

## PRESIDENTIAL TARIFF AUTHORITY

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As part of the “America First” agenda discussed in his inaugural address, President Donald J. Trump promised that “[e]very decision” on trade, among other areas, would be “made to benefit American workers and American families.”<sup>1</sup> During its first months, the Trump Administration made a number of trade moves apparently in connection with this “America First” trade agenda, including initiating national security investigations into steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962<sup>2</sup> and preparing an “omnibus” report on trade deficits.<sup>3</sup> The Trump Administration also took steps to alter U.S. treaty relationships, by withdrawing from the Trans-Pacific Partnership Agreement,<sup>4</sup> announcing the renegotiation of the North American Free Trade Agreement,<sup>5</sup> and requesting a special session of a joint committee created under the United States-Korea Free Trade Agreement.<sup>6</sup> In August 2017, President Trump continued this course—and indicated a willingness to take unilateral action against U.S. trading partners—by signing a presidential memorandum directing the United States Trade Representative to determine whether China’s treatment of U.S. intellectual property warranted investigation under Section 301 et seq. of the Trade Act of 1974.<sup>7</sup>

As these actions demonstrate, U.S. presidents have significant authority to influence international trade policy, and the current administration has indicated a willingness to use this authority. Presidential power in international trade also includes Section 338 of the Tariff Act

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<sup>1</sup> Remarks of President Donald J. Trump – As Prepared for Delivery, Inaugural Address (Jan. 20, 2017), at <https://www.whitehouse.gov/inaugural-address>.

<sup>2</sup> See Presidential Memorandum for the Secretary of Commerce, Steel Imports and Threats to National Security (Apr. 20, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/20/presidential-memorandum-secretary-commerce>; Presidential Memorandum for the Secretary of Commerce, Aluminum Imports and Threats to National Security (Apr. 27, 2017), at <https://www.whitehouse.gov/the-press-office/2017/04/27/presidential-memorandum-secretary-commerce>.

<sup>3</sup> Executive Order No. 13786, Omnibus Report on Significant Trade Deficits, 82 Fed. Reg. 16721 (Mar. 31, 2017).

<sup>4</sup> Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

<sup>5</sup> Office of the United States Trade Representative Press Release, Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement (May 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>.

<sup>6</sup> See Letter of July 12, 2017 from Amb. Robert E. Lighthizer to Dr. Joo Hyunghwan, available at <https://ustr.gov/sites/default/files/files/Press/Releases/USTR%20KORUS.pdf>.

<sup>7</sup> Presidential Memorandum for the United States Trade Representative (Aug. 14, 2017), at <https://www.whitehouse.gov/the-press-office/2017/08/14/presidential-memorandum-united-states-trade-representative>.

of 1930, a long overlooked, but still viable, unilateral authority to impose tariffs in response to discriminatory behavior by U.S. trading partners. As compared with Section 301 of the Trade Act of 1974 or Section 232 of the Trade Expansion Act of 1962, presidential authority under Section 338 appears less dependent on factfinding or investigations of government agencies or commissions, and instead lies at the discretion of the president alone.

Although no president has ever directly applied Section 338 to impose tariffs on a U.S. trading partner, this provision was used for years in other contexts, forming the basis of general monitoring of trade relations and the investigation of individual complaints. Separately, this provision also provided leverage in treaty negotiations and in combating discriminatory behavior by trading partners and achieving equality of treatment for U.S. producers. Today, despite long years of dormancy, it appears that Section 338 remains available to modern U.S. presidents seeking to address unfair trade practices or carry out an “America First” trade agenda. A direct application of Section 338 to impose tariffs today would certainly invite challenges in the World Trade Organization, however, perhaps along the lines of a prior challenge to Section 301 of the Trade Act of 1974.

The sections that follow set out the history of Section 338, which may prove instructive in any contemplated modern use of the statute. Part I sets forth the statutory background of Section 338, discussing both this provision and its predecessor statute, Section 317 of the Tariff Act of 1922. Part II discusses the various uses of both Section 317 and Section 338 during their respective times in force. Part III describes recent references to Section 338 and suggests lessons that may be gleaned from the history of the statute. Finally, Part IV discusses a potential challenge that could be launched in response to a direct application of Section 338.

## I. STATUTORY BACKGROUND

Section 338 was enacted to provide the president certain flexibility in imposing tariffs, as a part of a broader U.S. trade policy to ensure the removal of discrimination among trading partners. As set forth below, such flexible authority was included in Section 317 of the Tariff Act of 1922, and deemed so essential that it was later incorporated in Section 338 of the Tariff Act of 1930.

### *Operation of Section 338 of the Tariff Act of 1930*

Section 338 authorizes the president to impose by proclamation “new or additional duties” in cases where specific countries discriminate against commerce of the United States.<sup>8</sup> The president’s authority under these statutes may be triggered whenever the president “shall find as a fact” one of the following conditions: (1) that a foreign country

imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country;<sup>9</sup>

or (2) that a foreign country

<sup>8</sup> Tariff Act of 1930, ch. 497, §338, 46 Stat. 704 (codified at 19 U.S.C. §1338).

