104TH CONGRESS
2d Session

COMMITTEE PRINT

WMCP:
104–16

SUBCOMMITTEE ON TRADE

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

WRITTEN COMMENTS

ON

INTERNATIONAL TRADE COMMISSION REFORMS

NOVEMBER 26, 1996

Printed for the use of the Committee on Ways and Means by its staff

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U.S. GOVERNMENT PRINTING OFFICE
35–611 CC WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053849-1

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ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON TRADE

FOR IMMEDIATE RELEASE
January 31, 1996
No. TR-16

CONTACT: (202) 225-6649

Crane Announces Request for Written Comments on International Trade Commission Reforms

Congressman Philip M. Crane (R-IL), Chairman of the Subcommittee on Trade of the Committee on Ways and Means, today announced that the Subcommittee is requesting written comments for the record concerning possible structural and procedural reforms to the International Trade Commission (ITC).

BACKGROUND:

The International Trade Commission is an independent and quasi-judicial agency that conducts studies, reports, and investigations, collects data, and makes recommendations to the President and the Congress on a wide range of international trade issues. The Commission's numerous responsibilities may be grouped into the following general areas: advice on trade negotiations and Generalized System of Preferences; import relief for domestic industries; East-West trade; investigations of injury caused by subsidized or dumped goods; import interference with agricultural programs; unfair practices in import trade; development of uniform statistical data; matters related to U.S. tariff schedules; international trade studies; and trade and tariff summaries.

Statutory authority for the Commission's responsibilities is provided primarily by the Tariff Act of 1930, the Agricultural Adjustment Act, the Trade Expansion Act of 1962, the Trade Act of 1974, the Trade Agreements Act of 1979, the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988, and the Uruguay Round Agreements Act.

Commissioners are appointed by the President for nine-year terms unless appointed to fill an unexpired term. Of the six commissioners, not more than three may be of the same political party. The Chairman and Vice-Chairman are designated by the President for two-year terms, and successive chairmen may not be of the same political party.

In recent years, both the Administrative Conference of the United States (ACUS) and the U.S. General Accounting Office (GAO) have investigated the ITC. The ACUS focused on ways to improve the ITC's decisionmaking in antidumping and countervailing duty investigations: Administrative Conference of the United States, *Administrative Procedures Used in Antidumping and Countervailing Duty Cases,* Recommendation 91-10, December 13, 1991. The GAO study examined whether the ITC's administrative structure should be clarified: General Accounting Office, *International Trade Commission: Authority is Ambiguous,* GAO/NSIAD-92-45, February 1992. Both studies discussed and recommended several possible reforms, most of which would require Congressional action.

POSSIBLE REFORMS:

In light of the results of the studies discussed above, the Subcommittee requests comments concerning whether there is a need for reform and, if so, what the nature of

the reform should be. Possible changes to the structures and procedures of the ITC include those listed below, many of which were suggested in the ACUS or GAO studies. The Subcommittee welcomes comments on these or any other reforms that the public believes may be appropriate as well as on whether any reforms are necessary at all:

- Reducing the number of commissioners from six;
- Providing for an odd, as opposed to an even, number of commissioners, with appropriate changes in political party composition;
- Increasing the term of the Chairman from two years;
- Changing the budget approval process so that the commissioners vote to approve the budget submission only, as opposed to the current system in which the Chairman has the authority to "formulate" the budget but subject to broad majority approval;
- Providing the Chairman with greater personnel authority so that hiring decisions would be no longer subject to disapproval by majority vote and only senior-level hiring decisions would require the approval of a majority of the commissioners;
- Providing the Chairman with greater authority in making other administrative decisions by no longer permitting a majority of commissioners to veto any administrative decision concerning day-to-day management of the Commission. For certain decisions, the override could be replaced with a requirement for approval (e.g., selection of designated senior employees, certain reorganizations, and budget approval);
- Removing the current exemption from Office of Management and Budget oversight of the Commission's budget by repealing 19 U.S.C. 2232;
- Creating the position of executive director to make administrative decisions; and
- Changing the hearing and investigation process so that any injury determination is made by an administrative law judge, subject to review by the Commission.

DETAILS FOR SUBMISSION OF WRITTEN COMMENT:

Persons submitting written comments should submit six (6) copies, with their address and date of request noted, by the close of business, **Friday, March 1, 1996,** to Phillip D. Moseley, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages including attachments.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

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Comments of Commissioner Lynn M. Bragg
United States International Trade Commission

The Subcommittee's request identifies a number of specific proposed reforms. Clearly, these proposals stem from a desire to seek greater efficiency in the performance of the ITC's functions and to improve its management. While the Subcommittee's objectives are certainly laudable, it is my view that the effect of the proposed reforms would be to radically alter the functioning of the Commission, in ways that would adversely affect the constituencies it serves.

The ITC performs a number of important functions, including the provision of technical advice on trade issues to the Congress and the Executive Branch, and the rendering of decisions on petitions from U.S. industries for import relief (including determinations concerning injury to a U.S. industry in escape clause and unfair trade cases, and disputes regarding infringement by imports of U.S. intellectual property rights). Many of the issues with which the ITC deals are politically very sensitive. Congress sought to ensure that these issues would be dealt with objectively, and would not be unduly influenced by the pressures of partisan politics or the ideological predispositions of any particular Administration. Consequently, Congress designed the ITC to be an independent agency, and built in a number of features -- an even number of Commissioners with an equal number from each party, staggered nine-year terms, limited powers for the Chairman, and independence from OMB budget oversight -- designed to ensure that neither political party would be able to manipulate the outcome of ITC decisionmaking or advice.

These features are critical to maintaining the agency's independence and objectivity, and thus its value as a resource to the constituencies it serves. The Commission has always had, and continues to have, a well-deserved reputation for producing high-quality, balanced analysis of trade issues. Even in the import relief area, where the Commission's decisions regularly come under fire from both opponents and supporters of the import relief laws, the Commission's decisions on the whole reflect the balance and objectivity Congress sought to ensure. If the Commission were to become simply another Executive Branch agency -- which would be the effect of the proposed reforms -- it would quickly lose its objectivity, and become the creature of whatever party held the Commission majority, and an instrument of the trade policy agenda of that party.

If it is truly Congress' desire that the Commission become a partisan political entity, then these proposals would achieve the intended effect. Such a change would have repercussions that should be carefully considered, however. In addition to losing an important source of objective, nonpartisan analysis of critical trade issues, the proposed reforms would alter a system that has functioned to take trade disputes largely out of the political process by channeling them to a relatively neutral administrative forum for resolution. If that forum is no longer perceived as neutral, then the pressure will increase for domestic industries injured by import competition to bypass the trade remedy laws and go directly to Congress for relief. If Congress elects to address trade relief issues on an ad hoc, political basis, rather than within the structure of the existing trade laws and agencies, that is certainly its prerogative. The result, however, will be both intensified pressures on Congress to provide import relief, and a greatly increased risk that resulting solutions to trade disputes will violate international laws and heighten tensions with U.S. trading partners.

Comments on specific proposals

1. **Proposals to Restructure ITC as a Partisan Political Entity**

Regarding the specific proposals outlined in the January 31 advisory, I note that most of them -- providing for an odd number of commissioners, increasing the term of the Chairman, providing the Chairman with greater authority over budgetary, administrative and personnel decisions, and removing the current exemption from OMB oversight of the Commission's budget -- would have the effect I have described above, of making the ITC a partisan political entity. Again, if Congress wishes to do so, this is Congress' decision to make. However, I caution that

these proposals should not be viewed merely as "process" improvements. Decisions regarding the budget, hiring, and other administrative matters all have a significant impact on the agency's ability to fulfill its functions in an objective and timely fashion. Giving the Chairman virtually unfettered authority over such decisions will enable the person in that position -- and the Administration that he or she serves -- to shape the agency in ways that can significantly affect its ability to respond to Congressional policymakers. For example, a Chairman of one party could use such authority to prevent agency personnel from responding promptly to requests for technical advice from members of Congress representing the other party.

Although studies of the ITC have recognized that its structure creates some administrative problems, neither of the reports cited in the Committee's January 31 advisory have advocated radical changes in the Commission's structure. Indeed, in its 1992 report, the General Accounting Office recognized that changes of the type proposed by the Subcommittee could have profound effects on the ITC's substantive work:

> "These changes to the ITC's structure, however, would not be limited to administrative matters, and they might have a profound effect on substantive decision-making. In the past, the Congress has been concerned that a more powerful chairman would reduce the independence of ITC by giving the chairman and/or President too much influence. Many of the ITC's statutory provisions are unique. The Congress chose to make neither the ITC chairman's selection nor the commission's composition like those of other agencies. Moreover, based on our survey of other commissions, adopting a different structure might not eliminate problems in making administrative decisions."

General Accounting Office, International Trade Commission: Authority is Ambiguous, GAO/NSIAD-92-45, February 1992, ("GAO Report") at 37.

Regarding the proposal for an odd number of Commissioners, I would also note that preeminent trade scholars John Jackson and William Davey, in their report underlying the Administrative Conference of the United States (ACUS) Recommendation 91-10 (also cited in the Committee's January 31 advisory) view such a change as unnecessary. Their report notes that

> "In the course of our study, several complaints were made about the structure of the ITC One was the undesirability of having an even number of commissioners. While this does lead to tie votes, the relevant statutes deal with that eventuality and we do not think that it poses a serious problem."

John H. Jackson and William J. Davey, Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases ("Jackson and Davey Report") at 969.

2. Creation of Executive Director and ALJs for Injury Determinations

Two of the proposals identified in the Committee's January 31 advisory raise slightly different issues. These concern the creation of an executive director to make administrative decisions, and a proposed change to the hearing and investigation process so that any injury determination is made by an administrative law judge, subject to review by the Commission. I regard these changes as unnecessary and unwise. They would simply interject additional layers of bureaucracy and cost, without any corresponding benefit either to the administrative process or the substance of Commission decisionmaking.

The GAO report expressed such reservations about the creation of an executive director:

> "Creating an executive director position at ITC would not necessarily end problems in administrative decision-making . . . We found that despite the existence of an executive director, 7 of the 13 commissions [studied by the GAO] experienced administrative disputes in some

> area. Commissioners still approve certain decisions; executive directors are often the chairman's representative, and disputes can occur over a delegated decisison. ITC had such a position for several years before 1977, but it was eliminated and responsibilities were divided between the current Director of Administration and the Director of Operations. Creating an executive director position would be unlikely to have any effect unless other changes were made to clarify or remove commission approval of administrative decisions. Otherwise, creating this position would only add a layer of responsibility to ITC and transfer the initial focus of all commission-level disagreement onto a subordinate."

GAO Report at 39.

The proposal to have an ALJ make injury determinations raises similar concerns. Injury determinations are probably the most sensitive decisions the Commission is tasked with making. That fact will not be changed by the introduction of another layer of decisionmaking. Commissioners will continue to take seriously the responsibilities with which Congress has charged them, and will each make an independent judgment as to whether the evidence collected in an unfair trade (antidumping or countervailing duty) or escape clause (Section 201) investigation demonstrates the requisite degree of injury and causation. As each Commissioner's approach to injury analysis differs, there is no common or accepted "institutional" approach to injury decisionmaking that an ALJ could embody. Thus, there is nothing to be gained by adding an intermediate decisionmaker in these determinations.

Indeed, the Commission reached this conclusion after experimenting with a similar approach in the early 1980s. For a brief period, the Commission had the Director of Operations make a recommended decision in preliminary determinations, but then terminated the experiment after rejecting the resulting recommendations. See Jackson and Davey Report at 961, n.180.

The introduction of a single decisionmaker to determine whether injury has occurred also is at odds with Congress' reasons for tasking a six-member body with making these decisions in the first place. As Professors Jackson and Davey recognize in their report, ITC injury decisions by their very nature are discretionary, involving an evaluation of economic data to determine whether or not injury has occurred or is threatened. Jackson and Davey Report at 972, n. 204. It is for this reason -- as well as due to the politically sensitive nature of such decisions -- that Congress chose to entrust injury determinations to a body of six Commissioners having varying backgrounds and perspectives, rather than to a single decisionmaker.

Moreover, given that the ALJ's decisision would be in the nature of an intermediate decision, which the Commission could override, the proposal runs the risk of shortchanging parties to injury investigations by denying them effective access to the ultimate decisionmakers, i.e., the Commissioners. Under current practice, the parties have the opportunity to present their case directly to the Commission at a hearing in the final phase of the investigation. If an ALJ were to conduct the hearing instead, parties would not have that opportunity, nor would Commissioners have the chance to ask questions of the parties and obtain the kind of "first-hand" impressions that help to shape their ultimate decision. Thus, introduction of an ALJ into the process not only would serve no useful purpose, but could in fact deny the partiestheir ability to present their arguments directly to the ultimate decisionmakers.

This proposal also would add significantly to the cost and length of AD and CVD proceedings. Professors Jackson and Davey estimate that more time would be needed both for hearings (which would be trial-type hearings under the Administrative Procedure Act) and for Commission review of the ALJ decision (which could include further argument at the request of any Commissioner). "Consequently, inserting an ALJ into the ITC injury determination would probably require some additional time (perhaps a month or two) to be added to the time frame of the standard injury investigation." Jackson and Davey Report at 962-63. "Use of ALJs would also cost more money, both for the parties and the government." Id. at 964. One source cited by Professors Jackson and Davey estimated (in 1991) that the use of ALJs would cost the

government $7 5 million. In this time of fiscal austerity, proposals that would so substantially increase the cost of antidumping and countervailing duty proceedings, not to mention adding another layer of bureacracy, should be considered very carefully, particularly when there is no apparent compelling benefit which would result from their adoption.

The feasibility of using ALJs also is questionable in light of recent amendments to the AD and CVD laws enacted by Congress to conform U.S. law to the Uruguay Round agreements For example, under current law, the Commission now must establish a record-closing date and provide parties with an opportunity to comment on all information received by the Commission prior to that date. Under a system involving the use of ALJs, the record would have to be closed quite early in the proceedings to allow the ALJ to consider all pertinent information. This, however, would preclude Commissioners from requesting further information they may deem necessary in the course of reviewing an ALJ determination, and thus would adversely affect their ability to conduct a thorough and informed review.

Finally, it is worth noting that neither the GAO nor the ACUS have recommended introducing an ALJ into ITC injury decisions. The idea was suggested by Professors Jackson and Davey in their report (primarily to improve procedures at Commerce's International Trade Administration), but was not adopted by the ACUS Instead, the ACUS adopted Professors Jackson and Davey's alternative recommendation, that the ITA and ITC "develop factfinding procedures that improve development of the administrative record, with increased opportunities for the parties and decisionmakers to test the factual submissions made in the proceedings." Specifically, in the case of the ITC, the ACUS recommended that the ITC "provide adequate time for oral presentations" and "allow reasonable time for cross-examination in appropriate cases without reducing the cross-examiner's timer for affirmative presentation at the hearing." Neither the ACUS recommendation nor the underlying report by Professors Jackson and Davey indicate that there is any serious problem with the ITC's hearing procedures. In fact, the recommendation and report focus primarily on perceived inadequacies in ITA's hearing and decisionmaking procedures, not the ITC's.

Many of the problems that have been identified in studies of the Commission simply reflect the reality that conflicts will arise within any group dealing with contentious and highly-charged trade issues, such as whether a particular industry should be granted import relief. That reality will not be changed simply by altering the structure of the ITC; rather, the conflicts will move to other arenas, such as the Congress.

Like the mythological Hydra slain by Hercules, the ITC has often been reviled as a many-headed monster. What critics of the Commission's admittedly cumbersome six-Commissioner, politically balanced decisionmaking structure often overlook is that the Commission's design is for a reason -- to ensure its objectivity and independence from undue partisan or Executive Branch influence in its performance of the sensitive trade functions with which it is tasked. I urge the Committee to consider carefully the consequences of remaking the Commission.

