

Chapter 4

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



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

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

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

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

Evolution of the Commission's Work

The Early Years (1916–39)

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

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

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

The Commission's earliest work on U.S. international trade policy is also reflected in the inquiries conducted and reports prepared at the request of Congress in a number of areas. Some of the major inquiries and reports included the use of foreign trade zones; reciprocity in commercial treaties; international tariff relations and commercial treaties; and dumping and unfair competition. The dumping and unfair competition inquiry resulted in a 1919 report²⁸² which reflected the influence the Commission possessed in the development of trade policy.

²⁸¹ See Edward S. Kaplan, "The Fordney-McCumber Tariff of 1922," found at http://www.washingtontraderreports.com/analysis/chapter_2.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁸⁵ USTC, *Annual Report for 1929*, at 12–16.

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

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

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

The Middle Years (1940–1974)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Modern Era (1975– Present)

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

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

The political background surrounding the enactment of the 1974 Trade Act helps explain some of the changes made to the Commission’s work by that law (as well as some institutional changes discussed below). In the early 1970s, there was some tension between the executive branch and Congress over control of U.S. trade policy, with some in Congress believing the balance between Congress and the President had tilted too much to the President. Exemplary of this was the negotiation by the U.S. Trade Representative (USTR, an ambassadorial position created by enactment in 1962 to lead the development, coordination, and implementation of U.S. trade policy and to exercise the trade negotiation authority of the President) during the Kennedy Round of an executive agreement establishing a new international antidumping code. It was signed unconditionally by the USTR on the basis that nothing in it conflicted with existing U.S. law. Congress differed (based in part on a Commission report²⁸⁷ to the Senate Finance Committee saying a conflict existed). Congress enacted a law (Renegotiation Amendment Act of 1968 (Pub. L. No. 90-634)) providing that the provisions of the code would be applied only to the extent that they did not conflict with U.S. law and did not limit the discretion of the Commission in its injury determination under the Antidumping Act of 1921. There were also

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

program under which the President can provide for duty-free treatment on particular products from less-developed countries). The Commission was then to determine the probable economic effects of such duty modifications or duty-free treatment on U.S. industries and consumers.

This provision has resulted in rather significant work for the Commission from time to time (as had similar provisions in earlier periods, as noted above), such as during the Tokyo Round of trade negotiations (the seventh round under the GATT) in the later part of the 1970s, and with respect to the negotiations of the NAFTA in the 1990s. With respect to the Tokyo Round, for instance, the Commission conducted hearings across the United States, and provided to the President thousands of pages of Trade Agreement Digests as to probable economic effects. Activity continues under section 131, as well as under sections 2104 (b) and 2104 (f) of the Trade Act of 2002 (relating to tariff reductions on import-sensitive agricultural products and proposed free trade agreements, respectively). For example, proposals such as the Trans-Pacific Partnership agreement still generate requests for probable economic effects studies.

The Commission's general fact-finding studies have continued to be a substantial aspect of its mission. The periodic series of detailed reports on the thousands of products imported to and exported from the United States remain part of these activities. These reports, currently known as *Industry and Trade Summaries*, include information and analysis of U.S. and foreign production and inventories, duties and customs treatment, and conditions of competition, among other topics. Since 1994, the Commission also has conducted an annual investigation and prepared a report reviewing the trade performance of key U.S. agricultural and manufactured products, adding services to the investigation and reports in 1995. The annual report on the operations of the trade agreements program (now titled *The Year In Trade*), begun in 1949, provides information on U.S. international trade laws and actions, activities of the World Trade Organization, U.S. free trade agreements and trade preference programs, and U.S. bilateral trade relations with major trading partners.

The demand for Commission investigations under section 332 of the 1930 Tariff Act has also remained robust. These studies, generally requested by the U.S. Trade Representative, the House Ways and Means Committee, or the Senate Finance Committee, have covered a wide range of subjects involving tariff and international trade. No recommendations on policy or other matters are made in these reports; rather, they represent independent and objective analysis, such as the Commission has provided since 1917. The range of studies is enormous, e.g., the effects of greater integration within the European Community on the United States (with numerous follow-up reports); the impact of NAFTA; NAFTA rules of origin; global competitiveness of U.S. advanced manufacturing industries; apparel; trade patterns in sub-Saharan Africa; wheat trading practices; pricing of prescription drugs; the Multifibre Arrangement; rice; digital trade in the United States and globally; the impact of significant U.S.

import restraints (updated periodically); and Cuban imports and the effects of the U.S. embargo, among hundreds of others.