<sup>9</sup> *Id.*, §1338(a)(1).

discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.<sup>10</sup>

Whenever the president shall find evidence of discrimination against the commerce of the United States, Section 338 authorizes him to “by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burden or disadvantage.”<sup>11</sup> Moreover, if the president finds as a fact that the discriminating country maintains or increases its discriminatory practices even after his proclamation, he may by a second proclamation “exclude[] from importation” such articles from the foreign country.<sup>12</sup>

The president’s power to impose additional duties under Section 338, however, is limited in a few ways. First, the additional rate shall not exceed 50 percent ad valorem of the targeted products or articles.<sup>13</sup> Second, the president bears the factual burden to establish discriminatory treatment as defined in the statute. Third, the International Trade Commission is assigned certain responsibilities to monitor trade discrimination and recommend remedies to the president.<sup>14</sup>

The extent to which the Commission may constrain the president’s authority under Section 338, however, is unclear. Other provisions of the Act—such as Sections 336 or 337—more explicitly place decision-making power in the Commission, leaving the president with limited authority to approve or disapprove measures adopted by the Commission.<sup>15</sup> By contrast, Section 338 only establishes “the duty of the commission to ascertain and at all times to be informed” of discriminatory practices by foreign nations, and “to bring the matter to the attention of the president, together with recommendations.”<sup>16</sup> Because a recommendation by the Commission is not a necessary condition for presidential action under Section 338, it appears the president *could* make the factual findings and adjust tariffs unilaterally.<sup>17</sup>

<sup>10</sup> *Id.*, §1338(a)(2).

<sup>11</sup> *Id.*, §1338(d). The language is similar under paragraph (e), which authorizes new or additional rates of duty to “offset such benefits” any third country may accrue from its unreasonable trade practices, as defined in paragraph (a). *Id.*, §1338(e).

<sup>12</sup> *Id.*, §1338(b).

<sup>13</sup> *Id.*, §1338(d)–(e).

<sup>14</sup> *Id.*, §1338(g).

<sup>15</sup> Section 337, for example, mandates that “[t]he Commission shall determine . . . whether or not there is a violation,” 19 U.S.C. §1337(c), and the Commission’s decision has legal force “upon publication thereof in the Federal Register.” *Id.*, §1337(j)(3). Thereafter, the president may by affirmation or acquiescence approve the Commission’s decision, or he may disapprove of the Commission’s actions to render them with “no force or effect.” *Id.*, §1337(j)(2). Section 336 operates in a similar manner. Under Section 336, the Commission “shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article,” and it “shall report to the President . . . such increases or decreases in rates of duty . . . necessary to equalize such differences.” 19 U.S.C. §1336(a). The president is not vested with authority to make these factual determinations. To the contrary, Section 336 states that “[t]he President shall by proclamation approve the rates of duty and changes in classification specified in any report of the commission under this section, if in his judgment such rates of duty are . . . necessary . . .” *Id.*, §1336(c). Moreover, Section 352 circumscribes Section 336 by excluding from its ambit articles imported pursuant to certain U.S. trade agreements. *See* 19 U.S.C. §1352(a).

<sup>16</sup> 19 U.S.C. §1338(g).

<sup>17</sup> Unilateral action by the president is not barred by 19 C.F.R. §159.42, which provides that “the discriminatory duties and penalties provided for in section 338, Tariff Act of 1930, *supra* note 8, shall be imposed only in

*Section 338's Predecessor: Section 317 of the Tariff Act of 1922*

As noted above, Section 338 of the Tariff Act of 1930 was based on Section 317 of the Tariff Act of 1922, and the text of the two provisions is substantially identical. Section 317 was included in the Tariff Act of 1922 in part based on studies that the Tariff Commission had recently conducted regarding, among other things, reciprocity treaties, colonial tariff policy, and existing “bargaining features” in U.S. law.<sup>18</sup>

Based on these studies, the Tariff Commission had recommended the adoption of a commercial policy of equal treatment among all trading partners, or unconditional most-favored-nation (MFN) treatment.<sup>19</sup> Apparently in an attempt to convince U.S. trading partners to adopt the same policy, Section 317 was intended for use “to secure the removal of all discriminations which foreign countries may inflict upon the commerce of the United States.”<sup>20</sup> In discussing this policy, the Tariff Commission emphasized that the United States should seek “the prevention of discrimination and securing of equality of treatment for American commerce and for American citizens” as well as “the frank offer of the same equality of treatment to all countries that reciprocate in the same spirit and to the same effect.”<sup>21</sup> An article published in this *Journal* more than ninety years ago discussed Section 317 in the context of this broader policy goal and the commercial treaties concluded contemporaneously.<sup>22</sup>

Securing this equality of treatment was not a simple matter, however, according to both the Tariff Commission and the president. The Commission suggested that granting the president tariff-raising powers under Section 317 was part of providing “[t]he necessary flexibility” to ensure that trade was carried out “with the same terms and the same treatment for all nations.”<sup>23</sup> In a December 1921 message to Congress, the president similarly suggested that the proper tariff rates may change frequently and without warning:

A rate may be just to-day and entirely out of proportion six months from to-day. If our tariffs are to be made equitable and not necessarily burden our imports and hinder our trade abroad, frequent adjustment will be necessary for years to come.<sup>24</sup>

Consistent with this need for flexibility, the Commission emphasized the breadth of the president’s authority under Section 317. Although the Commission stated that

pursuance of specific instructions from the Commissioner of Customs.” Because the Commissioner of Customs serves at the president’s behest, such specific instructions could also be issued at the president’s request. Moreover, this provision has not been specifically identified by the Government Printing Office as implementing legislation, thus its effect on Section 338 is unclear.