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

Written Comments of
Commissioner David B. Rohr
United States International Trade Commission

I appreciate this opportunity to comment on the proposals before the Subcommittee regarding structural and procedural reforms for the United States International Trade Commission. In my government career, I have been a customer of, an overseer of, and finally responsible for the work of the Commission. As someone who has spent years intimately involved with the Commission, its work and its processes, it is my view that these proposals would fundamentally compromise the independence of the Commission and, through its consequent politicization, its ability to provide Congress, the Executive Branch, and the American public the objective decisions and advice for which it was created. Let me explain why.

Changes to the Number of Commissioners

Since its creation in 1917, the Commission has been authorized to have six Commissioners, with no more than three from any one political party. In the Subcommittee's proposals, it has been suggested that the total number of Commissioners could be reduced, and possibly to an odd rather than an even number. These two proposals raise different issues and I will address them separately.

While six Commissioners are authorized under the legislation creating the Commission, over the last 20 years the Commission has operated with as few as three and as many as six Commissioners. There is clearly no special "magic" to the number six. When considering the number of Commissioners, it is important, in my view, to recall the basic reasons Congress established a six-member Commission in 1917. Congress desired a diversity of experience and views among the men and women whom it charged with the responsibility to advise on international trade and economic questions, and later, to make quasi-judicial decisions.

Such diversity has been the hallmark of the Commission. In appointing Commissioners, geographic diversity has always been important, with Commissioners at all times representing different regions of the country. So, too, has the professional background of the Commissioners provided a cross-section of American life. The Commission has been served by Commissioners with farming backgrounds, business -- both small and large -- backgrounds, academics, lawyers, Washington trade professionals, labor experts and, indeed, politicians. The Congress that established this system

appears to have been of the mind that, by assuring a range of experience among Commissioners, the Commission would not become simply an isolated Washington ivory tower, but would remain responsive to real conditions in the United States. Congress sought diversity in the composition of the Commission, believing that this would assure more well rounded and well thought out debate in its deliberation and advice.

With a full complement of six Commissioners, the Commission is best able to provide the comprehensive view which was the intent of Congress in establishing the agency. Clearly, some of that is lost with a smaller number of Commissioners. While a case can be made that some marginal efficiencies may be achieved with a Commission of four members, in my view, the loss of expertise and experience outweighs the benefits in organizational efficiency.

An alternative proposal, which would promote the goal of greater efficiency and collegiality, would be to allow more deliberative rules of procedure among the members of the Commission. A process that would allow more private discussions among Commissioners would go a long way to addressing internal problems that result from most communication being limited to a public setting. This sort of change would probably require an exemption from the Sunshine Act.

The second proposal relating to the composition of the Commission is to provide for an odd rather than even number of Commissioners, with some unspecified changes in the political party considerations appropriate to these odd numbers of Commissioners. First, it would be well to review how the current system operates. Currently, of the six Commissioners, no more than three can come from any particular political party, and, in practice, three usually are affiliated with each of the two main political parties. Generally, the system of appointing Commissioners to reflect various political considerations is kept on track by the alternating expiration of democratic and republican slots which keeps possible a balancing of appointees. The change to an odd number of Commissioners obviously distorts this relatively balanced situation and makes the politics of appointing Commissioners that much more difficult.

An odd number of Commissioners also makes changes in the operations of the Commission that clearly are not for the better, in my view. While the six Commissioners are currently chosen with explicit consideration of their political affiliations, in the actual operation of the Commission, these affiliations cannot be the basis for decisions. If decisions were to be made on a strictly political basis, these could be opposed by an equal number of Commissioners, thus balancing any political bias. In practice, this means that decisions of the Commission must be based on other factors, such as objective, non-political facts, because they must be supported by a coalition of Commissioners across party lines. The fact that the Commission has operated successfully, making thousands of decisions and publishing hundreds of reports on controversial and difficult issues with bipartisan majorities, is evidence that the system works. In essence, then, an even number of Commissioners works to ensure that the Commission's deliberative process can be relied upon to produce non-political outcomes.

Powers of the Commission's Chairman

The next set of proposals relates to increasing the power of the Chairman of the Commission. These proposals include lengthening the term of the Chairman from two to four years, eliminating a provision that requires an absolute majority of the Commission for certain types of decisions, and limiting the power of the Commission as a whole to disapprove the action of a Chairman for other administrative decisions.

The pertinent question for the Congress to consider, and it is the same basic question to be addressed in considering other proposals to strengthen the powers of the Chairman relative to the Commission, is what problem will lengthening the term of the Chairmanship solve, and what benefit will come from it to improve the ability of the Commission to carry out its statutorily mandated duties. To merely extend the length of the Chairmanship may increase the personal prestige of the individual who is appointed to that office but does not appear to me to provide any significant institutional benefits. It has been suggested that a longer term would provide for more stability and better management. The Commission, however, is a small agency with a small budget and virtually no discretionary funds to manage. The benefits to be gained over the longer term of a Chairman are thus negligible.

Additionally, a four-year Chairmanship, particularly if tied to the four-year Presidential cycle, would present a number of practical problems. For example, if the current provision calling for Chairmen of alternating political affiliation were not changed, then some Presidents would be required to appoint a four-year Chairman of the opposite political party for the entire length of his or her term. There would be little incentive for such an action, increasing the possibility for delays or simply non-appointment of the position.

Assuming, as an alternative, that the alternating provision were also eliminated, the result would be a Chairmanship that followed the Presidency, as is done by some agencies such as the Federal Trade Commission (FTC). The FTC, however, has acknowledged policy functions and, unlike the Commission, has no direct responsibility to Congress. The FTC's need for independence from the Executive Branch has never been an issue as it has for the Commission. On the other hand, I believe there would be some benefit to adjusting the two-year term of Chairman to correspond to the beginning and mid-term of the Presidential cycle to ensure a greater amount of focus on these appointments.

The next proposal is to decrease the role of the Commission relative to the Chairman in the Commission's budgetary process. The Chairman of the Commission already exerts strong control over budgetary matters at the Commission. The Chairman both formulates and implements the Commission's budget. A majority vote of the Commission is required to approve the budget or changes in expenditures inconsistent with that budget. The proposal being suggested would allow a Chairman to modify and ignore the budget that was approved by a majority of his or her colleagues by labeling changes as an implementation plan rather than a budget.

While administrative in form, I must stress the fundamentally substantive nature of such resource allocations. A solely partisan allocation of resources would completely compromise the ability of any

minority or single Commissioner to provide the independent, objective advice to Congress for which the Commission was created. Commission budget control is a necessary guarantee ensuring that funds are expended in such a way as to support the independent bipartisan mandate of the Commission. The requirement for majority support of a budget or change in a budget is not an onerous one. In my view, any competent Chairman should be able to get a majority of his or her colleagues to agree to any necessary changes in the same manner as he or she forged a consensus on the initial budget submission. If such support cannot be found, such changes should not be made.

The next proposal that has been made is to limit the role of the Commission in hiring decisions at the Commission. It is not clear to me what problem this change is meant to resolve. Certainly prior to 1976, when the current provisions of law went into effect, there were problems with staffing decisions at the Commission. Presently, the statute allows a majority of the Commission to disapprove a hiring decision. An affirmative approval by the Commission is required only in limited situations such as the removal of a senior agency official with management responsibility, which protects against the use of the removal authority to politicize or politically pressure the Commission's professional staff. It has certainly not been my experience that the Commission has concerned itself in hiring decisions below that of senior office managers and directors. The only exceptions that I can recall in my twelve years on the Commission have had to do with the possible hiring of schedule C employees into career positions, but even that has been extremely rare.

On the other hand, it may be that Chairmen have been influenced by the need to have support on the Commission and chosen not to offer a position to someone whom he or she thinks might be disapproved by a majority of the Commission. This obviously raises questions of psychology that I cannot comment on. I will suggest that it may, in fact, be a useful safeguard in the hiring process for a Chairman to consider that at least two of his or her colleagues must not object to the hiring of an individual when making personnel decisions about the career staff at the Commission.

Yet another of the proposals that has been offered is to remove the right of the Commission as a whole to override the administrative decisions of the Chairman. Again, I must question the existence of a problem that such a proposal is meant to solve. The override authority exists because decisions that are administrative in form may nevertheless be substantive in effect, and Congress felt the need for a mechanism for the Commission to protect itself in such instances.

In my tenure, the number of times the Commission has acted to override a decision of the Chairman can be counted on one hand. It has happened only in the most extraordinary circumstances. Again, it may be that the knowledge that they might be overruled has affected decision making by individual Chairmen, preventing them from actions that they otherwise might have liked to take. However, I would suggest that Chairmen who actively consult with their colleagues and make an effort to ensure that the Commission is operating collegially are not troubled with overrides or threats of overrides.

Multi-member agencies, such as the Commission, work best when members communicate effectively and are attuned to the need for information flow and collegiality among themselves. The

Commission's experience has certainly proven this axiom to be true. Unfortunately, while legislation can attempt to do a great many things that may improve efficiency, neither effective communication nor true collegiality can be guaranteed through legislation.

As an example, I would point to the recent budget difficulties encountered by the Commission and the painful process of downsizing that it has undertaken. Such circumstances could easily have led to controversy and gridlock. However, all Commissioners were fully involved and worked extremely cooperatively under the leadership of the Chairman to achieve an acceptable result. In my view the override potential is a safeguard which enhances the stability, independence and value of the Commission to Congress and the country as a whole.

Direct Congressional Budget Review

Another proposal that has been made is to remove the current exemption from Office of Management and Budget (OMB) oversight that requires the Commission's budget to be sent directly to Congress without change by the Executive Branch. In considering this proposal, I believe you need to consider the reason why the exemption was originally adopted in the Trade Act of 1974. The Commission, by that time, had already demonstrated its independence from political considerations by making decisions on cases and by offering advice to Congress that differed from what the Executive Branch wished to be heard. There was a realization on the part of Congress in 1974 that the objectivity of Commission advice could easily be affected by Executive Branch control of the Commission's purse strings.

I should note that the Commission has a cordial and cooperative relationship with OMB and responds to all of its data and reporting requirements. I would also add that over the period of my tenure, the Commission has been careful to exercise very strict discipline over its budget requests. Requests for budget increases were modest on those occasions when they were made and the Commission began its own process of downsizing and streamlining before these became popular government-wide processes.

The exemption from OMB control was put into law so that the Executive Branch would not be able to exercise control over the advice which Congress wished to obtain from the Commission. The Commission has continued over the years to give objective trade advice to both Congress and the Executive Branch. It is my belief that surrendering budget authority to OMB would inevitably compromise the objectivity and the independent nature of the Commission's advice.

Creation of an Executive Director for the Commission

The final administrative proposal that has been made is to create a position of executive director to make administrative decisions. There is a history connected such a position that should be considered. The Commission has from time to time experimented with the concept of an executive director, most recently in 1974. At that time, because it was felt to be too politically divisive, the position was dropped and the responsibilities divided between two career individuals, a Director of Operations and a Director of Administration. In addition to the day-to-day handling of responsibilities by these two career individuals, the Chairman was authorized an additional staff position within his or her office to handle such matters. In my tenure at

the Commission, there has always been one senior schedule C employee in the Chairman's office who has effectively served that Chairman as an "Executive Director" of the Commission. The creation of an additional layer of management for which no need can be shown would seem to be contrary to the desire of Congress for leaner and more efficient government.

Use of ALJs in Injury Investigations

Finally, the last proposal that has been made is to replace direct Commission decision making in dumping and countervailing duty injury investigations with an Administrative Law Judge (ALJ) process, subject to Commission review. Injury determinations by the Commission are not adjudications. The statute requires a determination of injury to an industry, not a particular company who may be a party to a Commission proceeding. That is why the Congress has required the Commission to conduct its own investigations rather than merely adjudicate the claims of particular parties who may appear before it. In the investigatory process the Commission uses expert investigators, accountants, lawyers, economists and industry experts and there is no need or benefit to be gained from adding an administrative law judge to oversee what is currently overseen by the Commission's highly experienced senior investigators.

The function of an ALJ system would be to replace the collective decision making of the six Commissioners with the solitary decisions of the ALJ. However, Congress itself has recognized that a single person with a single perspective is not the optimal way to approach the rather subjective concept of decisions about whether U.S. industries are being injured by unfair imports. If ALJs were to take over the process, one could logically question the utility of the Commission if it were to function as merely a high level review board.

The insertion of ALJs into the process also would put a premium on a particular perspective of a particular ALJ, based on his or her specific experience and training. Another ALJ might have a completely different view leading to even more procedural bickering over "judge-shopping" to obtain an ALJ whose methodology and approach is suited to the particular facts of a case. It must also be recognized that the decision of the ALJ is still to be reviewed by Commissioners who may not share the conceptual framework of an individual ALJ, creating even more confusion, expense and difficulty in the process.

Moreover, it would be difficult, if not impossible, to find ALJs with the range of knowledge and background that the Commission brings to its decision making. As I noted earlier in connection with the advantages of a six-member Commission, Commissioners bring varied backgrounds and experiences to their determinations. This has, in the past, been an important factor in ensuring that Commission decisions were realistic and reasonable.

Conclusion

The proposals that have been made for reform of the United States International Trade Commission will in no way accomplish any change that will make the Commission better suited to carry out its role for Congress or the American people. They will, I believe, result in a Commission that is more political, less efficient and one that produces lower quality products. Moreover, it will cease to be seen as a neutral source of international trade advice. In my view, the Commission does its complex job very well at very little cost. In the time-honored words so often heard in this city of Washington, "If it ain't broke, don't fix it."

Thank you for providing me with this opportunity to comment.

February 23, 1996

Honorable Philip M. Crane
Chairman, Subcommittee on Trade
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington D.C. 20515

Mr. Chairman:

In response to your request for comments regarding proposals to reorganize the International Trade Commission, I offer the following suggestions. These are based on my personal observations and experience during eight years at the Commission. The Commission has had an excellent reservoir of expertise in trade and microeconomic issues, one found in few other organizations. However, continuing malfunctions of administrative oversight have resulted in an erosion of this expertise and in the ability of the Commission to work as productively as it might to provide timely analysis for our customers.

The single most severe problem lies in extremely short-sighted micromanagement of the professional staff by six individual commissioners. Each of these individuals has a personal career agenda and political philosophy that often overrides the objective analytical mission of the Commission as proscribed by law. A 50 percent reduction in the number of commissioners (bringing the number to 3) and reduction in their terms to 5 years would alleviate a portion of the problem. Such a reduction would also bring the size of commissioner offices and staff more in line with a dramatically down-sized agency. In addition, a cap (3% or less) should be placed on the percentage of agency funds that can be used to run all commissioner offices in total - including travel expenditures. Excessive expenditures by the Commissioners' offices have contributed to the current situation in which there are few training funds available for the staff and promotions are delayed, yet Commissioners continue to travel abroad with dubious returns for the mission of the agency. The agency budget should also be submitted to OMB oversight.

I am opposed to the idea of vesting more power in the Chairman. It has been my experience that any single individual is likely to unilaterally advance a personal agenda that may impair the functioning of the agency. While compromise between several individuals can be "messy" (as in Executive/Congressional deliberations), this generally ensures a more moderate approach. In addition, there currently is no protection for the agency staff from arbitrary and capricious whims of Commissioners under the current system. Vesting greater authority in a single individual without some buffer mechanisms is certain to further impair the professional ability of the Commission - which rests in the staff, not the Commissioners.

Similarly, creation of an executive director position also opens the possibility that a single individual can thwart the mission of the agency by executing a personal agenda. For example, excessive funds are being allocated for annual upgrades in computer hardware and software, despite an associated cost/benefit analysis that decidedly underscores the wastefulness of this for the Commission as a whole. To help counter this type of empire building and execution of personal agendas, some system of checks and balances is necessary. Perhaps an executive director could make administrative decisions, which must be specifically disapproved by the Chairman or the other two Commissioners.

