury.

The first safeguard provision appeared in the 1942 U.S.-Mexico Trade Agreement. This paved the way for President Truman to sign a 1945 executive order requiring all trade agreements to contain such provisions. In 1951, the then Tariff Commission was given the responsibility for performing these “escape clause” investigations, although safeguards could be awarded only to industries making products that had been awarded a tariff concession in a recent trade agreement. About 10 safeguard investigations were instituted each year between 1951 and 1962. Of the 135 petitions filed, the Commission recommended action in 33 cases, with the President taking action 15 times.

In the following decades, changes in the safeguard laws reduced the number of safeguard investigation petitions filed. Two changes were made in the Trade Expansion Act of 1962, raising the threshold that was required for imposing a trade remedy. In the 12 years that followed, only 30 petitions were filed, of which only 5 resulted in safeguard protection. Section 201 of the Trade Act of 1974 returned the threshold back to its originally mandated “substantial injury” standard, and changed the trigger for an investigation from a specific tariff concession to a “surge” in imports.² After an industry is determined to have met these criteria, the President may choose to enact some type of protection for that industry, but is not obligated to do so.

After the resultant spike of safeguard actions, which were filed in 1974–77, led to unexpectedly few industries receiving protection, the number of actions filed declined precipitously. In fact, the last section 201 investigation completed by the USITC was on steel products in 2002. Reynolds speculated that so few safeguard investigations have been filed in recent decades because of the higher injury standard, compared with that in antidumping/countervailing duty investigations; the short time period for protection; and the uncertainty of Presidential action.

At the United States' urging, the language in the original GATT agreement included an escape clause that mirrored U.S. legislation. Changes during the Uruguay Round provided the impetus for the United States to modify its legislation to match those Uruguay Round changes. Since that time, the United States has imposed safeguard protection six times, but all six of these safeguard actions imposed by the United States have been challenged before the WTO's Dispute Settlement Body, and the United States has lost each challenge. Often the challenges stem from the concept of parallelism, which involves whether imports from all countries, or only a subset, are the subject of the investigation or the imposed remedy.

² This differs from antidumping and countervailing duty investigations, in that the threshold is that the U.S. industry must be “materially” injured or threatened with material injury by reason of dumped and/or subsidized imports from one or more specific countries.

Reflections of Members of the Trade Bar

Four individuals with ties to the USITC that span many decades were invited to provide some reflections and insight about their personal interactions with the USITC over their careers. These include former Commissioner Alfred Eckes; lawyer Terence Stewart, who has practiced before the USITC for decades; economist Chad Bown, who has worked at the WTO and the World Bank, and is currently with the Petersen Institute; and the longest-serving USITC Secretary, Ken Mason. Each provided a distinct perspective on the workings of the USITC.

Eckes began his reflections by noting that former Commissioner Clubb had suggested establishing a USITC Historical Society. As part of the effort to bring it to fruition, the society's board interviewed several practitioners before the USITC to collect oral histories. These histories were updated for this Centennial Celebration. Among the themes touched upon by these interviewees were the informality and openness to USITC staff that practitioners enjoyed in earlier years. Interviewees also praised the USITC's staff for the quality of work they perform.

Stewart reflected upon the informality of the USITC's processes during the late 1970s. He misses the access to USITC staff that he once had. He thinks that the 1979 trade legislation's provisions mandating a move to a formal record and a formalized process for judicial review changed the nature of the practice as well as the quality of information in investigations. It also had the effect of expanding the number of law firms practicing before the USITC. Additionally, the USITC used to do many more field hearings outside of Washington, DC. Finally, he stated that foreign countries had had more flexibility in reaching political solutions with the United States on trade disputes (such as agreeing to voluntary export restraints) before the WTO's Agreement on Safeguards was adopted.