<sup>18</sup> 6 Annual Report of the United States Tariff Commission, at 4, 52 (1921–1922).

<sup>19</sup> *Id.* at 4–5 (quoting the Tariff Commission’s report to Congress of December 4, 1918).

<sup>20</sup> *Id.* at 5 (quoting the Tariff Commission’s report to Congress of December 4, 1918).

<sup>21</sup> *Id.*

<sup>22</sup> Wallace McClure, *German-American Commercial Relations*, 19 AJIL 689, 690 (1925) (stating that Section 317 demonstrated Congress’s adoption of the Tariff Commission’s recommendation that “the country’s post-war commercial policy should be one of equality of treatment” as opposed to most-favored-nation treatment that was merely conditional). The same author published a book describing the development of Section 317 in the context of larger American trade policy. See WALLACE MCCLURE, *A NEW AMERICAN COMMERCIAL POLICY: AS EVIDENCED BY SECTION 317 OF THE TARIFF ACT OF 1922* (1924).

<sup>23</sup> 6 Annual Report of the United States Tariff Commission, *supra* note 18, at 5 (quoting the Tariff Commission’s report to Congress of December 4, 1918).

<sup>24</sup> *Id.* at 1–2 (quoting the president’s message to Congress on December 6, 1921).

“discriminatory export duties are found almost exclusively in colonies” and acknowledged that certain “reasonable exceptions” could allow for discrimination, its statements on the whole confirm the breadth of the provision.<sup>25</sup> In a 1921 publication, the Commission wrote that Section 317 “covers discriminations of all varieties” and may be applied to “customs duties or other charges, or in classifications, prohibitions, restrictions, or regulations of any kind.”<sup>26</sup> A few years later, the Commission reaffirmed this position, and wrote that Section 317 dealt with discrimination “in a comprehensive manner.”<sup>27</sup> Despite the apparent breadth of the president’s power under these provisions, neither Section 317 nor Section 338 was ever directly applied to raise tariffs.

## II. APPLICATIONS OF SECTIONS 317 AND 338

Although tariffs were not imposed directly under Sections 317 or 338, these provisions were frequently invoked and discussed in both investigations by the Tariff Commission and in negotiations with trading partners carried out by the U.S. Department of State. Publicly available records of the Tariff Commission and State Department indicate that Sections 317 and 338 were in steady use during the 1920s, and the 1930s and 1940s, respectively.

### *Investigations Under Section 317*

Shortly after the Tariff Act of 1922 was passed, President Warren G. Harding issued Executive Order 3746 which created a private right of petition under Section 317, among other provisions of the Act. As Executive Order 3746 provides, “all requests, applications, or petitions for action or relief” under Section 317 and other provisions, “shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.”<sup>28</sup>

Rules of procedure were also established to govern applications under Section 317, as well as other provisions of the Tariff Act of 1922.<sup>29</sup> According to these rules, applications could be made by “any person, partnership, corporation, or association.”<sup>30</sup> To establish the basis for an investigation, the application itself or a “preliminary investigation” would need to “disclose[] to the satisfaction of the commission that there are good and sufficient reasons therefor under the law.”<sup>31</sup> In contrast to other provisions of the Tariff Act of 1922, hearings were to be held in Section 317 investigations only if necessary in the judgment of the Tariff Commission, rather than as a matter of course.<sup>32</sup> Although a right of appeal was provided in other

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.*

<sup>27</sup> 11 Annual Report of the United States Tariff Commission, at 2 (1926–1927). *See also* 13 Annual Report of the United States Tariff Commission, at 46 (1928–1929) (stating that Section 317 “covers discriminations ‘in fact’ of all varieties, whether in customs duties or other charges, or in classifications, prohibitions, restrictions, or regulations of any kind”).

<sup>28</sup> Executive Order No. 3746 (Oct. 7, 1922).