Important trade information services have also continued without abatement. One major activity has been the maintenance of the Harmonized Tariff Schedule of the United States (HTS), which provides applicable tariff rates and statistical categories for all merchandise imported into the United States. This is the successor to the Commission's earlier work on the Tariff Schedule of the United States Annotated, published periodically from 1965 until superseded by the HTS in the 1990s. A new edition of the HTS is published each year, and it is updated throughout the year to reflect classification and duty rate changes to any of its over 10,000 statistical classifications. An important aspect of this maintenance is the work of the Committee for Statistical Annotation of the Tariff Schedules, which the Commission chairs and which decides on changes in HTS statistical reporting categories. Since 2001, the Commission has also maintained the Interactive Tariff and Trade DataWeb that is open to the public, and provides worldwide interactive access to current and historical U.S. import and export trade data, on a monthly, quarterly, annual, and year-to-date basis.

The Commission also has reported annually on tariff-related bills before Congress, providing for each commodity covered by a bill such information as imports (including duties collected), U.S. production, and uses in the United States, etc. The number of bills on which reports were prepared often exceeded 300 in each session of Congress. Pursuant to the American Manufacturing Competitiveness Act of 2016, the Commission now receives petitions requesting duty suspensions and reductions, and will report to Congress concerning these petitions.²⁸⁹

As it has from its beginning, the Commission continues to provide support to Congress and the executive branch for the development of U.S. trade policy and implementation. Commission staff serve as observers to the Trade Policy Review Group (TPRG) (cabinet deputy secretary level) and as technical advisors on the underlying interagency Trade Policy Staff Committee (TPSC) and each of its numerous subcommittees; the TPRG and the TPSC and its subcommittees, all chaired by USTR officials, play a major role in development of U.S. trade policy and its implementation. Commission staff provide continuing support to the USTR for negotiations, dispute settlement, work on nontariff measures, and the GSP and other preference programs, among other activities. Commission staff have long participated in international customs organizations, such as the Customs Cooperation Council and now the World Customs Organization, which is responsible for the continuous development and maintenance of the global Harmonized System of tariff classification. Of course, the

²⁸⁹ Pub. L. No. 114-159, May 20, 2016; see the Commission's MTB Petition System, at <https://mtbps.usitc.gov/external/> (accessed December 1, 2016).

Commission continues to respond each year to hundreds of Congressional requests, both formal and informal, for technical assistance.

In short, following the 1974 Act, while the Commission continues to provide support to Congress and the President/USTR and continues to conduct numerous investigations under its general investigative authority, there has been and remains a notable shift of resources to addressing unfair trade practices. In fact, it is typical in recent years for the Commission to devote 50 percent of its resources and staff to section 337 and antidumping/countervailing duty investigations.

Institutional Evolution

From its inception, the Commission has been structured institutionally to be independent, nonpartisan and impartial. It is a structure consistent with the functions of the Commission as set forth above to engage in independent fact-finding and provide unbiased advice not subject to politics. As such, it would be expected that insulation from the executive branch, and indeed insulation from partisanship in Congress, would be an objective. During the course of the past 100 years, this structure has endured and been strengthened.

As originally instituted, the Commission comprised six members, appointed by the President, subject to Senate confirmation. A Commissioner was appointed for a 12-year term, and no more than three members could be from the same political party. The President annually was to designate a Chairman and Vice Chairman. The even number of members, the length of the term, and the limitation on party membership were all designed to result in the best chance for the desired independence, impartiality, and nonpartisanship.

Over the years, the even number of Commissioners provided by statute has not changed. Attempts to change to an odd number have been rejected. For example, in the consideration of the 1974 Trade Act, the Senate Finance Committee proposed changing the number to seven. This was objected to in the Conference Committee by the House Ways and Means Committee, and the Senate provision was dropped. Rather than risk losing the benefits of the even number for nonpartisanship, the effect of even-numbered Commissioners yielding more tie votes than normal (and hence the Commission effectively not being able to decide) has instead been dealt with by specific tie-breaking statutory provisions, e.g., a tie vote will result in a Section 337 investigation being instituted, or a tie vote under section 202(b) of the 1974 Trade Act (safeguard) means the President may accept the determination of either set of Commissioners.