If the Committee decides to enact these suggested reforms or others that are proposed, I urge you to act quickly. The agency staff is under extreme stress, caused in large part by a lack of clear direction, interpersonal skill, and managerial acumen on the part of the current Commissioners. Such action will be perceived as a signal that you appreciate the objective analytical mission of the Commission and intend to ensure that its mission can be executed in a productive way. Reform will be a welcome first step in restoring the agency's equilibrium.

Thank you for your consideration. While I would like my comments to remain anonymous and be shielded from public disclosure to the extent possible, staff may contact me for additional information or exposition.

February 27, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington D.C. 20515

Dear Representative Moseley:

This letter is in response to your request for comments on suggested changes to the structure and procedures of the U.S. International Trade Commission (ITC). The ITC provides a very important service by offering a bi-partisan analysis of trade issues.[1] Although the ITC has been relatively successful in its task, there are inherent problems with its current structure that suppress the full potential of the ITC.

As you know, the ITC is run by six Commissioners, which are appointed based on their knowledge of trade issues. Yet, managing the ITC is their largest task. Commissioners give final approval on most every decision at the ITC, including the budget, hiring, initiating studies, releasing reports, and travel and training expenditures .

There is a twofold solution to this situation, which has caused many problems within the ITC. Reducing the number of Commissioners would drastically help matters. As is stands now, reports and requests must be presented to each Commissioner for approval. That means that any change in a document by one Commissioner must be approved by the other five Commissioners. Even when there are only minor changes to a report, the approval process alone can take weeks. In addition, this process often subjects unbiased reports to political infighting between Commissioners. The second, most important measure is to let the Commissioners concentrate on their expertise, trade. Creating the career position of executive director would enable this to happen. The executive director would be responsible for formulating the budget with the U.S. Office of Management and Budget, approving reports, and making staffing decisions. In effect, the management of the ITC would be put in charge of a manager.

The many problems that we face today could be alleviated with these structural adjustments. The moral of the employees has continued to decline as promotions and hiring authority are delayed. The Commissioners are too far removed from the day-to-day activities of the Commission to see the effects of their actions on productivity and moral. The Commissioners should have the luxury of focusing their attention on trade matters rather than budget and management issues. The events of this past year are a perfect example of how budget considerations can preclude Commission attention to trade issues.

Sincerely,
An ITC employee

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[1] This is evident by the wrath the ITC has received in recent years both by extremists that follow protectionism and free trade theory.

February 29, 1996

The Honorable Philip Crane, Chairman
Committee on Ways and Means
Subcommittee on Trade
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Dear Congressman Crane,

I applaud your request for comments regarding possible reforms to the U.S. International Trade Commission. As a professional employee of the Commission, I believe a reevaluation of the administrative structure and procedures of the organization is appropriate as is congressional action necessary to impart change.

I support several reform options suggested by the Administrative Conference of the United States and the General Accounting Office in their investigation of the USITC. The creation of a position of executive director to make administrative decisions would improve the efficiency and effectiveness of the USITC. If the position were occupied by a Senior Executive Service individual, the research function of the Commission could be conducted unfettered by six Commissioners promoting their own separate agendas. An executive director would eliminate the need for all six Commissioners to approve every administrative action and concentrate the organization's leadership, which at this point is quite diluted and hard to find. A complementary reform would be a reduction in the number of Commissioners.

Although no reform option addresses this subject, I am concerned about the way in which Commissioners appear like aristocrats. The budget for a congressionally requested study is fair game for Commissioners regardless of any contribution they may make to the report. In other words, Commissioners are currently free to travel on budgets designated for a specific study without any obligation to assist those analysts and investigators who are actually conducting the study. This arrangement does little to insure the quality of a study and only serves to alienate employees.

In late October, 128 Commission employees were issued lay off slips. Due to the uncertainty of our budget, travel for all agency employees was eliminated and instructions to limit database searches and other cost-saving measures were issued. On the other hand, Commissioners and their staff were unrestrained in their travel activities.

As government agency downsizing seems inevitable, the manner in which it is done is still a matter for debate. I support thoughtful and logical reforms not the slash and burn type. I look forward to working for a stronger, relevant and more effective organization and am prepared to undergo the requisite changes to do so.

Sincerely,

Anonymous

The Hon. Philip M. Crane, Chairman
Subcommittee on Trade,
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Bldg.
Washington, DC 20515

February 28, 1996

Dear Congressman Crane:

The Subcommittee is to be commended for evaluating structural and procedural reforms to the U.S. International Trade Commission. As a professional employee of the USITC, I support several of the reforms in administrative structure and operating procedures put forth by the Administrative Conference of the U.S. and the U.S. General Accounting Office.

The Commission's current administrative structure and operating procedures impede its research, analytical, and investigatory abilities in redressing allegations of unfair international trade practices. Creating the position of executive director responsible for formulating administrative, operational, and budgetary actions will not only clarify the Commission's administrative structure but should also provide direction in improving its operational efficiency. By no longer requiring the commissioners to formulate these actions, their personal staffs need not be as large, and the commissioners are freed to focus upon their primary responsibility-- international trade issues-- rather than management details. Likewise, the research, analysis, and investigations of the USITC can proceed independently of any potentially conflicting agendas of individual commissioners. But along with such an appointment, it is also necessary to reduce the number of commissioners from the current six to four. Failure to do so only further increases the ratio of managers (and their staff) to workers nor does it reduce commissioners' personal-staff expenditures.

A related concern with commissioners' staffing expenditures are travel expenditures. Currently, commissioners and their staff can travel on budgets allocated for a specific investigation regardless of any contribution to the final report, over the needs of the analysts, economists, and investigators assigned to conduct the research. Last Fall, with uncertainty over the Fiscal Year 1996 appropriation level, 128 employees (about 30 percent of the workforce) received reduction-in-force notices as a contingency measure, but commissioners' staffing levels and travel expenditures appeared not to be affected. Furthermore, despite a moratorium on travel for USITC employees, commissioners' and their staffs' travel were reported to have continued during that period. Incidentally, the notices were rescinded last month for all but 33 employees, but a significant number of employees left in the meantime (and continue to do so) for job opportunities outside the Commission. Clarifying the budgetary process and reducing administrative staffing levels and travel expenditures will also help stem the outflow of experienced employees. Such action also enhances the USITC's ability to attract well qualified employees, particularly international trade analysts, economists, and investigators.

Taking the actions enumerated above to streamline the USITC's administrative structure, to provide leadership in its operating procedures, and reducing administrative expenditures would go a long ways in ensuring that the Commission can continue effectively in its mission of investigating and redressing antidumping and countervailing duty cases.

Sincerely,

February 29, 1996

Honorable Philip M. Crane

Chairman, Subcommittee on Trade
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Mr. Chairman:

Thank you for the opportunity to comment on potential reforms for the International Trade Commission. I believe structural and procedural reforms are necessary, even mandatory for the ITC to function as a professional organization carrying out both mandated and requested projects and responsibilities.

I regret this letter is unsigned - the atmosphere at the ITC is one of retaliation, blame and continual negativity. This clearly comes from the level of the Commissioners and filters on down. The bickering and fighting is well known throughout the ranks, effecting all ITC employees. Managerial competency is completely lacking and should not be under the purview of the Commissioners. In recent months this lack of managerial competency has been clearly underscored as layoff notices were issued to approximately 130 employees. It remains unclear as to why this occurred so early in the year, given reconciliation of the budget process had not begun. While approximately 100 of the notices were rescinded (none of the circumstances had changed), the morale at the ITC has remains very low, with no acknowledgment of the difficulty the layoffs created for all of the remaining employees. In addition, travel and training is forbidden for everyone except the Commissioners themselves. When the Commissioners travel (often very expensive unrelated to on-going work trips) they do not contribute to the institutional knowledge of the Agency unlike analysts, economists or investigators who share and expand knowledge gained while traveling. Repeated trips to Asia and New Zealand seem patently unnecessary for the Chairman of the Commission. It is notable, however that he is originally from New Zealand!

There are a number of changes that can be put into place to improve the functioning of the Commission.

Reducing the number of Commissioners to three or five is mandatory. The review process become petty and cumbersome because of the in-fighting among the Commissioners. Where career employees are expected to keep deadlines, the Commissioners offices' have no regard what-so-ever for due dates and career staff responsibilities. The Commissioners give little to no credibility to the knowledge and experience of the staff. If a Commissioner lacks knowledge of an area - he or she assumes there is no institutional knowledge within the agency. The lack of respect for career employees is continual. By reducing the number of sitting Commissioners and having a non- political liaison the administrative review processes will be shortened. Parenthetically, it also should be made mandatory to vacate the

position of Commissioner when the term expires, unless renewed. We currently have a Commissioner who is in his ***second*** year ***over*** his term. Had this office been vacated at the proper time, a notable amount of additional money would have been saved.

Remove the current exemption from the Office of Management and Budget oversight of the Commission's budget and change the budget approval process so that the Commissioners vote to approve the budget submission only, as opposed to the formulation process currently in place. During the last budget cycle it became increasingly clear that financial expertise lacks at ITC and that personal agendas were put *before* concern for the ITC mandates and the ITC employees. Rescinded RIF notices and excessive (and most likely unnecessary) furlough days are examples of the lack of competency exhibited here.

Statutorily create a career service position of Executive Director to oversee administrative and operational decisions. This is the single most important change necessary for the International Trade Commission to function well and to function as the originally mandated. There needs to be protection for the career employees from the whims of the Commissioners. The current operations and administration employees create and reenforce the havoc created by the Commissioners.

There are many possible and productive ways to improve, downsize and manage-well the International Trade Commission. The current group of Commissioners have shown they are not capable of doing this. While this is subject to change if more competent people were appointed to the positions, it also is possible that less competent people could be appointed.

Please put reforms in place that will improve both the function and form of the International Trade Commission. I ask you this as an employee but also a taxpayer and a concerned citizen.

Sincerely,

February 29, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Dear Mr. Moseley:

The purpose of this letter is to respond to your request for written comments with regard to possible structural and procedural reforms to the International Trade Commission. In general, it is my opinion that the career staff of the agency, and the work that is undertaken by the career staff, would greatly benefit from reform of the Commission. In particular, my letter focuses on 3 suggested reforms: (1) reducing the number of Commissioners from six; (2) changing the budget approval process, and (3) creating the position of executive director.

(1) Reducing the number of Commissioners from six--Operationally, the activities of the Commission would benefit from a reduction in the number of Commissioners. First, each Commissioner maintains a relatively large number of staff aides in his/her office. As budgets decline under general government belt tightening, most of the inevitable personnel cuts will most likely come from career staff. The result will be a declining number of career personnel serving the same number of Commissioners and their immediate staff. It may become very well impossible for the career staff to maintain the professional quality of their work while at the same time serving the Commissioner offices.

Second, the Commissioners, because they have large personal offices or for other reasons, have very little contact with the career staff, and they have little knowledge of the constraints on the staff for meeting diverse project deadlines. Reducing the number of Commissioners would allow the staff to attempt to meet the disparate requests of the Commissioner offices while maintaining the quality of the Commission's work.

(2) Changing the budget approval process--One of the most important reforms that could be made is to change the budget approval process. The Commission's budget is usually provided to the career staff relatively late in the fiscal year. This means that important training and other types of expenditures that need to be made at a certain time are often not made due to the lack of authorization. Additionally, funds are often spent at the end of the year, or left unspent, when the funds could have been put to use more effectively if spent earlier. As noted previously, the

Commissioners have little contact with the career managers so they probably have no idea how the lack of a budget to plan annual expenditures adversely affects the work of the career staff.

Because of the Commissioners' lack of knowledge of and interest in the career work of the agency, the budget process should be formulated from the bottom up, rather than imposed from the top, as is the current process. The career staff of the agency, and their work, would benefit if the budget were prepared by the career managers and approved as a formality by the Chairman of the Commission.

(3) Creating the position of Executive Director--The career staff and their work would greatly benefit from the creation of the position of Executive Director. The role of the Executive Director should be to make the different offices of the Commission work together to provide information and reports to the Commissioners that are based on the expertise of the different Commission offices. Although the Commission is a relatively small agency, currently there is a lack of coordination among the different offices in conducting various activities. This lack of coordination is a disservice to the public, which depends upon the expertise of the various Commission offices being utilized in the best possible manner to provide a professional work product.

In addition to ensuring that Commission offices work together, the Executive Director should represent the career staff to the Commissioners, and be in charge of all administrative decisions and hiring, except possibly the most senior positions. Above all, however, the Executive Director should be **independent**, that is not favoring either political party. The latter point is important because if the Executive Director were to be appointed from a Commissioner's office, and reflect a partisan view, this will result in a decline in staff and expertise in certain offices while other offices that are associated with this particular view will expand. This of course will affect the independent nature of the Commission's work.

Thank you for the opportunity to express my views on these important issues.

National Journal

THE WEEKLY ON POLITICS AND GOVERNMENT OCT. 28, 1995/NO. 43

Cracking Up

Beset by critics, rocked by internal feuds, the International Trade Commission — a little agency with a big job — is in deep trouble.

Cracking Up

Old grudges between free-traders and protectionists are bubbling up at the International Trade Commission. And among the fiercely feuding commissioners, it's getting harder and harder to tell where the political ends and the personal begins.

BY BEN WILDAVSKY

In January 1969, an international law professor who headed an obscure federal commission caused a stir when he declared that he and his colleagues didn't have enough work to do.

"There is not enough of a job here for a chairman—let alone all the other commissioners," Stanley D. Metzger, the chairman of the U.S. Tariff Commission, told the *Christian Science Monitor*. "The agency is greatly underutilized."

Metzger was soon being called "a hero among bureaucrats" by *Life* magazine—and far worse things by his five fellow commissioners. In any case, his call for the Tariff Commission to cast off its quasi-judicial role in trade cases and instead focus solely on fact-finding research never went anywhere.

Fast-forward a quarter-century or so.

The agency—now called the International Trade Commission (ITC)—still plays a critical role in ruling on dumping and other unfair-trade cases. And the chairman and his colleagues are still none too happy with one another.

But this year the periodic skirmishes that have marked much of the ITC's history seem to have intensified. A panel that usually operates out of the limelight is suddenly beset by powerful critics and rocked by internal feuding. By the end of the year, depending on how things go on Capitol Hill, the ITC may be facing a drastic round of belt-tightening. Further down the road, it could even be voted out of existence altogether.

Many of the ITC's recent woes revolve around a staff study the commission issued in June after a two-year investigation. The report came with a bone-dry title ("The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements") but a potent conclusion. It found that the U.S. economy pays a heavy price—$1.59 billion in 1991 in added costs—as a result of the penalties that the United States imposes on foreign products said to have been "dumped" in U.S. markets or to have benefited from government subsidies.

Had the report been the handiwork of a university economist or one of the capital's think tanks, its findings would probably have raised few eyebrows. The notion that preventing foreign firms from selling cheap goods in this country hurts consumers is hardly a hot discovery. But defenders of U.S. trade laws, both inside and outside the ITC, were outraged at what they viewed as a politically slanted analysis coming from a body entrusted with ruling on antidumping cases. The fox, they cried, was guarding the henhouse.

The antidumping study, first requested in the final days of the Bush Administration by then-U.S. Trade Representative (USTR) Carla A. Hills, was released only after much last-minute wrangling among the six ITC commissioners. Chairman Peter S. Watson gave his wholehearted support to the report. He was backed by his fellow Republican and frequent ally Carol T. Crawford. Vice chairwoman Janet A. Nuzum and David B. Rohr, the longest-serving commissioner, both Democrats, held their noses and voted for the study with strong, publicly voiced reservations. Commissioners Lynn M. Bragg, a Republican, and Don E. Newquist, a Democrat, flatly opposed releasing the report.

And the in-fighting at the ITC didn't stop after the study's release. Throughout the summer, Watson and company sniped at one another in a series of remarkably bitter and often petty internal memos (copies of which were obtained by *National Journal*). In one internal missive, four of the chairman's five colleagues accused him of "management by intimidation." In a response, Watson countercharged the four with "actionable libel." As the squabbling continued, Watson and Rohr traded barbs over whether Rohr—an ITC member since 1984—was or wasn't permitted to use the title "senior commissioner."