<sup>29</sup> 7 Annual Report of the United States Tariff Commission, at 53 (1922–1923).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 54.

provisions of the Tariff Act of 1922, such a right was not described in the rules with respect to Section 317 proceedings.<sup>33</sup>

The Commission's records indicate that it received a number of applications under Section 317 during the 1920s. These applications related to, among other things, automobiles, refined oil and gas, and hardwood flooring.<sup>34</sup> Applications were also received regarding the apparently more general discrimination in Guatemala and Australia.<sup>35</sup> Applications under Section 317 were recorded, numbered, docketed, and information about these records was furnished regularly to the Commission, its staff, and "other interested persons."<sup>36</sup>

Records of the Tariff Commission at the National Archives indicate that the Commission proceeded carefully in these investigations under Section 317. In internal memoranda from a 1923 investigation into alleged discrimination by Italy against cottonseed oil from the United States, Commission officials opined that the motives for discriminatory treatment could be relevant to a determination of whether Section 317 had been triggered, and—after noting that "[t]he task of showing that a discrimination in fact exists distinctly rests upon the United States" under Section 317—recommended against taking action under the statute in the face of conflicting evidence.<sup>37</sup> As Commission staff advised, it seemed "unwise to allege and impossible to prove" an intent to discriminate and the fact of discrimination against the United States within the meaning of Section 317, and the imposition of penalty duties "would carry with it the possibility of endangering the whole structure of Italy's most favored nation treatment of the United States on a case of uncertain merit."<sup>38</sup>

In other cases, internal documents indicate that the Commission declined to pursue penalty duties under Section 317 for other reasons. For example, in a case concerning alleged discrimination by Canada against maple, beech, and birch flooring, an internal Commission memorandum recommended against proceeding with Section 317 duties because the complainant was facing antitrust claims under the Sherman Act at that time, and the Department of Justice was seeking the complainant's dissolution.<sup>39</sup> In response to an inquiry relating to import duties assessed in France against American bichromate of soda and potash, the Commission did not immediately proceed with an investigation or the imposition of duties, but rather requested additional information from U.S. interests, such as the costs of production of third-country producers and U.S. makers' ability to compete with third-country producers.<sup>40</sup>

<sup>33</sup> *Id.* at 55.

<sup>34</sup> 13 Annual Report of the United States Tariff Commission, *supra* note 27, at 243.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 30.

<sup>37</sup> Advisory Board's Memorandum on the Application from the Interstate Cotton Seed Crushers' Association, May 12, 1923 & Supplemental Memorandum on the Application from the Interstate Cotton Seed Crushers' Association, June 4, 1923, RG81 Records of the U.S. International Trade Commission, Records Relating to Investigations Under Sections 315, 316, 317 & 318 of the Tariff Act of 1922, Box No. 126.

<sup>38</sup> Supplemental Memorandum on the Application from the Interstate Cotton Seed Crushers' Association, June 4, 1923, RG81 Records of the U.S. International Trade Commission, Records Relating to Investigations under Sections 315, 316, 317 & 318 of the Tariff Act of 1922, Box No. 126.

<sup>39</sup> Memorandum for the Advisory Board, April 21, 1923, RG81 Records of the U.S. International Trade Commission, Records Relating to Investigations Under Sections 315, 316, 317 & 318 of the Tariff Act of 1922, Box No. 126.

<sup>40</sup> Letter from the Chairman of the Tariff Commission to A. Kipstein & Company dated November 21, 1922, RG81 Records of the U.S. International Trade Commission, Records Relating to Investigations Under Sections 315, 316, 317 & 318 of the Tariff Act of 1922, Box No. 126.

In at least one case, action under Section 317 also appears to have been considered as part of general diplomatic dialogue with other agencies. According to a December 17, 1924 press release from the United States Tariff Commission, Section 317 was discussed at an informal conference between representatives of the U.S. automotive industry and the United States Tariff Commission.<sup>41</sup> This discussion followed meetings between the U.S. auto industry and the secretaries of State and Commerce, all of which related to difficulties faced by American manufacturers through alleged discrimination by foreign governments against American automobile exports.<sup>42</sup>

In addition to permitting individual applications under Section 317, the Tariff Commission engaged in its own factfinding pursuant to this provision. Specifically, the Tariff Commission conducted surveys of U.S. businesses during the 1920s to gain information about discriminations that might be actionable under Section 317. As the Commission described them, these surveys were intended “to determine whether discriminations against American commerce existed and to obtain data in regard to the practical effect of the discriminations.”<sup>43</sup> These surveys took the form of “questionnaires” and were sent to “more than a thousand leading manufacturers and exporters in all lines of trade.”<sup>44</sup> In addition to circulating these questionnaires, the Commission also conducted “personal interviews with exporters.”<sup>45</sup> Finally, the Commission responded to “special requests of the president for information bearing upon [U.S.] tariff relations with other countries.”<sup>46</sup>

Although the Tariff Commission’s annual reports do not reveal details, they do indicate that the Tariff Commission created significant work product based on its activities under Section 317. The Tariff Commission submitted reports to the president regarding “all important existing discriminations against the commerce of the United States by means of tariff rates and regulations.”<sup>47</sup> The Tariff Commission also stated that it was analyzing and preparing information “for eventual publication in the form of reports dealing with the postwar tariff legislation and commercial policies of countries which are important export markets for United States products.”<sup>48</sup>

Even with such myriad efforts ongoing, the Tariff Commission expressed concern that Section 317 did not provide “sufficient safeguards from attacks made or threatened by other countries by way of export duties, restrictions, or embargoes upon raw materials.”<sup>49</sup> The Commission acknowledged that Section 317 permitted “a countervailing duty to offset differential export duties,” but in multiple reports expressed that “the situation may be such

<sup>41</sup> Press Notice – United States Tariff Commission, December 17, 1924, RG81 Records of the U.S. International Trade Commission, Records Relating to Investigations Under Sections 315, 316, 317 & 318 of the Tariff Act of 1922, Box No. 126.