It should also be noted that the statute permits the Commission to continue to function in spite of vacancies among its membership. Because the President and the Senate have not always been in a position to immediately replace departing Commissioners, the actual number of

Commissioners serving at any one time has varied from six to three and in fact there have often been an odd number of Commissioners serving. This occurrence, and because the Commission often acts unanimously or by clear majority, has meant that concerns related to a tie vote have rarely materialized.

The length of the term for a Commissioner has changed over the years. Originally set at 12 years, in 1930 it was changed to 6. This in turn was changed by the 1974 Trade Act to 9 years, the length it remains today. Nine years was likely chosen because it is beyond the 8 years of a two-term President, making an appointed Commissioner not beholden to the appointing President. This was strengthened still further by adding a provision that a person who has served 5 years or more as a Commissioner is not eligible for reappointment.

The requirement that no more than three Commissioners be from the same political party has never changed. Indeed, this balancing of party affiliation has been extended to the President's appointment of the Chairman and Vice Chairman. In 1974, the law was amended to provide that the Chairman and Vice Chairman could not be from the same political party, and that a Chairman from one party could not be succeeded by a Chairman from the same party. This, combined with a current 2-year term limit for a Chairman and Vice Chairman, seeks to prevent a single party from gaining any significant control of the Commission's Chairmanship.

Regarding the Chairman's role compared to that of other Commissioners, from 1916 to 1977 the Chairman had no formal duties prescribed by statute, nor any substantive role different from that of any other Commissioner. Most decisions, even about personnel and other relatively routine administrative questions, were addressed by the Commission as a whole. This led to delay in decision-making on routine matters that were unlikely to result in introducing any partisanship or undue influence on substantive decisions. It also resulted in consideration in the 1970s of whether there should be a "strong Chairman," a first among equals.²⁹⁰ This ultimately was rejected, but recognizing the then existing administrative inefficiencies, the law was changed in 1977 to provide for the Chairman to make most personnel decisions and handle most other administrative matters, though subject to a veto in some situations by the Commission.

The 1974 Trade Act saw the addition of two provisions intended by Congress to further increase the independence of the Commission from the executive branch. It has already been noted that there was a confluence of events at the time of the Act that resulted in a desire to constrain executive authority in the international trade area. Originating in the Senate Finance Committee, the first provision added that the annual budget developed by the Commission

²⁹⁰ GAO, *International Trade Commission: Administrative Authority is Ambiguous*, Report NS/AD-92-45, February 25, 1992, at 11–12.

would be submitted with the Executive's budget proposal without change. This meant that the Office of Management and Budget no longer ultimately controlled the Commission's budget. Of course, it was anticipated (and practice has borne out) that the Commission would work with both Congress and the executive branch in developing its budget. At the time of the enactment of this provision, the Commission was the only agency receiving this particular treatment.

The second provision added by the 1974 Trade Act was also a striking departure from the norm, and again reflected Congress' concern for the Commission's independence. The provision provided that the Commission had the option of representing itself in federal court proceedings involving the Commission's authority and decisions. The Attorney General wrote to the Senate Finance Committee (the originator of this provision) strongly objecting to the change, but the Conference Committee accepted the provision. This provision has led to the current practice in which the Commission, through attorneys in the General Counsel's office, routinely represents itself in appeals of antidumping, countervailing duty, and section 337 unfair trade practices cases before the U.S. Court of International Trade and U.S. Court of Appeals for the Federal Circuit.

Of course, discussion of the institutional evolution of the Commission would not be complete without a consideration of the Commission staff. The Commission has been headquartered in Washington, DC, since its inception. It also maintained a New York City office from 1922 until 1983. For a period from 1925 to 1936, the Commission also maintained an office in Brussels, Belgium, which was moved there from an office previously maintained in Berlin, Germany; the Brussels office was used to facilitate contacts for investigations in Europe. The vast majority of Commission staff has always been in Washington, and is exclusively so since 1980, unless detailed to negotiation delegations or the like.

The work of the New York office reflected the depth of and breadth of information which the Commission routinely sought and needed to carry out its functions and develop its expertise. Located at the Custom House originally, its function throughout its existence was to collect and analyze original data on the import and export trade directly from Customs records and from importers and producers in the region. It often reviewed tens of thousands of entry records to provide direct input on such matters as classification, trade flows, dutiable and non-dutiable trade, and more.