With the ITC facing budget cuts this fall that could mean layoffs for more than half the staff, the panel seems to have called a cease-fire to address its financial plight. Nevertheless, as recently as Sept. 14 the commissioners were unable to put aside their differences long enough to

sign a joint letter appealing to Members of Congress for support.

To many trade hands, the contretemps is simply par for the course at a notoriously unmanageable commission. But in the same breath, some say the latest disagreements could have more-serious consequences than those of the past.

"I'm more concerned than I ever have been before about the future of this agency because of the direction we seem to be going in and the divisions we've had," Rohr said. He asserted that the panel's substantive decisions have not been affected but added, "There's a political tension here I've never seen before."

A trade lawyer who typically represents domestic industries (and who, like many people interviewed for this story, didn't want to be named) was blunter. "The place is out of control," he said.

Both fans and foes believe that the shenanigans at the ITC have made it more vulnerable to cuts. And talk of restructuring the commission, which has been attempted for years with little success, has been revived. On one side, some protection-minded critics are sympathetic to moving the ITC's core decision-making functions elsewhere. On another, the House Ways and Means Subcommittee on Trade is mulling internal reforms that would retain the ITC as a force in U.S. trade law but strengthen the chairman's hand in running the commission.

At root, the ITC's troubles are a microcosm of the fierce passions and political maneuvering that the nation's often arcane unfair-trading laws stir up. Even in a city known both for grand ideological run-ins and small-minded backbiting, the recent goings-on at the commission make for an unusually stark case study. Down at 500 E St. SW, home to a body that Rep. Sam Gibbons, D-Fla., once characterized as a "six-headed monster," the personal and the political have become all but impossible to separate.

WELCOME TO THE ITC

The commission usually doesn't generate much public controversy. A typical press release issued the day before the recent dumping study was headlined "Canned Pineapple Fruit From Thailand Injures U.S. Industry, Says ITC."

"Almost no one in the United States whose company has not been involved in an antidumping case has a sense of what the ITC is," said former commissioner Ronald A. Cass, now dean of the Boston University School of Law. "When I sit next to people at parties, I always tell them I was U.S. Trade Representative—it's much easier."

But the agency, which has a staff of about 425 and had a budget this year of $44.5 million, plays a vital behind-the-scenes role. The Tariff Commission was created in 1916 to provide "scientific" analysis of the politically charged tariffs that then provided nearly half of the federal government's income. But in recent years, tariffs have become less and less

The disarray at the commission has not gone unnoticed on Capitol Hill. "They're just crazy — there must be something in the water over there," a senior House aide said.

important. With the exception of high duties on products such as chemicals and textiles, most tariffs are headed toward insignificant levels.

That means domestic firms concerned about foreign competition increasingly turn to unfair-trade laws. And the ITC's role in administering those laws places it in the middle of these high-stakes battles. Although the commission has a variety of responsibilities, by far its most contentious function involves deciding antidumping and countervailing duty cases.

The procedure for handling these disputes boils down to two critical steps. After some preliminaries, a division of the Commerce Department first decides whether foreign goods are being unfairly subsidized or dumped in the United States. About 95 per cent of the time, Commerce's answer is yes. Commerce then assesses preliminary duties based on its calculation of how much the foreign product is being subsidized or how far below the company's true costs of production the product is being sold.

The second step involves hearings before the ITC, which must decide whether the U.S. industry petitioning against the imports is being financially injured by the below-cost pricing or subsidies. If the commission says yes, the preliminary duties are collected. If not, they are removed. But the ITC's votes are less predictable than Commerce's. The ratio of yeses to noes varies; but since December 1991, the commission has voted for import relief in the all-important final stage about 58 per cent of the time.

This unpredictability means that the ITC sometimes acts as a stumbling block just before the finish line, thwarting domestic petitioners convinced they have a good case. At the same time, it is the last, best hope of foreign companies under attack and of their U.S. customers.

In theory, the ITC is independent and nonpartisan. The commissioners, who earn $115,700 annually, serve nine-year terms. The President nominates them, and the Senate confirms them. No more than three of the six commissioners may be from the same political party, and the chairman (who is appointed for two years and makes $123,100 a year) may not be of the same party as the preceding chairman.

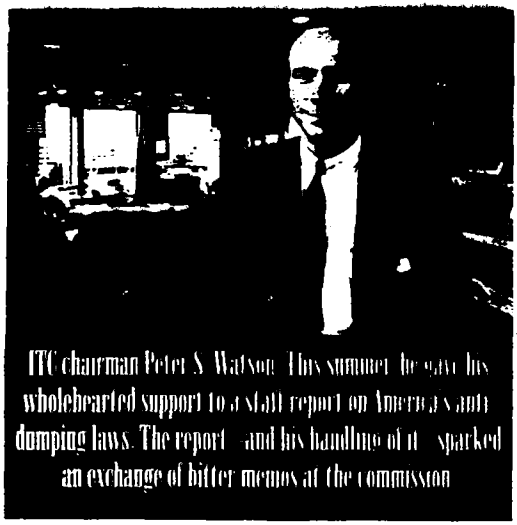
President Wilson wrote Congress in his request to create the commission that he foresaw a body "as much as possible free from any strong prepossession in favor of any political policy and capable of looking at the whole economic situation of the country with a dispassionate and disinterested scrutiny."

He might not be happy with how things have worked out. Because the agency's decisions can have enormous financial consequences, the votes of individual commissioners have come to be closely watched by trade lawyers and lawmakers. As a result, nominations of plugged-in congressional aides and other political cronies to the panel have taken on great importance because of the nominees' potential to shift the balance of votes. "There's been a tendency in recent years for both parties to appoint ideologues to the commission," a Washington trade analyst asserted. "You tend to see some people on the commission . . . who either want to get rid of the law or who believe that industry should always get relief."

Two Reagan appointees, Susan W. Liebeler and Anne E. Brunsdale, each of whom served a stint as ITC chairwoman, were frequently criticized for their votes against domestic petitioners.

In 1988, after Liebeler left the commission, Brunsdale became the most visible target of complaints that "free-trade ideologues" were stacking the deck at the ITC. More grousing came after a series of

steel cases brought by heavy-hitting trade lawyers Alan Wm. Wolff of Dewey Ballantine and Robert E. Lighthizer of Skadden, Arps, Slate, Meagher & Flom appeared on the commission's docket. On July 27, 1993, the ITC ruled that foreign steelmakers had not significantly injured U.S. producers in 42 of 72 cases argued before the commission. It took only 90 minutes for the value of American steel stocks to drop by more than $1.1 billion.



ITC chairman Peter S. Watson: This summer he gave his wholehearted support to a staff report on America's anti-dumping laws. The report—and his handling of it—sparked an exchange of bitter memos at the commission

Robert Jacks

A few days later, 60 House Members urged President Clinton to replace Brunsdale. Although her term had expired in June 1993, outgoing commissioners (like Rohr) generally continue to serve on the panel until they're replaced. Brunsdale cast the deciding vote in 11 of the cases that the domestic steel industry lost. In an interview, Brunsdale, who finally left the commission in March 1994, said she took the angry calls for her replacement after the steel cases as a backhanded compliment. "I just thought that was wonderful," she said. "It's nice to know you've made a difference."

Many critics regard Watson and Crawford as the intellectual heirs of Republican Brunsdale and Reagan independent Liebeler. Indeed, Watson and Crawford are far more likely than their commissioner colleagues to vote against import relief. But the politics of the ITC are a lot like an inkblot test: No two analysts seem to see the same events the same way. Talk to free-traders and you'll hear complaints that the commission is dominated by "retrograde protectionists" such as Newquist and Nuzum.

WERE THE BOOKS COOKED?

Nowhere is this split better illustrated than by the reaction to the June antidumping study. In a blistering July 14 op-ed piece in the *Journal of Commerce* titled "Cooking the Books at the ITC," former ITC chairman Alfred E. Eckes said the report "can only invite paroxysms of laughter" among "serious readers."

In joint comments attached to the report, commissioners Nuzum and Rohr asserted that they were voting somewhat reluctantly to approve a study they did not consider "balanced and comprehensive." Bragg and Newquist were harsher still in separate comments explaining their thumbs-down.

A July 14 *Journal of Commerce* editorial took a dramatically different tack. "Protectionists are always infuriated when the costs of trade protection are exposed," it said. "They are doubly outraged by the ITC report because it comes from an agency they expect to defend them." The study, the editorial continued, presents the new Republican Congress with "an opportunity to revise—or better yet scrap—the anti-dumping laws."

Chairman Watson joined commissioner Crawford in praising the report as a "balanced, objective and rigorous" document that gave a "conservative estimate" of the costs of unfair-trade laws to the U.S. economy. But Watson insisted in a recent interview that the study is no call for an overhaul of America's trade rules. "We weren't critical of these laws," he said. "All [the study] did was to give the best assessment of what the over-all impact is. There was no editorializing and there was no related attempt to say therefore we should do this or that with our existing laws."

Watson's adversaries beg to differ. "He's engaged in a full-frontal attack on the legitimacy of the trading laws," a Democratic congressional source said. "It's like [Securities and Exchange Commission chairman] Arthur Levitt saying we don't need the insider-trading laws." Commissioner Newquist—who during his stint as ITC chairman asked USTR Mickey Kantor whether he *really* wanted the analysis that Hills had asked *for*—says the study request was designed to elicit calls to junk antidumping laws. "That's precisely what it was set up to be used for," Newquist complained, saying that such proposals are "like declaring unilateral disarmament at the height of the Cold War."

COMMISSIONERS AT PLAY

It is perhaps no surprise that Watson had trouble getting the report out the ITC's door by its June 30 due date. That afternoon, four commissioners refused to approve a seemingly innocuous press release circulated by Watson that gave no hint of the report's explosive conclusions. Bragg said in an interview that she had simply wanted to add a line noting that some commissioners had expressed "additional views." Watson refused to make the change and issued an ultimatum to Peg O'Laughlin, the ITC's public affairs director. "I direct you to issue the attached press release immediately," he wrote in a memo marked "June 30, 1995 (6:00 P.M.)."

According to some insiders, Watson threatened to fire O'Laughlin if she didn't follow his orders. Watson denies this, saying only that O'Laughlin "had to be able to say, 'I have been told to do this [or else] there may be negative consequences.'" O'Laughlin declined to comment.

On July 12, armed with an opinion prepared by a member of the ITC general

counsel's staff, Bragg, Newquist, Nuzum and Rohr complained to Watson about his "heavy-handed tactics." They argued that the agency's rules prevent one commissioner from speaking on behalf of the ITC without the panel's approval.

"Your actions in this matter are rendered even more egregious by the 'management by intimidation' tactics that you employed," they wrote. "It is highly inappropriate for the chairman to threaten career government employees with adverse personnel action if they fail to follow his personal instructions that violate the clearly expressed position of a majority of the commission. We are very concerned about your use of such tactics, which place the entire commission at risk for employee grievances, sexual harassment lawsuits and resulting potential liability."

Watson shot back a day later, taking issue with his colleagues' "particularly serious and totally groundless" charge that his conduct made the ITC a possible target of sexual harassment lawsuits. The following day's interoffice mail brought a "clarification" from the gang of four. "We were not, and are not, alleging that you have engaged in sexual harassment, and regret any inference of such." But Bragg, Newquist, Nuzum and Rohr reiterated their concerns about "intimidating tactics" and possible lawsuits. "We need a chairman who leads by respect, not threat," they wrote.

Such talk didn't sit well with Watson. On July 17, he wrote in response that he had been advised by "knowledgeable counsel" that "actionable libel was committed by each of you (and perhaps others, yet to be identified)" in the initial memo. "Adlai Stevenson once observed that it is often easier to fight for principles than to live up to them," he wrote. "I have *no* lessons to learn from those who would presume to piously school me while simultaneously publishing and disseminating the insidious and odious language referred to."

Watson attempted to strike a lighter tone in an interview. "My colleagues acknowledge that it was a silly statement. Obviously, nobody took it seriously except perhaps me," he said. "It does, however, demonstrate extraordinary political excess even by Washington standards."

A few weeks later, after Rohr asked how a *Financial Times* (London) reporter had obtained an unofficial fact sheet that seemed designed to put a positive spin on the dumping study, Watson unleashed another salvo. He pointed out that Rohr had signed several letters using "the nonexistent title 'senior commissioner.'" Watson then ticked off the federal penalties for impersonating an officer or employee of the United States (a fine, three years in jail, or both), directing Rohr to "immediately and permanently cease and desist" from using the title.

The silly season was in full gallop. Newquist, in an Aug. 18 memo, dubbed himself "Senior-Commissioner-In-Waiting Newquist" and passed along a rumor that Rohr "has ordered vanity license plates which read 'SR COMM'R.'"

Richard A. Brown

Democratic commissioner David B. Rohr, a critic of Watson: "There's a political tension here I've never seen before"

The disarray at the ITC has not gone unnoticed on Capital Hill. "They're just crazy—there must be something in the water over there," said a senior House aide who monitors trade matters. "Their main goal seems to be to undermine each other," she said, likening the commissioners to kindergarteners. "I think this is the worst it's ever been. . . . They're losing their credibility."

A Senate aide familiar with the commission voiced similar worries. "There is a lot of infighting going on over there, and the perception is that a lot of it is kind of petty," he said. With enemies like Sen. Ernest F. Hollings, D-S.C., already gunning for the ITC, he said, the commission's internal strife "doesn't help."

Although House lawmakers have approved a budget for the commission only slightly below this year's level, the Senate bill would cut the ITC's budget by 20 per cent, to $34 million. Commission officials say that if the final appropriation is close to the Senate figure, as many as 220 employees may be laid off and the ITC's work could be seriously compromised.

On Oct. 12, Senate Finance Committee chairman William V. Roth Jr., R-Del., and ranking minority member Daniel Patrick Moynihan, D-N.Y., wrote Senate conferees that a 20 per cent cut "would place the ITC in a very precarious position" and urged them to match the House funding level.

Watson calls the controversy over the antidumping report "a tempest in a teapot." The commissioners have now banded together to address the grave budget threats they face, he says. But efforts to present a united front weren't helped last month when a Sept. 14 letter about the ITC's budget problems sent to Members of Congress carried the signatures of only four commissioners. Bragg and Newquist dispatched a letter of their own and, in an internal memo to Watson, said that it would seem hypocritical to ask for budget relief while joining a letter from someone whose views of the trade laws they didn't share. ("That blew my mind," said Rohr. "I couldn't understand it.")

Many trade analysts say that the antidumping study and the underlying tensions it reflects have kept the commission from receiving much help on the Hill from its traditional allies. Several lawyers who represent domestic producers say that they haven't seen an upwelling of support for the beleaguered agency from their colleagues and clients. But they also stress that they don't believe the appropriations process should be used to send the ITC a message of disapproval.

Lighthizer, a confidant of Senate Majority Leader Robert Dole of Kansas and a behind-the-scenes power in trade policy, is widely believed to be interested in moving the ITC's decision-making powers to the Commerce Department or to a trade agency yet to be created. Many free-traders in Washington maintain that such a move would make unfair-trade decisions more subject to top-down political control and remove the uncertainties that reportedly angered Lighthizer when

he lost some of his steel cases after getting a green light from Commerce.

But in an interview, Lighthizer demurred. "It's unfair to suggest that I have some plan for dealing with the ITC," he said. "I don't really have an agenda in this thing. We win some and we lose some at the ITC, which is fine." He did, however, allow that severe budget problems at the commission make it only natural to look at reorganization. "To me, the question is one of resources," he said. "If you're going to cut back money, you have to decide where you're going to put the functions."

A senior House Republican aide took a jaundiced view of Lighthizer's disclaimer. "That's a self-fulfilling prophecy," the aide said. "You cut the budget and of course they can't do the job with two-thirds of their staff gone, and so you roll them in [with another trade agency]. It's really laying the groundwork." Several protection-inclined trade players other than Lighthizer make no bones about their inclination to move the ITC's quasi-judicial powers to a trade agency.