<sup>42</sup> *Id.*

<sup>43</sup> 7 Annual Report of the United States Tariff Commission, *supra* note 29, at 42.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 8 Annual Report of the United States Tariff Commission, at 7 (1923–1924).

<sup>47</sup> 10 Annual Report of the United States Tariff Commission, at 34 (1925–1926); 11 Annual Report of the United States Tariff Commission, *supra* note 27, at 30; 13 Annual Report of the United States Tariff Commission, *supra* note 27, at 47.

<sup>48</sup> 10 Annual Report of the United States Tariff Commission, *supra* note 47, at 34.

<sup>49</sup> 8 Annual Report of the United States Tariff Commission, *supra* note 46, at 7.

that the remedy provided is inadequate.”<sup>50</sup> In one report, the Commission expanded this concern, noting that Section 317 “cover[ed] export duties, restrictions, or embargoes only when they have differential features.”<sup>51</sup> The Commission observed that “[s]ome of our largest industries, notably rubber and tin, are entirely dependent on imported raw materials” while “others, such as the leather and paper industries, would be seriously crippled by the cutting off of foreign supplies.”<sup>52</sup>

Despite such concerns about the adequacy and scope of Section 317—or perhaps because of them—the president did not impose tariffs directly under Section 317 during the time that statute was in force. As the Tariff Commission’s final report on Section 317 makes clear, “[t]he President has secured the removal of important discriminations without imposing the retaliatory duties authorized by this section of the act.”<sup>53</sup> Even without such direct application, however, Section 317 from the Tariff Act of 1922 was deemed sufficiently important for incorporation into the Tariff Act of 1930. In fact, the debates in the House of Representatives on the 1930 Act called a provision of this type “absolutely necessary” in the event of discrimination against U.S. commerce and “an important feature” that would “wield great influence” for U.S. exports with foreign countries.<sup>54</sup> As discussed in the following sections, Section 338 was indeed frequently invoked, at least indirectly, during the first decades of its enactment.

### *Investigations Under Section 338*

After Section 338 of the Tariff Act of 1930 replaced Section 317 of the Tariff Act of 1922, it appears that the Tariff Commission continued at least some of the same procedures.<sup>55</sup> During the 1930s, investigatory powers under Section 338 were construed broadly, like those under Section 317, and the United States Tariff Commission undertook both general monitoring of trade relations and the investigation of individual complaints. In 1933–1934, for example, the Commission indicated the existence of “numerous confidential projects,” including the Commission’s “customary work on discriminations against the foreign commerce of the United States as required by Section 338 of the Tariff Act of 1930.”<sup>56</sup> In addition to such general monitoring, it appears that at least one private petition was filed during the 1930s,<sup>57</sup> indicating that the right of petition that was exercised under Section 317 was carried forward with Section 338 of the Tariff Act of 1930.

<sup>50</sup> *Id.*; 7 Annual Report of the United States Tariff Commission, *supra* note 29, at 43; 9 Annual Report of the United States Tariff Commission, at 10 (1924–1925); 10 Annual Report of the United States Tariff Commission, *supra* note 47, at 34.

<sup>51</sup> 8 Annual Report of the United States Tariff Commission, *supra* note 46, at 7.

<sup>52</sup> *Id.*

<sup>53</sup> 13 Annual Report of the United States Tariff Commission, *supra* note 27, at 47.

<sup>54</sup> 72 Cong. Rec. 12325.

<sup>55</sup> 14 Annual Report of the United States Tariff Commission, at 2 (1929–1930) (“Section 338 takes the place of section 317 covering discriminations by foreign governments against the commerce of the United States. The only important modification of this section as reenacted is the extension of its application to articles imported in vessels of such foreign countries as discriminate against the commerce of the United States.”).

<sup>56</sup> 18 Annual Report of the United States Tariff Commission, at 16 (1933–1934).

<sup>57</sup> 21 Annual Report of the United States, at 38 (1936–1937) (“In the past year, the Commission conducted one preliminary inquiry pursuant to application, but concluded that the institution of a formal investigation in the case was not warranted.”).