Bown praised the work of the USITC, as its tools and reports have greatly assisted his academic pursuits. The World Bank has helped to fund, and now maintains, his initiative to create and maintain a multi-country Temporary Trade Barriers Database. Through his work, he has learned that economic evidence is increasingly important in the determination of public policy. This requires data, and the USITC is an incredible data collector. Also, he noted, this data helps USITC reports to be both highly transparent and incredibly rigorous. In contrast, the data available from other countries, as well as the processes used, are much less transparent than those found in the work of the USITC. This is especially true of an increasing number of developing countries that have started to use antidumping measures since the early 2000s.

Ken Mason discussed how reports have become longer and more transparent since he became Secretary of what was then the Tariff Commission in 1960. At that time, the Commission's opinion, which was decided behind closed doors, would be locked up in his office until it was ready for publication. It would be very thin, maybe seven pages, and not contain the staff report. After the proceedings of the Commission were required to be on the record due to the Trade Act of 1974, the amount of paper relating to each case grew more than 10-fold. The Government in the Sunshine Act of 1976 also altered the way the USITC operated—for example, it limited the number of Commissioners in one room that could discuss any investigation.

Intellectual Property Proceedings

Summaries by Lauren Gamache

Panel Introduction

To introduce the discussion of intellectual property rights, Commissioner Scott Kieff referenced *Pearson v. Post*, a case about property rights and foxes. He stated that property rights over what exists in nature are similar to intellectual property rights: ideas exist before they are discovered and are not necessarily new. What is new, he says, is how these ideas are put to use, and that is where intellectual property rights come into play.

Unfair Import Investigations under Section 337

Sarah Hamblin of the law firm of Adduci, Mastriani, and Schaumberg stated that in 1922, the Senate passed section 316, a precursor to section 337. Until the 1970s, the law was not used often. During the 1970s, the growing trade deficit and lobbying by concerned industries led to renewed interest in this type of law. In 1974, the section 337 statute was passed, granting the USITC authority to institute a remedy and granting the President the authority to review the remedy.

Jim Adduci of the same law firm described arriving at the USITC in 1976 as an attorney-advisor to Commissioner Ablondi, who was tasked with reorganizing the legal offices, including that of the General Counsel. At the time there was a question whether the Office of the General Counsel should maintain its dual functions as both the legal advisor to the USITC and as an investigative agent at the USITC. In 1976, the USITC created the Office of Legal Services (OLS) to handle the investigative role of section 337 investigations, which in 1985 became its own office, known today as the Office of Unfair Import Investigations (OUII).

Adduci described the three primary functions of OUII as

- 1) to provide an opportunity for complainants to review the draft complaint with the staff during the pre-filing review,
- 2) to examine complaints for legal sufficiency and compliance and to make recommendations to the USITC on whether to institute an investigation, and
- 3) to participate during the discovery period, to weighing in on legal positions.

Former Commissioner Deanna Tanner Okun, now also an attorney at Adducci, Mastriani, and Schaumberg, began by saying that the Commission was created with an emphasis on manufacturing. However, section 337 expanded the USITC's scope of work to intellectual property, while remaining a trade statute at heart. As such, it contains certain threshold provisions, including thresholds for the domestic industry. The Omnibus Trade and Competitiveness Act of 1988 amended the statute to allow complainants to prove the existence

Summary of the Proceedings of the USITC's Centennial

of an intellectual property-based domestic industry by showing that it made use of research and development, engineering, or licensing, as opposed to the traditional methods of measuring the existence of a domestic industry through its use of capital and labor.

Okun noted that as business models have evolved, the USITC has also had to evolve and be creative in how it addresses the domestic industry statute. She highlighted the USITC's creativity in using its administrative rule-making to address these issues, and referenced the 100-day pilot program whereby a case can be referred to deal with dispositive issues, such as the domestic industry's existence.

Stephanie Roberts of the law firm of Steptoe and Johnson reviewed the centennial history's chapter on intellectual property rights, highlighting the evolution of the roles of the USITC and the President since the 1920s. She stated that she particularly appreciated the discussions of domestic industry requirements and injury requirements. She also pointed out that while most section 337 investigations are patent-related, non-patent investigations have been reemerging at the USITC.