DESIGNED TO WOBBLE

Some trade policy analysts say the ITC's problems are structural. "Basically, in the administration of the place, no one's in charge," said Allan I. Mendelowitz, head of the international trade division at the General Accounting Office (GAO), which studied the ITC's management in 1992.

Expert: make sure that the commission remains a creature of Congress and not the White House, lawmakers have built in numerous safeguards designed to preserve the ITC's independence. The agency's budget is exempt from Office of Management and Budget review, for instance. The panel is one of only a few federal commissions to have six members rather than five, which makes for built-in deadlock but also makes it hard for the President to control the body through his nomination of the chairman. And the chairman's powers are subject to numerous statutory constraints.

Frequent disputes about the chairman's authority mean that the agency's general counsel is often called on to referee. That in turn sometimes produces conflict between the chairman and the general counsel. Several sources say that during his tenure as chairman, Watson has locked horns with general counsel Lyn M. Schlitt and has tried to fire her. Schlitt has resisted. Both sides are said to have hired outside lawyers.

"Any suggestion I'm trying to fire her or force her out is simply totally false," Watson said. "There are some areas for improvement, but generally speaking she performs very well." Schlitt (who is married to *National Journal* reporter Richard E. Cohen) refused to comment on any aspect of this article. Rohr said Watson's denial "surprises me no end."

Schlitt's defenders say that she's under

Trade lawyer Robert E. Lighthizer: "It's unfair to suggest that I have some plan for dealing with the ITC."

Lyn Kitner

fire because of her by-the-book interpretation of the ITC statute; she hasn't given Watson the answers he wants, they argue. But, as with much of the other infighting at the commission, ideology may be a factor. A source maintains that Schlitt has aligned herself with the "protectionist" wing on the panel. "What the ITC needs is an impartial general counsel, and she really isn't that," the source said. "She doesn't quite know how to do that." A senior commission figure disputed that assessment. "She's not ideological. She's been very professional," he said. "I think that crowd wanted to put their own person in there."

Against this backdrop, many analysts sat up and took notice when a draft set of ITC reforms drawn up by the Ways and Means Subcommittee on Trade over the summer included a provision that would make the general counsel's job a political appointment rather than a career position. The list (which a House Republican aide emphasized was "very preliminary") also includes several institutional changes suggested in the 1992 GAO report: reducing the number of commissioners from six to five, increasing the chairman's term from two to four years, strengthening the chairman's authority and hiring an executive director to make day-to-day administrative decisions.

Some commissioners maintain that the ITC doesn't need a structural overhaul. A little personal diplomacy would go a long way toward allowing Watson to get his way more often, they say, adding that the point also applies to controversial former chairmen such as Brunsdale. Specialists on both sides of the trade fence also praise the general quality of the commission's staff and maintain that periodic hostilities between commissioners don't necessarily interfere with the panel's meat-and-potatoes decision making.

"We're human beings over here, and we have differences of views," Nuzum said, "but that's to be expected. Congress never expected the agency to be made up of six fungible persons. . . . But at the end of the day we're interested in an institutional result." She maintained that the "slight differences of perspective" about the antidumping study "don't mean we were at war over it." Nuzum declined to comment on the internal memos. But another senior commission official was less reticent about the significance of the ITC battles. "It is a true ideological difference," he said. "They're not just Mickey Mouse things."

Meanwhile, as the federal budget process moves into its final stages, ITC commissioners have been closeted in meeting upon meeting to sort out who on the staff will stay and who will go if there are major cuts. Officials are keeping their fingers crossed.

Whatever the commission's short-term fate, it seems likely that congressional scrutiny of its workings will only increase. And—who knows?—a close examination of the ITC might even lead Congress to reexamine the question of whether America's antidumping laws make sense. Until then, brace yourself for more high jinks from the six-headed monster. ■

Statement of
AK Steel Corporation,
Bethlehem Steel Corporation,
Inland Steel Industries, Inc.,
LTV Steel Company,
National Steel Corporation,
and
US Steel Group, A Unit of USX Corporation

Regarding Possible Structural and Procedural Reforms
to the U.S. International Trade Commission
Submitted to the Committee on Ways and Means
Subcommittee on Trade
March 1, 1996

We appreciate the opportunity to submit a statement concerning possible structural and procedural reforms to the U.S. International Trade Commission ("ITC"). This statement sets out the views of the six largest integrated steel producers in the United States on those potential reforms: AK Steel Corporation, Bethlehem Steel Corporation, Inland Steel Industries, Inc., LTV Steel Company, National Steel Corporation and US Steel Group, a unit of USX Corporation. These companies, which compete vigorously with each other, formed a coalition five years ago to defend the U.S. industry against dumped and subsidized imports. As part of that effort, we filed trade cases in 1992 that were heard before the Commerce Department and the ITC. Therefore, the ITC is an agency that we know quite well.

As a threshold matter, we note that the ITC is an agency that is in need of reform. This is in no way a disparaging comment. The ITC and its staff have themselves recognized the need for change. Over the past year, the ITC has circulated for comment suggestions for improvements to its procedures in antidumping and countervailing duty proceedings. In the context of recent federal budget talks and otherwise, it has also been deliberating internally whether sweeping institutional changes are desirable and/or necessary.

Notwithstanding the need for reform, we believe that the potential changes identified in the Notice do not go to the heart of the agency's problems. Indeed, we believe that certain of those changes would do more harm than good. Before commenting on some of the specific proposals that have been made, we offer the following observation about the proposals as a whole. Taken together, these proposals would, deliberately or otherwise, greatly politicize the ITC. Given that the ITC's independence is often cited as its primary reason for being, we have grave reservations about the proposals. If Congress believes that it is necessary or desirable to introduce a greater political dimension to the ITC, we respectfully suggest that it would be cleaner and cheaper to do so openly by placing the ITC under a Cabinet department responsible to the President.

As to the specific proposals themselves, they raise three issues. First, in a time of increasing budgetary constraints, what measures might enable the ITC to cut costs without detracting from its ability to carry out its functions effectively? The second and related question is whether the internal management of the agency needs to be changed to enable the agency to operate more efficiently. Third, is there a need for changes that would fundamentally alter the structure of the system in which antidumping and countervailing duty and other Commission investigations are decided? Because the third issue is the most important one to the Flat-Rolled Steel Producers, we will address it first.

The most troubling proposal identified in the Notice is the suggestion that the law be changed to provide for an odd, as opposed to an even, number of commissioners. This would in no way constitute a "reform," but would instead radically and inappropriately alter the balance that Congress has established

for the resolution of antidumping and countervailing duty investigations.

Congress provided for an even number of commissioners for two reasons. First, this ensures that no political party controls the Commission.1/ Second, this gives domestic industries an appropriate benefit of the doubt in antidumping and countervailing duty cases. It is important to keep in mind that, when such cases come to the Commission for final resolution, it has already been established that imported merchandise has been unfairly traded. By providing for an even number of commissioners, and by further providing that a tie vote results in an affirmative injury determination, current law does nothing more than give U.S. industry a slight benefit of the doubt when there is any question whether it has suffered injury because the law has been broken. Furthermore, as Congress and the Courts have recognized, this structure adds appropriate "additional deterrent strength to the law, and greater certainty, speed, and efficiency in its enforcement."2/ This is an eminently proper and fair approach, and there is no reason to change it.

With respect to the internal management of the agency, various proposals identified in the Notice would give much greater power to the Chairman.3/ We do not favor these changes. The current system requires commissioners to achieve some degree of consensus on major issues. While this procedure may at times slow down the Commission's internal decision-making process, this is far preferable to the alternatives suggested. Over the past ten years, certain chairmen at the Commission have pursued a highly political and ideological agenda in staffing decisions and in allocating resources among offices within the Commission. While one may agree or disagree with any particular political or ideological agenda, giving the Chairman greater ability to pursue such an agenda would destabilize the agency over the long run. Administrative decisions made by one Chairman for political or ideological reasons might then be undone by his or her successor, and so on ad infinitum. The present process, with all of its flaws, is far better than the proposed alternative.4/

Finally, with respect to cost savings, as the ITC appears to recognize, federal budget constraints may require the Commission to go beyond recent layoffs to reduce costs further. The manner in which this is done will, of course, be largely decided by the Commission itself, as it should be. The only suggestion that the Flat-Rolled Steel Producers have to offer in this regard is that the Subcommittee should carefully monitor this process to ensure that it is carried out fairly, without regard to political or ideological considerations.

1/ See J. Dobson, Two Centuries of Tariffs: The Background and Emergence of the United States International Trade Commission 87 (1976). See also Border Brokerage Co., Inc. v. United States, 646 F.2d 539, 546 (C.C.P.A. 1981) ("Border Brokerage").

2/ S. Rep. No. 1619, 85th Cong., 2d Sess. 2 (1958) See also Border Brokerage, supra, 646 F.2d at 546.

3/ These include the proposal to increase the term of the Chairman from two years; to change the budget process to lessen the degree to which other commissioners have a role in formulating the Commission's budget; and to provide the Chairman with greater authority in personnel and other administrative decisions.

4/ Given these concerns, the suggestion that an executive director be given power to make administrative decisions is worth considering. However, if this is done, the executive director should be a career appointee approved by a majority of the Commission.

JOINT COMMENT OF:
American Beekeeping Federation, Inc.; American Honey Producers Association; Bicycle Manufacturers Association of America, Inc.; Coalition For Fair Atlantic Salmon Trade; Committee To Preserve American Color Television; Copper and Brass Fabircators Council; Footwear Industries of America, Inc.; Fresh Garlic Producers Association; Leather Industries of America, Inc.; Municipal Castings Fair Trade Council; National Pasta Association; Specialty Steel Industry of North America; Specialty Tubing Group; Tanners' Countervailing Duty Coalition; VEMCO Corporation; and Verson, Division of Allied Products Corporation

Before the
Subcommittee on Trade
House Ways and Means Committee

COMMENTS ON ITC REFORM LEGISLATION

On behalf of a number of domestic industries that practice before the U.S. International Trade Commission in antidumping and countervailing duty proceedings, we submit these comments addressing the proposed structural and procedural reforms to the Commission. The companies and industries on whose behalf these comments are submitted include: American Beekeeping Federation, Inc.; American Honey Producers Association; Bicycle Manufacturers Association of America, Inc.; Coalition for Fair Atlantic Salmon Trade; Committee to Preserve American Color Television; Copper and Brass Fabricators Council; Footwear Industries of America, Inc.; Fresh Garlic Producers Association; Leather Industries of America, Inc.; Municipal Castings Fair Trade Council; National Pasta Association; Specialty Steel Industry of North America; Specialty Tubing Group; Tanners' Countervailing Duty Coalition; Vemco Corporation; Verson, Division of Allied Products Corporation

Prior to addressing each of the proposals, we note our concern for the goals apparently underlying the reforms being suggested. Collectively, the reforms proposed would dramatically increase the potential for politicization of the Commission, a result that has long been resisted by Congress. To the contrary, Congress has always attempted to preserve the independence of the Commission as a quasi-judicial, investigative body charged with implementing international trade laws. In addition, certain of the proposed reforms would increase the costs incurred by the Commission in exercising its statutory function at precisely the time that budget constraints are being imposed by Congress. These dual concerns weigh heavily against most of the proposed reforms identified.

1. Reducing the Number of Commissioners from Six

The first proposal would reduce the membership of the Commission from its current complement of six members to an unspecified, lower number. If this proposal is merely another means of obtaining an odd number of members on the Commission (such as five or three commissioners), that issue is addressed separately below. If this proposal would reduce the Commission membership to another specified, even number of members (such as four or two), we have the following concerns.

Although reduction of the Commission membership has a certain appeal, in that it would reduce the costs of the Commission somewhat, there are offsetting considerations that we believe weigh against such a reduction. Specifically, even with a membership of six under present law, the Commission has often been left with but three members to issue decisions on a case due to vacancies or recusals by commissioners. If the membership were further reduced, one could envision scenarios where only one or two commissioners formed the basis for the Commission's decision. A vote by only one or two members is far removed from the collegial body Congress envisioned when establishing the Commission.

Indeed, in discussing the size of the Commission, Congress was mindful of the need to maintain a significant number of members so that there was sufficient breadth of expertise in the ultimate decision:

> This amendment is directed at helping secure consideration of the important matters which come before the Commission by a number of Commissioners which is not so small as to unduly limit the expertise and consideration brought to bear on the subject; in the past, sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission.

S. Rep. No. 1298, 93rd Cong., 2d Sess. 115 (1974). A reduction in the number of commissioners from the current six-member composition could lead to precisely the concerns Congress

identified, limiting the consideration and expertise that is brought into the decision. Accordingly, we urge the rejection of the proposed reform to reduce the membership of the Commission.

2. **Providing for an Odd, as Opposed to an Even, Number of Commissioners, with Appropriate Changes in Political Party Composition**

We strongly oppose the proposal to provide for an odd, rather than an even, number of commissioners. At present, the Commission's membership is set at six, and not more than three of the commissioners can be of the same political party. 19 U.S.C. § 1330. This provision ensures political balance within the Commission. Altering the membership to an odd number of commissioners would automatically tip the scales in favor of one political party. In our view, it would be impossible to successfully make "appropriate changes in the political party composition" to ensure political balance. Even if the odd-number commissioner were from an independent party, the "independence" of the individual would likely be questioned based on the party in power that appointed that commissioner, and the perception of balance at the Commission would no longer exist.

We are particularly concerned with this proposal to the extent it is merely an attempt to negate the statutory provision that deems tie votes at the Commission to be affirmative determinations. 19 U.S.C. § 1677(11). Congress recognized the potential for there to be tie votes among a Commission membership of six, and expressly provided for that eventuality by statute. It is improper to attempt to undermine this statutory provision by altering the composition of the Commission and thus preventing tie votes in most cases.

3. **Increasing the Term of the Chairman from Two Years**

The proposal to increase the term of the Chairman from two years would pose an additional potential for politicization of the Commission that should be resisted by the Subcommittee. Under present law, the term of the Chairman is relatively limited, at two years, after which time a commissioner with a different party affiliation must be appointed. Clearly, the purpose of the abbreviated term and the alternating political affiliation requirement is to prevent any one Chairman from exercising undue political power over the Commission. A relatively abbreviated term of two years as Chairman ensures that no one commissioner can exert his or her own views on the management of the Commission for a lengthy period of time. Extension of the Chairman's term would dilute the careful, political balance established by the present statute.

4. **Expanding the Powers of the Chairman**

Three of the proposals evidence an attempt to diminish significantly the role of other commissioners vis-a-vis the Chairman with respect to budget approval, hiring decisions, and other administrative decisions. These proposals would alter the fundamental structure of checks and balances within the Commission that was established by Congress to maintain political balance and to prevent the Chairman from becoming overly dominant.

Specifically, in structuring the International Trade Commission, Congress was mindful of the powers employed by chairmen of other federal agencies and commissions, but deliberately chose to provide members of the Commission with the ability to balance the Chairman's views in order to maintain political balance. The ability provided to other commissioners to have input into key decisions made by the Chairman on issues such as the budget, personnel hiring, and other administrative matters, was granted for a purpose: "This will insure that no individual and no political party can exercise undue influence over the Commissioners on substantive issues." S. Rep. No. 122, 95th Cong., 1st Sess. 5 (1977). Indeed, the areas of personnel, administrative decisions, and the budget were identified by Congress as three key areas in which there was a need to permit input by other Commission members in addition to the Chairman:

> By reserving to the Commission as a whole the three key areas of administrative matters [i.e., hiring of key personnel, administrative decisions, and budget decisions], the Committee is being responsive

> to the need to maintain a degree of independence for Commissioners to exercise their individual obligation for research, analysis, and judgment fully supported by the staff.

H.R. Rep. No. 217, 95th Cong., 1st Sess. 9-10 (1977).