The Commission's work under Section 338 was exercised in secret, however, in contrast to its work under Section 317. The Commission made clear, for example, that it "does not . . . make public the correspondence and complaints that it receive[d] under the provisions of section 338"<sup>58</sup> and that "[h]earings are neither required nor contemplated by section 338."<sup>59</sup> Until 1962, the Code of Federal Regulations confirmed the secrecy of Section 338 proceedings, and stated that no rules to govern Section 338 investigations had been issued because such investigations of possible discrimination against U.S. commerce must be "conduct[ed] under cover of secrecy."<sup>60</sup>

In the interwar period, under the authority contained in this provision, the president found that Germany and Australia had discriminated against the commerce of the United States.<sup>61</sup> Based on this finding, the president withdrew from these two countries the benefit of certain concessions granted to other countries.<sup>62</sup> It appears that the president did not, however, go so far as to impose penalty duties against Germany and Australia.<sup>63</sup> In addition, with respect to Germany, the United States may have been responding to actions in addition to trade discrimination. According to a 1943 edition of this *Journal*, the withholding of these tariff reductions from Germany "evidently arose from mixed economic and political motives . . ."<sup>64</sup>

#### *Use of Section 338 in Trade Negotiations*

Separate from the indirect application of Section 338 to Germany and Australia, use of Section 338 was threatened in the course of various trade negotiations in the 1930s. For example, Section 338 retaliation was threatened against France in 1932 in response to both quotas on U.S. imports, and a tax treaty that would exempt Belgian goods (but not U.S. goods) from French import taxes. With respect to the quotas, the topic of Section 338 retaliation was broached during a discussion between a U.S. Department of State official and the French commercial attaché.<sup>65</sup> In that discussion, the State Department official indicated that, while the United States "did not want to use Section 338," the country was "under considerable pressure" and it was "impossible to determine what course of action would be necessary" in response to the French quotas.<sup>66</sup> Five days later, the acting secretary of state advised the U.S. ambassador in France that the U.S. government "can give no assurances that it may not at any moment invoke Article 338 against French imports" and requested

<sup>58</sup> 25 Annual Report of the United States Tariff Commission, at 43 (1940–1941).

<sup>59</sup> 15 Annual Report of the United States Tariff Commission, at 111 (1930–1931).

<sup>60</sup> 19 C.F.R. §201.1 (1961). The 1962 amendment of this language does not reveal the reason that this sentence was omitted. See 27 Fed. Reg. 12118.

<sup>61</sup> 20 Annual Report of the United States Tariff Commission, at 47 (1935–1936).

<sup>62</sup> Benjamin H. Williams, *The Coming of Economic Sanctions into American Practice*, 37 AJIL 386, 389 (1943) (stating that the reason for this action against Germany was that it "did not allocate a fair amount of foreign exchange for the purchase of goods from the United States").

<sup>63</sup> 25 Annual Report of the United States Tariff Commission, *supra* note 52, at 44 ("Since 1922, when this retaliatory power was conferred on the President by the tariff act of that year, no action by this Government against foreign discrimination under this law has been carried as far as the imposition of penalty duties.")

<sup>64</sup> Williams, *supra* note 62, at 386, 389.

<sup>65</sup> See Memorandum by the Chief of the Division of Western European Affairs (Boal) of a Conversation with the French Commercial Attaché (Garreau-Dombasle), Washington, 651.116.320 (Apr. 18, 1932).

<sup>66</sup> See *id.*

that the U.S. ambassador keep these considerations “before the French.”<sup>67</sup> With respect to the tax treaty, the U.S. Department of State likewise took a robust position, and stated in a communication to the chargé in France that “[t]he Department feels that there can be little question that this type of discrimination clearly falls within the meaning of Section 338 of the Tariff Act.”<sup>68</sup>

Available documents indicate that the quota dispute with France was resolved, at least temporarily, through an agreement between the governments that would assure the United States unconditional MFN treatment “[i]n all matters relating to quotas and restrictions on importations.”<sup>69</sup> The Belgian tax benefit likewise appears to have been resolved by treaty after the action under Section 338 was threatened.<sup>70</sup> Based on these communications, it appears that Section 338 was successfully invoked in this instance to preserve U.S. trade interests.

Around the same time, Section 338 was discussed among American officials during negotiations with Spain regarding general MFN treatment for all American goods. In a 1932 communication to the U.S. ambassador in Spain, the acting secretary of state asserts that “[w]e are seriously considering the application of Section 338” and requests that the U.S. ambassador opine on the probable result of such action and confer in confidence with the commercial attaché on the issue.<sup>71</sup> The U.S. ambassador advised in response that invocation of Section 338 could result in the exclusion of American products from Spain, and that both the commercial attaché and the president of the American Chamber of Commerce agreed that application of Section 338 would be ill-advised.<sup>72</sup> On this advice, it appears that discussions of Section 338 were not pursued.

Section 338 was likewise discussed, and construed broadly, in the context of trade relations with Japan and China in the late 1930s. Memoranda among U.S. Department of State officials at this time indicate that invocation of Section 338 was considered in response to Japan’s policies in China, in which Japan had “deflect[ed] to its own purpose normal trade and commerce and which place[d] Japan in position effectively to discriminate against all non-Japanese trade and commerce.”<sup>73</sup> In these discussions, the legal adviser to the secretary of state observed that the situation with respect to Japan and China likely differed from the one Congress had envisioned when enacting Section 338. As the legal adviser wrote, Congress likely “had in mind discrimination by a country in its own territory” and the situation of “occupied territory such as exists in China” was probably not contemplated at that time.<sup>74</sup> Nevertheless, the legal adviser concluded that terms of Section 338 were “broad

<sup>67</sup> See The Acting Secretary of State to the Ambassador in France (Edge), Washington, 651.116/308: Telegram (Apr. 23, 1932).