Former USITC Assistant General Counsel N. Timor Yaworski highlighted an especially important consequence of the Trade Act of 1974: that it made section 337 subject to the quasi-judicial provisions of the Administrative Procedures Act. He also stressed the fact that the amended statute allowed the USITC to represent itself in court, as opposed to needing to be represented by the Department of Justice. He noted that the caseload has been trending upward and wondered what the statute will look like over the next hundred years.

Panel Discussion

Commissioner Kieff asked the panel if the structure of the USITC help explain its collaborative, analytical, and neutral approach. Adduci responded that the USITC offers at least three elements that are not available elsewhere: (1) the automatic injunction, (2) the expertise of the judges, and (3) the knowledgeable and experienced staff. He adds that the same expertise extends to the General Counsel's office. For companies that have products with a short shelf life (like cellphones), Adduci said that the speed of the process at the USITC is a huge advantage.

Kieff then asked if there are opportunities to make the USITC's review of the administrative law judge's initial determination more transparent. Okun replied that during her tenure at the USITC, she had been interested in the possibility of oral arguments. She stated that there had been a big hearing in the *543 v. Qualcomm* case and that hearings may not be the best way to move forward with oral arguments on a regular basis. Okun stated that it is unclear how oral arguments could affect a client's ability to appeal. She said that as it is, clients are generally certain they are getting a review and a thorough opinion. She raised some questions to consider: Are more individual Commissioners asking questions? Should practitioners be thinking about who is asking the questions and what that means? What is the role of the General Counsel's office? And would practitioners be answering the same questions that they would have otherwise received in written form?

Summary of the Proceedings of the USITC's Centennial

Okun did note that an additional hearing, or oral argument, would affect parties' choices. She stated that some clients may be willing to devote additional resources to attending hearings, if they think they will help their case. Others, specifically respondents, may be less inclined, and the USITC would need to decide how to address this. She noted that the USITC has done good work in attempting to lessen the cost for parties during discovery.

Yaworski enumerated two issues. First, he stated that there is potential that an oral argument could delay the issuance of the final decision. Given that the statutory deadlines have not changed, he observed that legislative history shows Congress wants these cases to be completed quickly, and stated that complainants with patents prefer to receive exclusion orders as soon as possible. Second, Yaworski suggested that Commissioners may prefer to spend their time elsewhere, rather than preparing for oral arguments.

Adduci said that he would welcome oral arguments and suggested that it could be built into the procedural schedule without extending the proceedings. He said that he would be able to learn more, and that he can more easily influence people in person, rather than through a raft of papers. Oral arguments also would give private parties an opportunity to identify the issues in the case.

Commissioner Kieff then asked for perspectives on the parts of the 337 docket that are not patent-related. Roberts responded that section 337 is being used more, and cited the U.S. Steel 337 case that has introduced many issues that have not been addressed at the USITC lately.

Okun replied that at the root, section 337 was designed to protect domestic industries, and the statute was written very broadly. She suggested that there are many other ways in which section 337 can be used at the USITC. She said that the expertise and expediency of the USITC's decisions and the certainty of the remedy are appealing to many. She suggested that practitioners may not have been creative enough in their use of section 337.

Hamblin suggested that while patent cases predominate, the USITC has seen a wide range of other applications, including common law trademarks, passing off, falling off, and unfair advertising. She stated that any recognized form of unfair competition could be "fair game" for section 337 cases.

Kieff then stated that the Federal Trade Commission and the Department of Justice have recently announced that they intend to promulgate new guidelines about the interface between intellectual property and antitrust. He asked whether the USITC should weigh in on this issue as well.

Okun responded by saying that the USITC should remember that it is an expert agency and that it may have a particular view. But she also stated that when she was Commissioner, she did not like it when other agencies contributed advice because the statute says that Commissioners need to listen to all parties, not limited just to other Federal agencies. She suggested that if Congress is looking for USITC input, the USITC may want to ask for explicit requests from Congress (through the Federal Trade Commission's regulatory language).