The Commission's staff began its existence with the wholesale transfer in early 1917 of the staff of the Cost of Production Division of the Department of Commerce. By 1919, the staff consisted of 73 persons (including Commissioners), with some 26 experts (economists, commodity specialists) and 34 clerks. In FY 1925, reflecting principally the effect of the 1922 Tariff Act's flexible tariff provision, the staff had grown to 201, including 100 experts and 75 clerks. In 1939, the staff had grown to over 300 in total. It then declined to about 200 in the 1950s, to a point

where the Commission indicated it was so short of staff that it could not do all the work that needed to be done. In the last several decades the staff has grown to between 350 and 380.

Following enactment of the 1922 Tariff Act, the Commission had organized its staff into four broad divisions: the Office of the Chief Economist, the Office of the Chief Investigator, the legal division, and the administration division. The chief economist supervised general investigations, while the chief investigator supervised the section 315 flexible tariff cost of production investigations. Commodity divisions were formed, each with a chief and experts; there were also an accounting division and a preferential tariffs and commercial treaties division. An advisory board, reporting to the Commission, supervised the staff's work; the board consisted of the chief economist, chief investigator (the Chairman of the Board), a representative from legal, and the chief of the commodity division under which the subject of an investigation fell.

With modification, this basic organization remains the nucleus of the staff organization persisting even today. While the composition of the staff has varied over the years, the Commission today maintains an expert staff of professional trade and nomenclature analysts, investigators, attorneys, economists, information technology specialists, and administrative and research support personnel. The same staff units have predominated relatively consistently. The major units in terms of personnel have been the Office of Investigations, Office of Industries (containing the commodities divisions), the Office of Economics, and the Office of the General Counsel. This consistency somewhat reflects the way the Commission has conducted its investigations over its history.

The Commission conducted its early investigations in a fashion perhaps unique at the time. Investigations were conducted using a team bringing together a number of disciplines. This remains the situation today. For example, as noted earlier, a current import injury team has typically consisted of an investigator, an economist, a commodity/industry analyst, an accountant/auditor, a statistician, and an attorney. All are managed by a supervisory investigator. (For investigations under more general investigatory authority, such as section 332 of the 1930 Tariff Act, the team may typically not include an investigator or accountant/auditor.) This approach has resulted in fully developed investigations and reports. It has also led to an appreciation of the Commission as a leader in independent research and expertise in trade matters.

There has always been an interest in Congress to request, and for the Commission to supply, staff support to Congress, especially the House Ways and Means Committee and the Senate Finance Committee. As noted earlier, during the consideration of the 1930 Tariff Act, Commission staff directly supported Congress, including even supplying four economists to the minority side. During the consideration of the 1974 Trade Act, the General Counsel of the Commission as well as Commission attorneys and economists directly participated in

supporting the House Ways and Means, Senate Finance, and the Conference Committees in executive session mark-up, and assisted in drafting both the statute and committee reports. This relationship continues to this day.

The Commission staff has also served as a source of talent for both other parts of the government and for the private sector. Over the years, a number of Commission staff alumni have become professional staff members of the House Ways and Means Committee and Senate Finance Committee. They have also taken positions as General Counsel at USTR and even as Deputy USTR, as well as other staff positions at USTR. They have served on the GATT Secretariat, in senior positions of the Customs Cooperation Council, and in other international organizations. They have joined leading law firms and various consulting groups relating to international trade. In addition to these permanent moves, Commission personnel have served on details to the executive and legislative branches as well as international organizations. All this is implicit recognition of the expertise represented by the Commission staff.

Conclusion

The Commission was conceived in 1916 as an agency to be a trusted assistant to Congress and the executive branch in the formation and implementation of U. S. trade policy and trade remedy laws. From the beginning it was structured to be non-partisan, impartial, and independent. Over the last century its structure and administrative authority have evolved to reinforce these important characteristics, making it perhaps unique as an agency and permitting it to be the trusted partner of both Congress and the executive branch.

The past century has seen significant shifts in the work of the Commission. From an early focus on tariff and customs administration, the Commission's functions shifted more to supporting the reciprocal trade agreements program. Over the last 50 years or so, and particularly with the enactment of the Trade Act of 1974, the Commission has shifted even more resources to remedy aspects of U.S. international trade, and in particular combating unfair trade practices.

While the above shifts were occurring, the Commission has continuously maintained its core competency and responsibilities to advise and assist Congress and the executive branch with data, analysis, and expert input on U.S. trade policy and implementation. This continues to absorb a significant part of Commission resources. From its inception, the staff of the Commission has been key to its success in this and all its work.

As the Commission heads into its second century, it continues in its role of providing important support to Congress and the President in the development and implementation of U.S. trade policy.

