

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.

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from Interviews Solicited by the ITC Historical Society^{755 756}

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.

⁷⁵⁵ 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.

⁷⁵⁶ 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 1953.⁷⁵⁷ "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."

⁷⁵⁷ 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 1955.⁷⁵⁸ 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.⁷⁵⁹

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!⁷⁶⁰ 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,

⁷⁵⁸ Interview conducted March 20, 1996, in Washington, DC, by Bruce E. Clubb for the ITC Historical Society.

⁷⁵⁹ USTC, *Umbrella Frames*, Investigation No. 63, section 7, April 1957.

⁷⁶⁰ 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.⁷⁶¹ 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.⁷⁶² 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.]."

⁷⁶¹ USITC, *Large Power Transformers from France, Italy, Japan, Switzerland, and the United Kingdom*, Investigation Nos. AA1921-86–90, April 1972.

⁷⁶² 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 1974.⁷⁶³ 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.”

⁷⁶³ 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.⁷⁶⁴ 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.

⁷⁶⁴ 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.⁷⁶⁵ 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

⁷⁶⁵ 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:⁷⁶⁶ “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.

⁷⁶⁶ 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 Case⁷⁶⁷

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.

⁷⁶⁷ 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:⁷⁶⁸ “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.”

⁷⁶⁸ 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 Clause⁷⁶⁹

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

⁷⁶⁹ 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.⁷⁷⁰

“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.”

⁷⁷⁰ 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.