Finally, Commissioner Kieff asked the panelists what they thought the next 10 years will hold for the 337 docket. Adduci replied that he hopes to see more non-patent-based investigations, and suggested that the statute is underused, given that it extends to more than patents, trademarks, and copyrights. He stated that the USITC could take jurisdiction of fishing rights, or the violation of child labor laws.

Okun stated that as the role of international intellectual property has grown, the USITC's mission grows as well. She added that this will only hold true if the USITC maintains its speed in resolving cases, but that if it gets slowed down like other agencies, it will be harder to get companies to commit resources to filing at the USITC. She further noted that Congress has the ability to change the role of the USITC. Yaworksi joked: "In other words, don't get too creative."

In the audience, Brian Busey, of the law firm Morrison & Foerster, asked the panel to comment on the adversarial relationship between the USITC and the Federal Circuit with respect to deference to USITC's expertise. Adduci replied that in some recent cases, more deference has been given to the USITC. He acknowledged that the Federal Circuit has recently been more critical of the USITC than it has been in the past, and that the USITC used to enjoy about an 85 percent affirmance rate. This has changed, and he agreed that greater deference is in order.

Industry and Economic Analysis

Summaries by John Benedetto

Panel Introduction

The panel on industry and economic analysis covered the USITC's role in providing information on trade to the President and Congress. The panel covered both the history of this role and potential issues for the future. Commissioner Rhonda Schmidlein introduced the panel discussion by pointing out that the USITC has more Ph.D. economists focused on trade than any other U.S. agency.

The Role of USITC Industry and Economic Analysis

Former Commissioner Thelma J. Askey began the discussion by stating that the congressional relationship with the USITC is a crucial relationship that leads to two outcomes. First, it allows Congress to have a foundation on which to base trade policy decisions. Second, it has provided Congress with an underpinning for supporting trade agreements even when the public might be skeptical.

The 1974 Trade Act culminated a bicameral Congressional effort to take a larger role in trade negotiations. It was in that Act that Congress required the U.S. Trade Representative to depend

heavily on the USITC for information. Since then, U.S. trade agreements have involved an increasing number of countries and a growing volume of trade. Askey concluded by stating that the USITC has provided unbiased information and high-quality economic modeling.

Former USITC employee Catherine Field sketched the evolution of Commission's mandate to research tariffs and their effects. She described how the original 1916 Act required the Tariff Commission to investigate the influence of tariffs and foreign competition on U.S. industry, and report its findings to the President, the House Ways and Means Committee, and the Senate Finance Committee. In the Tariff Act of 1922, Congress authorized the President to implement a "flexible tariff" that would equalize domestic and foreign costs of production, with the Commission investigating the differential costs of production. The Tariff Act of 1930 included section 332, part of which remains the basis for today's requests for the USITC to investigate various matters, including tariff changes.

Field then described in more detail the various roles the USITC has played in providing advice to the President and Congress over its history since 1930. The USITC has assessed trade negotiations, nontariff measures, the probable economic effects of tariff reductions on U.S. industries and consumers, and most recently, the Trans-Pacific Partnership agreement. The USITC's economic analysis has also played a role in contexts beyond 332 investigations, such as the eligibility of products for preferential treatment under the African Growth and Opportunity Act (AGOA) and the implementation of agreements to change the rules of origin in U.S. free trade agreements.

Issues in USITC Industry and Economic Analysis

The next discussant, former USITC Economist Michael Ferrantino, discussed the writings of Economist Frank Taussig, whose 1911 article "How Tariffs Should Not Be Made" stated that it was difficult to figure out what tariffs on particular products actually were at that time. Taussig thus advocated for the establishment of a permanent body to systematically report on tariffs and their effects. Ferrantino continued by stating that in more recent times, the USITC has had "ivory tower-oriented" economists who developed analytical tools for trade policy, such as partial and general equilibrium models. The USITC's responsiveness has been driven by the fact that its customers can ask it anything they want, and then the USITC needs to come up with a way of answering the question.