The proposed reforms would dilute considerably the ability of the other commissioners to maintain a check on a dominant Chairman. The concern with a dominant Chairman, moreover, is not limited to the procedural impact that administrative, budget or personnel decisions could have, but the fact that such decisions can and do affect the substantive operations of the Commission. As the 1992 GAO Report indicated, the difference between an administrative decision and a substantive decision can often be difficult to distinguish: "For example, a decision to cut the travel funds of an investigation could be viewed as either an administrative or substantive decision, or both." General Accounting Office, International Trade Commission: Authority is Ambiguous, GAO/NSIAD-92-45 at 9, Feb. 1992 [hereinafter "1992 GAO Report"]. Indeed, while the GAO report stated that there could be some benefits to enhancing the power of the Commission Chairman, such changes "might have a profound effect on substantive decision-making." Id. at 37. The GAO Report further acknowledged that Congress had deliberately chosen to limit the Chairman's power somewhat in order to ensure the independence of the Commission. Id.

In sum, while some might argue that enhancing the Chairman's powers would lead to more efficiency in the decision-making process, it is also true that enhancing the Chairman's powers would increase the potential for unreasonable control by the Chairman. Accordingly, in order to maintain the independence of the Commission and prevent the inevitable impact on substantive decisions that expansion of the Chairman's powers would have, the domestic industries represented herein oppose the proposals to expand the International Trade Commission Chairman's powers beyond those that are statutorily authorized at present.

The three specific proposals are addressed below.

- **Changing the Budget Approval Process**

The first proposed reform would change the budget approval process so that the commissioners vote to approve the budget submission only, as opposed to the current system in which the Chairman has the authority to "formulate" the budget but subject to broad majority approval. Under this proposed reform, the budget approval process would be tantamount to a "fast-track" approach, with only an up or down vote permitted by other commissioners and no meaningful input into the process. Present law provides the opportunity for other commissioners to have input into "budget formulation," granting broader opportunity to affect the ultimate budget decisions than a mere approval or disapproval option. In the past, commissioners have indicated that their active participation in budget formulation "has reflected different priorities, not a concern about specific management problems." 1992 GAO Report at 25. Elimination of this ability, therefore, would remove the other members of the Commission from any meaningful input into the budget process in contravention of the original statutory scheme.

- **Providing the Chairman With Greater Personnel Authority**

The second proposal would provide the Chairman with greater personnel authority so that hiring decisions would not be subject to disapproval by majority vote and only senior-level hiring decisions would require the approval of a majority of the commissioners. Currently, all personnel decisions at the Commission are subject to Commission disapproval, although in point of fact this disapproval has been limited to senior-hiring decisions. Nonetheless, the statute envisions that if the majority of the Commission membership felt so strongly about a particular hiring decision as to register its disapproval, that disapproval should be sufficient to override the Chairman's hiring decision. This provision should not be altered as to do so, again, would remove the system of checks and balances established by Congress over Commission decision-making.

- **Providing the Chairman With Greater Authority in Administrative Decisions**

The final proposal designed to dilute the input of other commissioners denies these commissioners the right to veto any administrative decisions concerning day-to-day management of the Commission. Elimination of the ability for the commissioners, by majority vote, to block administrative decisions of the Chairman would give the Chairman unchecked ability to implement his or her interests without regard for the other commissioners. Although this may increase efficiency, as noted above many of these administrative decisions will have a substantive impact on a particular case. Accordingly, members of the Commission should not be deprived of the ability to veto a decision of the Chairman with which they strongly disagree.

5. Removal of Exemption from OMB Oversight

Under the Trade Act of 1974, Congress created a statutory exemption for the International Trade Commission from the requirement that the Office of Management and Budget ("OMB") review and approve its budget. 19 U.S.C. § 2232. The reason for this exemption was set forth in the legislative history to the 1974 Act: "The Committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of the Congress." S. Rep. No. 1298, 93d Cong., 2d Sess. 118 (1974).

The proposal to eliminate this exemption, therefore, would increase the potential for politicization of the Commission in direct contravention of the purpose sought by the exemption. As detailed above, the entire structure of the Commission is intended to result in an independent, quasi-judicial investigative agency that would be insulated as much as possible from political influence. This independence is preserved by the exemption from OMB budget oversight. Other federal agencies, such as the Federal Reserve System Board of Governors, are also exempt from OMB oversight for the same reason. With a goal of maintaining the independence of the Commission, we oppose the proposed elimination of the exemption from OMB oversight currently provided for the International Trade Commission.

6. Creating an Executive Director Position to Make Administrative Decisions

It has been proposed that the position of executive director be created at the International Trade Commission "to make administrative decisions." The general nature of the description of the executive director's responsibilities and his/her role at the Commission make it difficult to comment upon the proposal. As the 1992 GAO Report indicates, the position of executive director exists at some other agencies, but the responsibilities vary widely. Further, the executive director at some agencies serves essentially as the Chairman's representative, while in other agencies the director is more independent. Id. at 39.

The GAO Report also notes that an executive director position existed at the International Trade Commission itself for some years prior to 1977, but the position was eliminated. Id. Given the current budget constraints facing the Commission, it is unclear why it would be justifiable at this time to add a new position, particularly one that had previously been eliminated. In any event, additional information would be needed on the nature of the executive director's role and responsibilities before we could determine whether such a position would justify the additional budget expense.

7. Use of Administrative Law Judges to Make Injury Determinations

The final proposal is to change the hearing and investigation process in antidumping and countervailing duty cases so that any injury determination is made by an administrative law judge ("ALJ"), subject to review by the Commission. This proposed reform would add significantly to the time and cost of conducting these cases with no substantive improvement in the process. Making injury determinations is the primary raison d'etre of the International Trade Commission. This is the single most important function of the commissioners. Accordingly, the domestic industries represented herein strongly oppose this proposal.

The proposal that an ALJ make injury decisions in antidumping and countervailing duty cases was first advanced, to our knowledge, in a report prepared by Professors John Jackson and William Davey to the Administrative Conference of the United States ("ACUS") in 1991. In that report, which was carefully identified as reflecting the authors' views and not necessarily the views of the members of ACUS, the authors proposed that administrative law judges make injury determinations in antidumping and countervailing duty cases and further proposed that, were ALJs to make such decisions, appeals of such decisions should proceed directly to the U.S. Court of Appeals for the Federal Circuit and bypass the Court of International Trade.1/

Significantly, ACUS' final report did not adopt the proposal to rely on ALJs in antidumping and countervailing duty cases or the proposal to eliminate Court of International Trade review. These proposals were opposed by many practitioners in comments submitted to ACUS, based primarily on the increased costs that would be associated with the cases if an ALJ were used. As a result, the final ACUS report does not recommend the use of ALJs in antidumping and countervailing duty cases. See ACUS, Administrative Procedures Used in Antidumping and Countervailing Duty Cases, Recommendation 91-10, Dec. 13, 1991.

It is noteworthy, however, that even the authors of the study that proposed reliance on ALJs for injury determinations in these cases recognized the significant increased costs that would be associated with use of ALJs, both for the Commission and for private litigants. According to the authors: "For the government, the installation of ALJs would clearly increase the cost of processing these cases and there would be no decrease in current spending if the staffs play the role that we envision for them." J. Jackson and W. Davey, Report for Recommendation 91-10, "Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases" at 964. Although no estimate was given as to increased costs at the Commission from the use of ALJs, an estimate of increased costs was provided for the International Trade Administration (where the use of ALJs had also been recommended by Professors Jackson and Davey). According to the Chief Counsel for Import Administration, it would cost $7.5 million, or 50 percent of the agency's budget at that time for antidumping and countervailing duty cases, to add ALJs to the ITA decision-making process. Id., citing S. Powell, Dept. of Commerce, Speech, Federal Circuit Judicial Conference, May 9, 1991. Any proposed change that would lead to such significant cost increases cannot be justified with the budget reductions currently facing the Commission.

Moreover, the use of administrative law judges in antidumping and countervailing duty cases would lead to a number of additional steps in an already lengthy investigative process, would increase the role of Commission attorneys and, at the same time, reduce considerably the role of the Commission investigator as well as other members of the investigative team, such as the commodity specialists and economists. Given the complex nature of the analysis that must be performed in antidumping and countervailing duty cases, it is inappropriate to minimize the role of the members of the investigative staff on these cases.

Finally, the use of ALJs has another drawback in the administration of these laws. If ALJs are relied upon to make injury determinations, members of the Commission will become even more removed from the facts and issues in a case. Commission members would be limited to reviewing the decision of the ALJ, rather than hearing direct witness testimony on key issues. The domestic industries represented here believe that more, not less, active involvement in these cases is needed by Commission members. For all of these reasons, we oppose the use of ALJs in the Commission's injury decisions for antidumping and countervailing duty cases.

1/ Given that the current proposal would not eliminate Court of International Trade review -- and we would strongly oppose such a proposal -- much of the justification for the use of ALJs advocated by Professors Jackson and Davey (i.e., elimination of the need for trial court review and offsetting cost savings) is not true with respect to the isolated proposal to rely on administrative law judges for injury decisions in antidumping and countervailing duty cases.

8. **Government in the Sunshine Act**

In addition to setting forth proposed reforms, the Subcommittee has requested affirmative suggestions for improvements in the administration of the International Trade Commission. One proposal made in the 1991 ACUS final report, although not identified among the proposed reforms, was that Commission members exchange drafts, views and other information before entering into formal deliberations. See ACUS Recommendation 91-10 at 4. Under present practice, the members of the Commission do not meet as a group to discuss their views of a case or key issues. Instead, each commissioner must vote before he or she has had the benefit of other colleagues' views on the central issues in the case.

We believe that the Commission's decision-making process would be improved by the exchange of drafts, views and other information prior to formal deliberations and decision-making in a case. The reason for not engaging in this process, according to the ACUS findings, was a concern stemming from the Government in the Sunshine Act. The Sunshine Act, however, creates an exemption from the open-meeting requirements for dispositions of a particular case of formal agency adjudication pursuant to the procedures of 5 U.S.C. § 554 "or otherwise involving a determination on the record after opportunity for a hearing." (Exemption 10) Determinations in antidumping and countervailing duty cases should fall within the second clause of this exemption.

Given the benefits that would be provided in the collegial sharing of information if closed deliberations were conducted by the Commission, we urge the Subcommittee to recommend that the International Trade Commission claim Exemption 10 of the Government in the Sunshine Act. If the Subcommittee finds, for any reason, that the Commission's determinations in antidumping and countervailing duty cases do not fall within the terms of Exemption 10, the Subcommittee should consider appropriate revisions to the Government in the Sunshine Act that would permit such closed deliberations by the Commission.

STATEMENT OF THE AMERICAN IRON AND STEEL INSTITUTE

The American Iron and Steel Institute (AISI), on behalf of its U.S. member companies, appreciates this opportunity to provide comments concerning possible structural and procedural reforms to the U.S. International Trade Commission (ITC).

First of all, it important to state at the outset that AISI supports ITC reform. That is, we agree with the general notion, also endorsed by the Commission and staff, that there are problems at the ITC and that constructive change should be considered. During the recent federal budget talks and the threat of severe cutbacks at the Commission, it became clear that the ITC itself has been looking at the pros and cons of possibly large-scale, institutional change. Thus, the issue is not if reform is a good thing -- it is what kind of reform and how significant it should be.

In terms of the types of change addressed by the proposals enumerated in the Notice, AISI agrees that it is important to look at how the ITC can cut costs and improve management efficiencies without reducing the ability of the Commission to perform its functions. Unfortunately, these proposals to "reorganize" the ITC do little to solve the Commission's real problems, and some of these proposals would cause major harm.

Our objections are primarily in three areas: (1) a proposed fundamental change in the way the ITC would decide antidumping (AD), countervailing duty (CVD) and other investigations -- going from an even to an odd number of Commissioners; (2) proposals for internal management changes that, taken as a whole, would increase greatly the authority of the ITC Chairman; and (3) a proposal to remove the Commission's current exemption from oversight by the Office of Management and Budget (OMB).

Our concern is that, if these proposals were to become law:

- the ITC would be subjected to control by the Executive Branch;
- it would no longer be the independent, quasi-judicial agency that the Congress intended;
- it would become much more politicized; and
- many of us would question whether the ITC should continue to exist.

Odd Number of Commissioners

The most troubling proposal would reduce the number of Commissioners from six to an odd number. AISI's U.S. members do not consider this fundamental change in the ITC's structure to be "reform." Transforming the Commission from an even to an odd number would severely politicize ITC activities, compromise the objective credibility of the ITC, seriously undermine the independence of Commissioners, reduce the deterrent strength of trade laws, and decrease the efficiency of trade law enforcement.

Congress provided for an even number of Commissioners (1) to ensure that no political party would control the ITC and (2) to give a slight -- and appropriate -- benefit of the doubt (an affirmative injury finding in the event of a tie vote) to U.S. petitioners in AD/CVD cases after it has already been established that imports under investigation have been dumped or subsidized in violation of U.S. law. Both the Congress and the Courts have recognized that the current even number structure is fair and proper, and there is no good reason to change it.

Authority of the Chairman

Because certain ITC Chairmen, over the past 10 years, have at times pursued a highly political and ideological agenda in staffing decisions, allocating resources and shaping or initiating Section 332 investigations, AISI favors the current deliberate, consensus-building system to the proposed enhancements to the Chairman's authority. These proposed enhancements would make politicized, and precipitous, action more likely.

- Increasing the term of the Chairman beyond the current two years would lead to less shared authority on the ITC, less cooperation among Commissioners and less independence for Commissioners. It could lead to agency gridlock.

- Providing the Chairman with greater authority to make administrative and personnel decisions would likewise limit the independence of individual Commissioners.

Given our concerns, we think it is worth considering giving an executive director (a career appointee approved by a majority of Commissioners) the power to make some administrative decisions.

OMB Oversight

Removing the ITC's current exemption from OMB oversight would compromise the Commission's independence from Executive Branch influence. This proposal would allow the Executive Branch to exercise control over the ITC's budget and, thereby, its policy. It is essential that the Commission be able to maintain its independence from the Executive Branch.

*

AISI closely followed the ITC's budget problems during the recent federal budget talks. Our primary concern was -- and remains -- the ability of this country's administering authorities to enforce fully and promptly U.S. laws against unfair trade. We do not wish to interfere in future budget decisions that are best made by the Commission itself. If further downsizing and layoffs are required at the ITC, we would urge only that the Commission's ability to enforce trade laws be maintained and that any reductions be done fairly, without regard to politics and ideology.

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March 1, 1996

Mr. Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Dear Mr. Moseley:

On behalf of the member companies of the American Textile Manufacturers Institute (ATMI), we are submitting the following comments concerning reform of the International Trade Commission (ITC), as solicited in your committee's advisory of January 31, 1996.

ATMI is the national trade association of the U.S. textile mill industry and our members consume nearly 80 percent of all textile fiber used in the U.S.

ATMI has the following concerns about the proposed reform:

(1) Most of the reforms recommended by the GAO seem to concentrate power very significantly in the office and person of the ITC chairman. We question the wisdom and prudence of this, especially in an institution that is charged with the objective, unbiased and non-political administration of many of our trade laws and remedies.

(2) One reform suggests that injury determinations be made by administrative law judges and received by the ITC. ATMI is strongly opposed to this change for several reasons:

- Trade remedies procedures are already extremely costly in the U.S. and this change will increase legal costs very significantly;
- Shifting to a courtroom procedure involving discovery and other procedures will in all likelihood have a chilling effect on the willingness of U.S. complainants to file petitions.
- If the ITC is to review courtroom findings, it seems simpler, and more straight forward to keep their responsibility for injury determination where it currently is -- at the ITC.

For the above reasons we recommend that the ITC keep its responsibility and authority for determining injury in trade remedy cases.