<sup>68</sup> See The Secretary of State to the Chargé in France (Armour), Washington, 651.5531/57: Telegram (July 15, 1932).

<sup>69</sup> See The Ambassador in France (Edge) to the Secretary of State, Paris, 651.116.355: Telegram (May 31, 1932).

<sup>70</sup> See The Ambassador in France (Edge) to the Secretary of State, Paris, 811.512351 Double/126: Telegram (Apr. 24, 1932).

<sup>71</sup> See The Acting Secretary of State to the Ambassador in Spain (Laughlin), Washington, 611.5231/742: Telegram (Oct. 10, 1932).

<sup>72</sup> See The Ambassador in Spain (Laughlin) to the Secretary of State, Madrid, 611.5231/743: Telegram (Oct. 15, 1932).

<sup>73</sup> See Memorandum by the Chief of the Division of Far Eastern Affairs, Washington, 611.9431/162 1/2 (Oct. 10, 1938).

<sup>74</sup> See Memorandum by the Legal Adviser (Hackworth) to the Secretary of State, Washington, 611.9431.176 1/2 (May 26, 1939).

enough to cover the Sino-Japanese situation if it should be deemed desirable to invoke the section.”<sup>75</sup> A December 1939 memorandum lists Section 338 retaliation among a number of other measures that could be invoked against Japan after the commercial treaty between Japan and the United States expired on January 26, 1940.<sup>76</sup>

After World War II, Section 338 appears in U.S. diplomatic correspondence again, this time with respect to trade relations with China. A 1949 telegram from Secretary of State Dean Acheson to the consul at Shanghai mentions Section 338 as a possible response to discrimination by China against American trade.<sup>77</sup> As that telegram provides,

[s]hould Commie commercial policy show clear evidence of discrimination against US trade (abolition GATT rate appears uniform and without discrimination) president has power under section 338 Tariff Act to impose as penalty duties higher than provided in 1930 Tariff or even to exclude Chinese goods altogether.<sup>78</sup>

The telegram also qualified, however, that such action “would have to be based on evidence discrimination, unfair treatment and not on mere fact [of] failure to comply [with] obligations [of a] trade agreement.”<sup>79</sup>

### III. SECTION 338 TODAY

After the Acheson telegram in 1949, Section 338 disappears from public records of treaty negotiations and the annual reports of the Tariff Commission. Occasional references in other documents indicate that the statute remains viable, even if apparently forgotten by some. In 1969, for example, Section 338 was raised before the U.S. Customs Court by a party attempting to argue that export duties fell outside another provision of the Tariff Act of 1930.<sup>80</sup> The court rejected this argument, and suggested in passing that Section 338 was “directed primarily at a situation where colonies of colonial powers were furnishing raw materials to their mother countries at an advantage over third countries, by various forms of discrimination.”<sup>81</sup>

Section 338 has also been mentioned before Congress, in connection with the possibility of granting the president other similar authorities. In 1973, for example, Eugene Stewart, general counsel of the Trade Relations Council of the United States mentioned Section 338 before the House Committee on Ways and Means.<sup>82</sup> In that statement, Stewart noted the existence of the president’s power under Section 338, and particularly this provision’s lack of use.<sup>83</sup> On that basis, he argued against granting the president additional similar authority over tariffs.<sup>84</sup>

The International Trade Commission has also referred to the statute. In 1979, Section 338 was included in a Commission report on the economic impact of the Multilateral Trade

<sup>75</sup> *See id.*

<sup>76</sup> *See* Memorandum Prepared in the Department of State, 793.94/15697 (Dec. 29, 1939).

<sup>77</sup> *See* The Secretary of State to the Consul at Shanghai (McConaughy), Washington, 560.AL/8-1249: Telegram (Aug. 12, 1949).

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Hammond Lead Prods. v. United States*, 306 F. Supp. 460, 472 (Cust. Ct. 1969).

<sup>81</sup> *Id.*

<sup>82</sup> H.R. Rep. No. 6767, pt. 7, at 2054 (1973).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Negotiations agreements.<sup>85</sup> This report, which was transmitted to the Senate Committee on Finance, describes Section 338 as “[a]n obscure and never-used provision of the law” and suggests that it “has been overshadowed by more recent enactments.”<sup>86</sup> The Commission likewise mentioned Section 338—and particularly its monitoring requirements—in a “descriptive report” providing “a list of the requirements that apply to the USITC.”<sup>87</sup>

At least a few scholars and researchers likewise remain aware of Section 338. For example, in 1963 one writer included Section 338 among specific grants of authority which the president may employ in seeking the removal of foreign import barriers.<sup>88</sup> A 1995 article discussed Section 338 among other provisions of U.S. law aimed at non-discrimination, but concluded that “it is believed that this section is not enforced.”<sup>89</sup> In December 2016, the Congressional Research Service included Section 338 in its “non-exhaustive list of sample statutory provisions that delegate some authority to the President” to raise tariffs.<sup>90</sup> In a 2001 article in this *Journal*, the statute was mentioned among trade sanctions that had been used to “pry open foreign markets” during the twentieth century.<sup>91</sup> In that article, Professor Steve Charnovitz described the “mixed blessing” of authorizing trade sanctions against governments that violate World Trade Organization (WTO) obligations, particularly when those sanctions are intended to induce compliance with trade obligations rather than to rebalance trade.<sup>92</sup> A similar caution might be appropriate regarding the potential use of Section 338.