George Washington University Economist Michael Moore stated that by going back to 1930 and examining what kind of investigations the USITC was asked to perform, one can see the broad changes in the U.S. economy, the U.S. trade policy process, and the economics professions' expanding toolkit. Moore characterized the early requests as focused on the "defensive" interests of import-competing industries, especially agriculture. The President typically made more requests than Congress, but both branches increased the number of requests they made over time. In the 1980s, the USITC began using input/output tables, computable partial equilibrium models, and general equilibrium models in its analyses. At the same time, requests were beginning to

reflect more “offensive” interests—for example, to see how U.S. services industries can operate in a global economy.

Former House Ways and Means and Senate Banking staffer Neena Shenai discussed how Congress depends on the USITC for impartial, nonpartisan information to conduct oversight on trade policy. As an example, she discussed the USITC's role in the Miscellaneous Tariff Bill (MTB) process. The USITC's bill reports formed the basis for Congress to decide which provisions it would ultimately put into the MTB. Congress has now expanded the USITC's role in the MTB process so that the USITC will accept proposed bills directly. She characterized this development as showing the regard that Congress has for the USITC's independence and expertise.

Future Issues in USITC Industry and Economic Analysis

Rutgers University Economics Professor Thomas Prusa addressed the increasing complexity of trade agreement analysis. He described how in the past, producing large estimated benefits from tariff reductions was easier because the tariffs were higher, whereas now, with most tariffs lower, the effects of any reductions are smaller. Another complicating factor, according to Prusa, is that now trade agreements cover not only “simple price effects” but also rules. He stated that analyzing new trade agreements will likely require new quantitative methods.

Commissioner Schmidlein asked the panelists what areas they thought that the USITC should be studying, and whether the USITC has the analytical tools to study those areas. Shenai answered that duty inversions, where the tariffs on the components of a product make the components more expensive to import than the finished product, would be an interesting area because it would illuminate disadvantages to manufacturing in the United States. Prusa stated that understanding global supply chains would be important. Moore added that understanding the differences between firms—for example, why one firm outsources certain products while another does not—might be more compelling than just broad sectoral analysis. Ferrantino further added that it might be helpful if USITC employees could access the confidential firm-level data used by the U.S. Census.

Askey, however, cautioned against asking the USITC to do too much, or to fit too much into its analytical tools used for trade agreements. In response, Moore stated that building up the ability to understand nontraditional models or issues might be useful, even if the issues are not arising due to trade agreements. Ferrantino stated that there has been a large economic impact from other globalization issues not linked to trade negotiations, such as economic growth in general, the reduction in transaction costs, and the slowdown in global trade growth since 2009.

Institutional Evolution of the USITC

Summaries by James Holbein

Panel Introduction

This article summarizes the panel on the institutional evolution of the USITC. The panel also covered the evolution of the Chairmanship, the headquarters and satellite offices of the USITC, and the USITC's role in response to changing external circumstances.

Early Years of the Commission

David Foster of the law firm of Foster, Murphy, Altman, and Nickel provided an overview of the early years at the Tariff Commission, noting that it was formed to provide advice and develop expertise to help Congress to set tariffs. The first step in the evolution of the Commission's role was the move to the Flexible Tariff provision (which allowed the President to adjust the tariff on the Commission's advice) in 1922. The shift of tariff setting from Congress to the President through section 315 of the Tariff Act of 1930 and the Reciprocal Trade Agreements Act of 1934 was the next big step. This shift expanded the advisory role of the Commission to advising the President on the probable economic effects of tariff changes.

The Trade Act of 1974 created the modern International Trade Commission. It took authority from the President concerning section 337 and shifted it to the USITC. It also established the USITC's roles in modern antidumping/countervailing duty material injury investigations and review. Establishing the USITC's role in the trade agreements program was a means to sell "free but fair trade."

Today, roughly half of USITC's resources are spent on trade regulation under Title VII and section 337. The other half goes to develop expertise, manage the tariff schedule, provide advice to Congress and the White House, and prepare economic studies.

From its founding, the USITC was intended to be independent, nonpartisan, objective, and expert. For this reason, no more than three Commissioners can be from the same political party. And appointments are for extended terms, so that the President's reappointment power is limited.