Sincerely,

Carlos Moore
Executive Vice President

CM/mbp

CRAFTED WITH PRIDE IN USA

Comments
of
Charles A. Hamilton
on
U. S. International Trade Commission Reforms

Prepared for the

Subcommittee on Trade
House Committee on Ways and Means

My name is Charles A. Hamilton. I am President, Charles A. Hamilton Associates, an international trade consulting firm located in Washington, D. C. During the period from early 1971 to 1980, I served as Executive Assistant to the Honorable Catherine May Bedell during her term at the U. S. International Trade Commission when she served as Chairman and Commissioner. It was during this period that I was actively engaged in her efforts to reorganize and revitalize what was then known as the Tariff Commission. It is in the context of my personal experience with this unique agency of the Federal government that I am submitting these comments. Hopefully, the experience of others will help provide some constructive insights as the Subcommittee on Trade undertakes its review of possible changes to the structures and procedures of the USITC.

The U. S. International Trade Commission is a Unique Agency

Time passes. Situations and personnel change, but the lessons of history can always be instructive That is why it is important that the present members of the Subcommittee on Trade understand something about the history and the uniqueness of this independent agency. Created in 1916, during the Wilson Administration, its predecessor agency, the Tariff Commission, was to provide a basis for independent study and review of trade issues and prepare for the period of expansion that was expected to follow the end of World War I. The Commission was to be independent, free from political influence and intervention by either the Legislative or Executive branches of the government.

For that reason, the Commission was to be an even numbered one. The reason being that six sitting commissioners were to study, debate and accomodate in their findings on the Commission's studies and investigations. At that time it was headed by an eminent scholar and economist, Dr. Frank Taussig, who had headed the Department of Economics at Harvard University. The Commission was empowered to conduct investigations at the request of the President, Congress or on its own motion.

As the Harding Administration came into office, agency appointments became more politicized contributing to the downward spiral of the agency. This continued until it was completely reconsituted by Congress in the 1930's. Since then, a variety of changes have been made in its operations. As part of a backlash reaction to Waterwgate in the 1970's, some changes were made under Senate leadership that removed the President's power to designate the Chairman. This quickly proved to be a disaster that further politicized the Commission. Congress then found it necessary to make further modifications by initiating the present nine year term arrangement for Commissioners. It restored the President's authority to appoint the Chairman and Vice Chairman for two year terms. However, Congress dictated that the Chairman be from one party and the Vice Chairman from the other. This procedure is currently in effect today.

It is in the context of present Congressional concerns that I submit these comments. Whatever, the present Commission has done that is vexing to Congress today, I submit that tinkering with the number of commissioners, so called organization "reforms" or procedures is far too simplistic an approach to the solution of what are perceived as major problems.

Much of the present Commission organization today was conceived in a reorganization plan drafted under Chairman Bedell's leadership and eventually enacted with modifications by the full Commission in the 1970's after the Office of Management and Budget and the General Accounting Office studies recommended institution of the proposed reforms. While all the organizational changes looked good on paper and the charts were neat and symetrical, those involved in the revitalizaton process quickly learned that even the best of plans require modification and change. An Executive Director positon was created and then abandoned in favor of a bifurcated management with a Director of Operations to oversee the substantive work of the Commission's professional staff and a Director of Administration to manage its day-to-day operations. The reason for the change had nothing to do with the concept, the Commission simply came to the conclusion that it was extremely difficult to find one person who knew and understood the technical work of the Commission and was also a good manager. A careful analysis of the organization of other independent agencies will show that the work of the USITC is simply different and demands a different approach. Thus, the change.

Setting a Standard for Future Operations

As a student of the U. S. International Trade Commission, I would like to make several broad points that go towards defining a policy Congress should lay down for the operation of future commissions.

- Those responsible for overshight of the U. S. International Trade Commission should never forget the unique character of the Commisson and never fail to champion its independence, regardless of which party controls the Congress or the White House. Sometimes at the Commission we wondered who we were independent from. While we were not always successful, the professional staff worked extremely hard to make sure the Commission's actions were independent.

- Further, Congress needs to understand the role of the Commission and provide policy direction to it by giving it substantive work and utilizing it as a means of providing the facts and information on which Congress and the President can make sound trade policy decisions. In my opinion, I believe that this has been lacking in recent years while the Commission's statutory case load has declined. In this role, Congress should hold annual oversight hearings on the Commission's work and operations. In all fairness to the present Commissioners, this has not been done. Congress too, needs to be accountable.

- The Commission, in turn, must remember it is a fact finding agency. Its role is to provide the basis on which Congress and the Executive Branch make policy. It is not a policy making institution and was never intended to be one.

- Where necessary, Congress should provide the Commissioners with guidance in terms of what it expects in the conduct of a Commissioner. It is unrealistic to think that the Commissioners will ever police their own activities. That has never been the case, and I doubt it will ever change, because Commissioners are political appointees and are co-equal.

- Congress should find a way to define the role of a Commissioner, and the basis on which it will confirm Executive Branch nominations to that body. Too often, appointments have been made on the basis of political favors or using the appointments as a sinecure for the party faithful. Fortunately, in many cases, Commissioners have risen to the occasion, grown on the job and worked earnestly and sincerely to fullfil their oath of office and make worthwhile contributions. This has not always been the case. A way must be found to make sure appointments are of the highest caliber in terms of experience, education and integrity. Candidates should also have the capability and the capacity needed to assure the civility and collegiality needed in the Commission's deliberations. Every

Administration, regardless of political party, always seems to have to learn this lesson the hard way.

- Exempt the Commission from Sunshine Act provisions when it comes to deliberations on cases. Careful consideration should be given to the advantage of allowing the Commissioners, like judges, to "argue" their positions in private so they can study, debate and accomodate in the consideration of their cases, agency studies or research programs. The merits of a change back to the old system has been debated, but having seen it work both ways, I tend to believe something was lost when Commission deliberations were conducted in the open. The current process is stilted and deprives protectionists and free trade advocates alike of the benefits of such collegial give and take. It has also deprived the Commission of contact with the professional staff. The quality of a Commissioner's opinions will provide insight into the rationale in his or her decision making and provide the transparency some members of the trade bar would like to see.

- Care should be taken to protect the professional staff from political influence. This is most important. All appointments should be on the basis of merit. The emphasis should be on technical expertise and experience. There should be no exceptions. In this regard, the public information and congressional liaison functions should be eliminated. The Office of the Secretary, as in years past, can provide public documents and Congressional Liaison can be left to the Commissioners who, after all, are the political appointees and the ones with access to Congressional trade committees. Also, the need for an Inspector General in an agency of four hundred persons seems to be questionable when the era of "big government" is supposedly over.

Responses to Proposed Reforms

Briefly, my comments on the reforms outlined by the Subcommittee in its Advisory are as follows:

- Retain the historic number of Commissioners at six.

- Retain the even number of Commissioners and require that they debate and accomodate on

the issues before them.

- Restore to the President authority to appoint a Chairman from his own party when a sitting Chairman's two year term expires and allow the President to renew a Chairman's term of office, if the President so desires.

- Retain the current system for budget approval. The Commission fought long and hard for a strong chairman concept of management. Someone has to be in charge, but the Chairman must provide leadership in gaining the support of his/her colleagues for overall approval.

- Providing the Chairman with greater personnel authority could further politicize appointments to what is supposed to be an independent professional professional staff. The Chairman's authority for hiring and firing should be the merit system as administered under Office of Personnel Management regulations. The Commission's "independence" should never exempt it from these rules.

- Do provide the Chairman with greater authority in making day-to-day administrative decisions. The other Commissioners need not concern themselves with travel, office space or paper clips. A procedure requiring the Chairman to be accountable by reporting to his/her colleagues on his/her actions would be better. Questionable actions by a Chairman can always be raised during Congressional oversight hearings.

- The Commission's independence should be sacrosanct. Repeal of the OMB oversight exemption would only allow for Executive Branch intervention or influence through control of the purse.

- The position of Executive Director has been tried before. The concept sounds good, but it did not work. Retain the present positions of Director of Operations and Director of Administration unless someone has a better idea.

- Retain the current hearing and investigation process. If you want to really gum up the works, go to Administrative Law Judges. The only people who will benefit will be the lawyers

and those who support complex rules of administrative law and procedure. Care must be taken to always keep in sight what the agency needs to accomplish. Again, the Commissioners need to be close to the professional staff in the investigative process. It is the way in which the Commission was historically organized to hammer out its decisions. Going to an ALJ system would only remove the Commissioners further from this process.

- In conclusion, I noted with interest that the proposed reforms listed by the Subcommittee dealt mostly with the Commissioners. There is no mention in the Subcommittee's Advisory of the Commission's professional staff, although the various studies mentioned may have done so. That could be a major omission. The Commission has no programs to administer. As a fact finding body, its resources are in its staff. Where else in the Federal government will you find a professional concentration of investigators, commodity industry analysts, economists, trade law attorneys, and expertise in trade nomenclature and trade agreements? In light of today's budgetary problems, I would recommend that Congress consider some trade offs in the reduction of the size of the Commissioners' personal staffs in order to enhance the Office of Industries and its commodity industry analysts in particular. Funding support so these specialists can keep abreast of the latest technical developments and trade shifts in their related fields is needed and necessary. The Commissioners need to lean more on the professional staff for support than duplicating it in their offices.

Looking Ahead

The Commission is not only independent, it has a record for preserving the confidentiality of data and information furnished by industry for its investigations. While rarely used, it also has the power of subpoena.

Since the statutory case load of the Commission may fluctuate, it also is ideally equipped to undertake broad long range studies under Section 332 of the Tariff Act of 1930, as amended, that would provide challenging and interesting work for its professional staff, free of political influence.

As we expand trade, enter into common market agreements and attempt to deal with the globalization of our industries, the Commission is ideally suited to develop the facts in which to base future trade policy decisions. Some areas for study might include:

- A review of the World Trade Organization settlement process and its potential impact on the U. S.

- The long range impact of offset agreements, military and civilian.

- The monitoring of trade agreements to support the Office of the U. S. Trade Representative in its enforcement of these agreements.

In the final analysis, it is people that make an agency work. By giving the Commission's organization the proper attention it deserves through legislative oversight, I believe progress can be made to restoring it to its historic mission and getting the agency back on track.

When several former members of the Subcommittee on Trade years ago were thinking of abolishing the Commission, I reminded them that if we didn't have a U. S. International Trade Commission, we'd have to create one. No other agency has such a role. In fact, it has no comparable counterpart in other governments. If it is to provide the basis for independent informed policy decision making, it will not fit in the Department of Commerce or the Department of the Treasury or even the Office of the U.S. Trade Representative which have their own constituencies. How this will play out is up to Congress for it must find a way to make the Commission's work more timely and relevant to world trade today.

In concluding, I would like to thank the Subcommittee on Trade for the opportunity to provide it with my views. The U.S. International Trade Commission does have a unique role to play. I hope my comments will provide the Subcommittee with some worthwhile insights and thoughts on how the independence and intellectual integrity of this small, little known, but important agency can be enhanced and preserved.

COMMENTS OF THE COALITION FOR FAIR LUMBER IMPORTS ON PROPOSED CHANGES TO THE INTERNATIONAL TRADE COMMISSION

SUBMITTED TO THE SUBCOMMITTEE ON TRADE COMMITTEE ON WAYS AND MEANS

MARCH 1, 1996

The Coalition for Fair Lumber Imports ("Coalition") appreciates this opportunity to comment on proposed legislative changes to the structure and operation of the U.S. International Trade Commission ("Commission"). The Coalition represents small and large lumber producers across the United States, including: The Independent Forest Products Association, the Intermountain Forest Industries Association, the Maine Forest Products Council, the Massachusetts Wood Products Association, the Northeastern Lumber Manufacturers Association, the Southeastern Lumber Manufacturers Association, the Southern Forest Products Association, the Timber Products Manufacturers, the Western Wood Products Association, the Forest Farmers Association, the Washington Farm Forestry Association, and the Arkansas, California, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia Forestry Associations.

The Coalition has been engaged for over a decade in efforts to ensure that subsidized imports of Canadian softwood lumber do not cause injury to the U.S. lumber industry. These efforts most recently have focused on Consultations with the Canadian Government, which in February resulted in an agreement in principle whereby the key Canadian provinces have committed to steps designed to offset the injury caused the U.S. industry. However, prior to these Consultations, the Coalition was active in litigating several countervailing duty actions before the Department of Commerce and the Commission against imports of subsidized Canadian lumber. The Coalition believes that strong and effective remedies against unfair trade are essential to the ability of U.S. industries to compete fairly at home and abroad. The following comments are based on the Coalition's experience in these cases before the Commission.

The U.S. International Trade Commission

The Commission is an independent, quasi-judicial agency that conducts a number of important functions relating to the development and implementation of U.S. trade policy. Most significant from the perspective of the Coalition is the Commission's role in determining whether U.S. industries are materially injured by imports found by the Department of Commerce to be dumped or subsidized. Given the importance of such determinations to U.S. economic interests and the concern that these determinations might be improperly influenced by political or foreign policy concerns, the Congress has sought to insulate the Commission, to the extent possible, from either partisan politics or the influence of the Executive Branch.

To insulate the agency from partisan politics, no more than three of the six Commissions may be from the same political party, and the Chairmanship of the Commission rotates every two years between Commissioners from the two political parties. To prevent the Executive Branch from influencing the Commission to follow a particular policy direction, the terms of the Commissioners are nine years -- one year longer than that of a two-term President.

The Coalition believes that any institution, the Commission included, can always be improved. In the case of the Commission, the Coalition's primary concern is that the Commission from time to time has issued staff reports on trade policy issues -- including a recent one concerning the U.S. trade remedy laws -- which take a sterile and inaccurate academic perspective with limited vision, if any, of the real world consequences of unfair trade practices on U.S. industries and their workers and which ignore the long-term implications of failing to act against unfair trade. Having said this, adoption of the proposed changes discussed below would not address this concern and would adversely affect the continued independence of the Commission and ability of the six Commissioners to make decisions solely on the basis of the facts presented and the legal standards for injury

determinations set forth by the Congress. Indeed, for some that will be a basis to support such proposals. Such a change is not only contrary to U.S. interests, but it would seriously call into question the necessity of maintaining an independent agency to make these determinations.

Specific Comments on the Proposals

Reducing the number of Commissioners from six. This proposal would fundamentally alter the nature of the Commission, which currently acts in a nonpartisan manner. With an odd number of Commissioners, the Commission would no longer be immune to political pressures from the Executive Branch and political parties, because one political party or the other would have majority control of the agency.

Increasing the term of the Chairman. Likewise, increasing significantly the term of the Chairman of the Commission would politicize the agency by increasing the power of the Chairman compared to that of the other members of the Commission. This would create at least the appearance that the political party of the Chairman has some increased influence over the agency for that extended period of time.

Providing the Chairman with greater authority. Providing the Chairman with greater authority to make administrative and personnel decisions would similarly increase the power of the Chairman over the other Commissioners, thereby fundamentally changing nature of Commission decision-making. Under current law, while the Chairman has the authority to run the daily activities of the Commission, a majority can overrule his or her administrative actions. Similarly, the Commission's budget may be proposed only if a majority of the Commission approves. If a majority of the Commission is no longer permitted to veto administrative decisions of the Chairman, this balance among the Commissioners would be upset.

Removing the current exemption from OMB oversight. Without the current exemption for the Commission's budget from oversight by the Office of Management and Budget ("OMB"), the Commission would no longer be truly independent from the Executive Branch. Through OMB oversight, the Executive Branch would be in a position not only to control the Commission's budget, but also to influence its policy decisions.

Providing for injury determinations by administrative law judges. Changing the hearing and investigation process so that injury determinations are made by administrative law judges, subject to review by the Commission, could increase the cost of investigations and remove the Commissioners from the particular facts of a proceeding, making it much more difficult for the Commission to make the thoughtful determinations on which industry relies. In fact, the use of administrative law judges would call into question the need for maintaining a six-member Commission altogether.

Conclusion

The Coalition urges the Subcommittee to reject the proposed changes to the structure of the Commission discussed above.