#### IV. CONSEQUENCES OF A POTENTIAL USE OF SECTION 338

As noted above, a direct application of Section 338 could lead to claims against the United States before the WTO or other international fora. As a WTO member, the United States has agreed not to raise tariffs above established “bound” rates, which are often zero. WTO and other trade agreements allow countries to raise tariffs above the “bound” rate only for specific and agreed-upon purposes, such as to offset subsidies as defined by the WTO’s Agreement on Subsidies and Countervailing Measures. But in negotiating the WTO and other trade agreements, the United States did not preserve the right to raise tariffs under Section 338 criteria. An individual trading partner who faced action under Section 338 might argue that such action is not consistent with guarantees of national treatment or MFN treatment in WTO and other trade agreements.

Like Section 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962—both of which have already been the subject of actions by the Trump

<sup>85</sup> MTN Studies, Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva-U.S., International Trade Commission Investigation No. 332-101, 96th Cong., 1st Sess., CP 96-27 (Aug. 1979).

<sup>86</sup> *Id.* at 48.

<sup>87</sup> U.S. International Trade Commission, Office of Inspector General’s Final Report, Descriptive Evaluation of USITC’s Affirmative Requirements, OIG-ER-15-02, at II.

<sup>88</sup> Craig Matthews, *Non-Tariff Import Restrictions: Remedies Available in United States Law*, 62 MICH. L. REV. 1295, 1341–42 (1963).

<sup>89</sup> Edward A. Laing, *Equal Access/Non-discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT’L L.J. 246, 304–05 (1995).

<sup>90</sup> CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES, R44707, at 3 (2016).

<sup>91</sup> Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AJIL 792, 797 (2001).

<sup>92</sup> *Id.* at 792, 807–08.

Administration—Section 338 pre-dates the WTO and its dispute-settlement provisions. When the European Communities launched a facial challenge to the unilateral remedies permitted in Section 301 of the Trade Act of 1974, a WTO panel found that these remedies constituted “a serious threat” to the WTO dispute settlement provisions, and that Section 301 was “prima facie” inconsistent with WTO obligations.<sup>93</sup> The panel found that this threat was “removed,” however, in light of representations by the United States to the panel in that case, as well as a Statement of Administrative Action submitted by the president to Congress, and approved by Congress, asserting that Section 301 determinations of U.S. rights under trade agreements would be based on findings of a WTO panel or the Appellate Body.<sup>94</sup> In light of these representations, the panel ultimately found that the United States was not in violation of its WTO commitments in that case.<sup>95</sup>

If the United States were to back away from such representations, however, or actually implement tariffs or take other action pursuant to Section 338 or otherwise outside the WTO framework, another WTO member could bring a challenge similar to the one previously brought by the European Communities with respect to Section 301. If such a challenge were launched, the change in U.S. rhetoric, and particularly unilateral action on the part of the United States, could lead a WTO panel to determine that United States was in violation of its WTO commitments.

Time will tell whether Section 338 will be revived in investigations and trade negotiations, perhaps along with some of its Section 317 history. President Trump has characterized a wide variety of measures as discriminatory in nature, some of which may credibly meet a statutory definition of “discrimination” under Section 338. State-sponsored theft of intellectual property, for example, which is the focus of the president’s recent action regarding a potential investigation under Section 301 of the Trade Act of 1974, would seem to meet this burden. On the other hand, while the president often cites trade deficits as evidence of discrimination, a trade deficit alone should not be sufficient to demonstrate discrimination under Section 338.

To the extent that the current administration may consider direct or indirect use of Section 338, a few points from the historical context may be instructive. First, neither Section 338 nor its predecessor was ever directly applied; instead, both were used essentially as only negotiating tools. This consistent, measured use of such broad power indicates that the mere prospect of raising tariffs has been sufficient to achieve U.S. trade goals in the past. Second, Section 338 and its predecessor were intended for use only in response to discriminations by other countries, to further free trade on an unconditional MFN basis. As such, even if Section 338 were resurrected as a tool to defend against discriminatory actions by other countries, it would be inappropriate to use this tool for protectionist purposes. Finally, any use of Section 338 would need to be considered carefully in light of U.S. commitments in the Uruguay Round (and in subsequent WTO litigation) to eschew self-help measures.<sup>96</sup>

<sup>93</sup> Panel Report, United States – Sections 301–310 of the Trade Act of 1974, paras. 7.131, 7.43, WT/DS152/R (Dec. 22, 1999).

<sup>94</sup> *Id.*, paras. 7.109–.126, 7.131–.136.

<sup>95</sup> *Id.*, para. 8.1.

<sup>96</sup> See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Art. 23, Annex 2, 1869 UNTS 401, 33 ILM 1226, 1241(1994).