In order to reinforce the independence of the agency, the 1974 act also gave the USITC the right to set its own budget, which is added to the President's budget without change. It also provided that the USITC could go to court to represent itself in matters within its jurisdiction with respect to cases it had decided.

The Chairmanship

Former Commissioner Deanna Okun then described her efforts to analyze the tensions inherent in the USITC structure. Democrats vs. Republicans, free traders vs. protectionists, strong and

weak Chairmen, and independence from both the Executive Branch and the Congress, are all opposing forces that are reflected through the Chairmanship.

The modern Chairmanship evolved in 1977 to address issues of the administration of the agency, so that a stronger Chairman could handle the agency's administrative issues—formerly decided by a consensus of all Commissioners—and permit the other Commissioners to spend more time on substantive work. Today, the Chairman makes administrative decisions, subject to disapproval of a majority of the Commissioners. As a result, Chairmen spend much of their time dealing with administrative issues.

Commission Buildings

Paul Bardos described the headquarters and field offices of the Commission over the years. The Tariff Commission/USITC occupied an architecturally impressive historic building (the present Hotel Monaco) until 1988. However, it had major problems due to Metro construction, rodent infestations, cracks in the foundations, and more. The current building has been much more comfortable, if not as historic.

In its early decades, the Commission had offices in New York, Richmond, Berlin (in the 1920s), Brussels, and Paris. But all of the European offices have been closed for many years.

Question and Answer Session

The question and answer period began with a question about a central issue: whether the USITC's mandate to be independent, nonpartisan, and objective is still relevant after 100 years—and will it remain so into the future?

Several panelists weighed in to confirm the need for independent, nonpartisan, and objective advice. The information that USITC's experts provide supports the trade agreements program and Congress's appropriations committees, and informs businesses and manufacturers. Due to their deep knowledge of trade issues, outgoing Commissioners and USITC staff have been sought for positions at international trade organizations around the world. Relationships with congressional oversight committee staff, USTR, and the trade agencies are invaluable, but they are based on the ability of staff to speak candidly.

Some commented that the USITC could do a better job of informing the world outside the Beltway of this great agency. It would make sense to hold more hearings outside DC and to travel more often for investigations; both would help bring more visibility to the USITC and its work. But care must be taken to avoid the appearance of taking junkets. These observers stated that the USITC has done an excellent job of putting its work out on the Internet, including DataWeb and the Harmonized Tariff Schedule, but that the agency has a weak social media presence. However, other commentators resisted this impetus to increase agency visibility and

Summary of the Proceedings of the USITC's Centennial

argued that the agency has to “stick to its knitting,” producing objective, expert analyses without overstepping into trade policy debates.

The panel also discussed the role of the Chairman. Most appreciated the fact that the Chairman has no more sway than other Commissioners on substantive work. Moreover, the Chairman's focus on administrative decisions helps other Commissioners to avoid distractions. But one panelist stressed that the Chairmanship needs to be strong enough to keep the work moving forward in order to meet statutory deadlines. The collegiality and the sense of responsibility for taking good actions that most Chairmen demonstrate help to prevent problems raised by the rotation of the office between parties every two years. Gaining the support of the rest of the Commissioners for administrative decisions is also key to being effective in the office.

Another discussion revolved around the question of the substantive and institutional issues facing the USITC going into the future, especially in the context of the interdisciplinary approach used for most work. This approach, bringing investigators, economists, industry experts, lawyers, and Commissioners together on most work products, is one of the reasons the USITC has earned such a good reputation. Going forward, tariffs are becoming less important in trade, while the study of difficult-to-quantify nontariff issues, like child labor, is becoming increasingly important.

The panel ended with a discussion of the Supreme Court. One question arose concerning whether the USITC should have the ability to hire top legal talent to litigate important intellectual property issues all the way to the Supreme Court. A panelist noted that the intent of the Trade Act of 1974 in giving the USITC independent litigation authority was to break it free from the Civil Division at Justice, but not to determine how high appeals should go. The question whether the USITC has the right to go to the Supreme Court must be balanced by another question—whether it is politically smart to do so.