COMMENTS OF SCHAGRIN ASSOCIATES ON BEHALF OF THE COMMITTEE ON PIPE AND TUBE IMPORTS AND WEIRTON STEEL CORPORATION

In response to the Subcommittee on Trade's request for written comment on possible structural and procedural reforms to the International Trade Commission, Schagrin Associates submit these comments on behalf of the Committee on Pipe and Tube Imports (CPTI) and on behalf of Weirton Steel, Corporation.

The subcommittee announcement directed attention tc two documents: (1) the Administrative Conference Recommendations of December 1991; and (2) the GAO Report: *INTERNATIONAL TRADE COMMISSION Administrative Authority is Ambiguous*, GAO/NSIAD-92-45 (February 1992) ("GAO Report"). The subcommittee request for comment also identified nine possible reforms for the Commission.

We believe the Administrative Conference recommendations deserve consideration if the subcommittee decides to pursue legislative changes to Commission operations. But the Conference document does not address the potential reforms identified by the subcommittee. Some of the identified issues were discussed in the GAO Report, but the GAO's analysis largely supports rejection of the possible options for changing Commission operations.

For the reasons detailed below, we believe the subcommittee should not develop legislation implementing the identified reforms for Commission operations.

I. THE REFORMS IDENTIFIED BY THE SUBCOMMITTEE TO IMPROVE ADMINISTRATION OF THE COMMISSION SHOULD BE REJECTED

A. The GAO Report Does Not Support Significant Changes in Structure or Operation of the Commission

We believe the data gathered by the GAO and the GAO discussion of options for changes to the Commission support the conclusion that no significant changes to the current Commission structure are advisable. Indeed, the GAO questioned the efficacy and advisability of each significant "option" for change they identified. GAO Report at 37-39.

As detailed more fully below, Congress has already created a strong Commission chairman. The GAO warned that enhancing the chairman's power further or providing for an odd number of Commissioners "might have a profound effect on substantive decision-making" and would compromise the independence of the agency. GAO Report at 37.

After examining the many federal commissions and agencies, the GAO found that it was the ability of the chairman and the commissioners to cooperate that had the greatest effect on efficiency in agency administrative decision-making. The Senate Finance committee also supported this view when it noted that Congress must "rely upon the discretion of the Commissioners in the conduct of their official duties." S. Rep. No. 122, 95th Cong. 1st Sess. 4 (May 5, 1977). Regardless of agency authority structure, seeking a collegial atmosphere is the most effective mechanism for administration. The unique statutory composition of the Commission merely increases the importance of adopting this approach to management of Commission operations.

B. Discussion of Specific Reforms

1. Reducing the number of Commissioners from six

The Commission has been a six-member body since its inception as the Tariff Commission in 1916. Title VII, Revenue Act of 1916, ch 463, 39 Stat 756. Reduction of the number of commissioners was not discussed in either the GAO Report or Administrative Conference recommendations. This idea should be rejected because it undermines the fundamental purpose of the Commission.

The antidumping and countervailing duty trade statutes provide standards for evaluation by the Commission of whether domestic producers are materially injured by unfair imports. Application of legal precedent cannot resolve the significance of the voluminous evidence collected by the Commission. Rather, a commissioner's ultimate determination largely rests on a personal evaluation grounded in that commissioner's experience.

In the past, Congress has recognized that it was essential that the number of commissioners not be "so small as to unduly limit the expertise and consideration brought to bear on the subject." S. Rep. No. 1298, 93d Cong. 2d Sess. 115 (1974). Reducing the number of commissioners undercuts the credibility of Commission determinations.

A Commission of six members is appropriate because "in the past, sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission." *Id.* A new factor threatening full participation by all commissioners is the greater sensitivity to the appearance of conflict of interest.

As detailed in our next comment, we do not believe the Commission should consist of an odd number of commissioners. Thus, any reduction in the number of Commissioners would mean the maximum complement of commissioners would be four. The impact of the non-participation of one commissioner is much greater on a four member Commission than one that has six members.

2. Providing for an odd, as opposed to an even, number of commissioners, with appropriate changes in political party composition

a. The independence and objectivity of Commission determinations would be seriously undermined

The current composition of the Commission balances political affiliation and seeks to limit executive branch influence on Commission determinations. No more than three of the six commissioners may be from one political party and the chairman, appointed by the President, must not be from the same political party as the previous chairman. Thus, the Commission's structure "was designed to protect commissioners' independence from external political pressure and to balance the internal political forces in their decision-making." GAO Report at 15. Despite substantial changes to the Tariff Commission in creating the current Commission, the Senate Finance Committee "strongly believe[d] in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch." S. Rep. No. 1298, 93d Cong. 2d Sess. 115 (1974). Thus, the current Commission remains "free from favoritism toward any political party" and capable of objectivity in consideration of economic conditions.[1]

In administration of the unfair trade laws, an even number of Commissioners is the foundation for bipartisan determinations regardless of which party occupies the White House or controls Congress. An odd number of commissioners would effect a fundamental change in the character of the Commission. The reform is a blunt instrument creating significant collateral damage if it is merely designed to address perceived administrative problems.

The alternative of appointing one commissioner who is "truly independent" to maintain political balance is not practical. Choosing an independent commissioner could result in lengthy partisan battles more costly than any gain in Commission operations.

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[1] *See Border Brokerage Co., Inc. v. United States*, 646 F.2d 539, 546 (CCPA 1981) discussing creation of the Tariff Commission and citing J. Dobson, *Two Centuries of Tariffs: The Background and Emergence of the United States International Trade Commission* 87 (1976).

b. The change would weaken U.S. trade laws

In providing that a tie vote results in an affirmative material injury determination, Congress recognized the "considerable importance" of the antidumping law and sought to "strengthen the deterrent effect of the law and in that respect help to prevent dumping." S. Rep. No. 1619, 85th Cong., 2d Sess. 2 reprinted in 1958 U.S.C.C.A.N. 3498, 3499.

Congress affirmed this policy by extending the tie vote provision to countervailing duty investigations when injury determinations were required for such investigations. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2050. Congress retained the tie vote provision without change when the relevant Tariff Act of 1930 sections were repealed and replaced with new law in 1979. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, 179. Current 19 U.S.C. § 1677(11) was intended to "carry forward under the new law the analogous provision under the existing law." S. Rep. No. 249, 96th Cong., 1st Sess. 91 reprinted in 1979 U.S.C.C.A.N. 381, 477.

Unfair trade remains a severe problem. Any solution to the perceived administrative problems of the Commission should not encourage an increase in unfair trade. The Commission only makes a final determination after the Department of Commerce has found that the foreign producers have engaged in unfair pricing or have been illegally subsidized by their governments. That half of the Commission believes the U.S. producers have been materially injured by these unfair imports should be sufficient to justify relief to U.S. producers.

c. The reform conflicts with concept of strong chairman

The 1977 amendments to Commission administration created a strong chairman. Pub. L. 95-106 (Aug. 7, 1977). Instead of requiring the Chairman to obtain the affirmative approval of a majority of the commissioners on administrative actions, Congress permitted the chairman to act on most administrative matters subject only to override by the majority of commissioners. H. Conf. Rep. No. 518, 95th Cong. 1st Sess. 7 (July 21, 1977); S. Rep. No. 122, 95th Cong. 1st Sess. 2, 5 (May 5, 1977).

Creating an odd number of commissioners undercuts administration of the Commission by a "strong chairman." If the Commission composition is unbalanced by party, half of the time the chairmanship will reside in a Commissioner of the minority party. The chairman would not be in a position to exercise his authority. The majority party could always override the chairman's decisions. Equally troubling, if the chairman was from the majority party, the chairman's decisions would be virtually immune from challenge by the minority Commissioners.

d. The reform would increase Commission costs with little benefit

As detailed above, reducing the size of the Commission would undercut the desirable and fundamental objective of bringing a broad range of experience to bear on material injury determinations. But we do not support increasing the size of the Commission to obtain an odd number of Commissioners. An additional commissioner would increase Commission staff and facility expenses. The Commission is of adequate size to perform its intended function. The incremental benefit of an additional viewpoint does not justify the cost of adding another Commissioner.

3. Increasing the term of the Chairman from two years

Rotating the chairmanship of the Commission between parties every two years insulates Commission determinations in antidumping and countervailing duty cases from executive branch trade policies and other foreign relations considerations. A longer term for the chairman would increase the influence of the Presidential appointment, particularly where the President would be selecting a commissioner from his own party.

The GAO noted that, of the many agencies it studied, the "relationship between the chairman and the other commissioners at ITC appears to be one of the most argumentative." GAO Report at 36. Increasing the term for the chairman increases the likelihood that conflicting viewpoints would harden. Rotation every two years gives the chairman and commissioners an incentive to work together, because soon their positions will be reversed. Congress should encourage collegial decision-making at the Commission.

Finally, the more authority granted the chairman, the more inappropriate a long term. A strong chairman with a long term may encourage attempts to dominate the other Commissioners. Such a development is not consistent with obtaining determinations from independent commissioners with a broad range of experience.

4. Changing the budget approval process so that the commissioners vote to approve the budget submission only, as opposed to the current system in which the Chairman has the authority to formulate the budge but subject to broad majority approval

Congress in 1977 "specifically constrained the chairman's power over the budget to ensure the Commission's independence and objectivity." GAO Report at 11. The GAO noted that, at the Commission, "in an attempt to build a consensus, the chairman considers comments from each commissioner to formulate a revised budget proposal that is then presented in a formal public meeting for commission approval." GAO Report at 19. Thus, commissioner involvement in the budget process enhances control of the Commission's budget to avoid wasteful or idiosyncratic expenditures and adherence to the Commission goals.

After approval by the Commission and Congress, the budget is executed based on the chairman's development of an expenditure plan. GAO Report at 19. "At this point, the chairman exercises primary responsibility for decision-making." *Id.* Based on advice of the Commission's General Counsel, expenditure plans do not necessarily require commission approval. But if the plans "alter the funding and staffing allocations approved in the original budget sent to Congress," then commission approval is necessary. GAO Report at 20.

We believe commissioners should have responsibility to monitor whether their agency is deviating from the approved budget. The current system is an appropriate compromise between permitting the chairman to execute the budget without interference, while ensuring that the Commission monies are not spent in ways which conflict with the budget approved by Congress.

5. Providing the chairman with greater personnel authority so that hiring decisions would be no longer subject to disapproval by majority vote and only senior-level hiring decisions would require the approval of a majority of the commissioners

The Commission is primarily a fact-finding agency and is reliant on the professionalism of its staff. Currently, the chairman selects individuals for positions in the agency subject to an override by a commission majority. Commissioner involvement in selecting officials for Senior Executive Service positions requires Commission approval. GAO Report at 28. These constraints on the chairman's power are necessary to ensure the Commission's independence and objectivity. Commissioners could lose confidence in the impartiality of the staff if the chairman's selections were not subject to review by the Commissioners.

The checks on the chairman's personnel authority are also important to job security for the Commission staff. Job security promotes not only professionalism, but also retention of expertise. Giving the chairman greater control over personnel poses the danger of creating a patronage system for the chairman. Such would be particularly true if the term of the chairman were increased.

The staff of the Commission serves the Commission as a whole and not simply the Chairman. It is appropriate for the commissioners to retain the little remaining authority they possess over personnel matters.

6. Providing the chairman with greater authority in making other administrative decisions by no longer permitting a majority of commissioners to veto any administrative decision concerning day-to-day management of the Commission

As stated above, the 1977 amendments created a strong chairman. Instead of requiring the chairman obtain the affirmative approval by a majority of the commissioners on most administrative actions, Congress permitted the chairman to act subject only to override by the majority of commissioners. S. Rep. No. 122, 95th Cong. 1st Sess. 2, 5 (May 5, 1977). Thus, the 1977 amendments gave significant authority to the chairman. With all commissioners voting, a two-thirds majority was effectively required to frustrate a chairman's decision. Moreover, the chairman would have to lose the vote of at least one commissioner from the chairman's own party to have an administrative decision overridden.

This shift of power from the commissioners to the chairman was sufficient to provoke formal supplemental views claiming that the delegation of authority went too far; that by requiring a majority to override a chairman's decision, the chairman was effectively gaining "an additional vote on all Commission administrative matters." *Id.* at 9 (Views of Senators Curtis and Hansen).

The Senate Finance committee in explaining its changes stated that it "recognize[d] that a strong chairman could dominate the other Commissioners on substantive issues." Making the chairman's decisions subject to disapproval by a Commission majority and rotating the chairmanship was necessary to "insure that no individual and no political party can exercise undue influence over the Commissioners on substantive issues." Sen. Rep. No. 122, 95th Cong. 1st Sess. 5 (May 5, 1977). Any greater shift of extraordinary authority to the chairman certainly "would run counter to the intent of Congress when it established a six member, bipartisan Tariff Commission" and "would tend to destroy the objectivity and independence of the Commission and Commission staff." *Id.* at 9 (Views of Senators Curtis and Hansen).

We believe that actions by the chairman opposed by a majority of the Commission should not be executed. Majority disapproval, where the full Commission is participating, means that the chairman was able to persuade only one commissioner to agree with the chairman's action and that the other four commissioners, one of which is from the same political party as the chairman, are opposed. In effect, the current structure parallels the checks and balances between the Congress and the President in that a two-thirds majority is necessary to override. The difference is that the two-thirds majority can only stop and cannot initiate action. Further power for the chairman is not warranted.

The commissioners monitor day-to-day administration by means of "a weekly activity report." GAO Report at 23. "Through these reports commissioners can follow the status of funds, changes in expenditure plan, all personnel changes for GS-13 level employees and above, the status of all staff detailed to and from the agency, all service contracts for experts and consultants, and all purchases above $10,000." *Id.* We believe the Commissioners have a responsibility to ensure that the Commission operates efficiently and lawfully. Weekly activity reports are a good method to monitor Commission actions and are appropriate to exercise of the commissioners' responsibility.

The GAO noted that the "general power of the ITC chairman could be enhanced," but warned that the impact of the change in authority would not be limited to administrative matters, and "might have a profound effect on substantive decision-making. GAO Report at 37. Moreover, based on [the GAO's] survey of other commissions, adopting a different structure might not eliminate problems in making administrative decisions. The GAO emphasized that rather than commission structure, "the personality and leadership style of a

chairman affects administrative decision-making." GAO Report at 36, 37. The Commission has a long history of disagreements among the Commissioners, dating back to the 1920s.[2] Congress cannot legislate collegiality among the Commissioners, they must accept this responsibility themselves.

7. Removing the current exemption from Office of Management and Budget oversight to the Commission's budget by repealing 19 U.S.C. 2232

The GAO noted that "exemption from Office of Management and Budget review is another example of Congress' intention to preserve the ITC's independence." GAO Report at 19. Similarly, the Senate Committee stated its strong belief "that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of Congress." S. Rep. No. 1298, 93d Cong. 2d Sess. 118 (1974). Permitting OMB review of the Commission's budget creates an opportunity for the executive branch to attempt to influence Commission operations and decisions.

We do not perceive any significant advantage to be derived from OMB review, as opposed to Congressional approval, of the Commission's budget. Congress should not dispense with an exemption for the Commission from OMB oversight.

8. Creating the position of executive director to make administrative decisions

The GAO noted that an executive director could be "placed between the commission and senior staff and would make administrative decisions." GAO Report at 39. But it stated that "creating an executive director position at ITC would not necessarily end problems in administrative decision-making, however." *Id.* Indeed, the agency "had such a position for several years before 1977, but it was eliminated. . . ." Without other changes "creating this position would only add a layer of responsibility to ITC and transfer the initial focus of all commission-level disagreement onto a subordinate." *Id.*

Congress should give the commissioners every chance to work collegially. Providing for more formality and the introduction of more bureaucracy does not serve this objective.

9. Changing the hearing and investigation process so that any injury determination is made by an administrative law judge, subject to review by the Commission

This proposal was not discussed in either the GAO Report or Administrative Conference recommendations. Commissioner workload does not require use of an ALJ intermediary to evaluate the data developed by the Commission staff. The commissioners have the benefit of a large and experienced investigative team to collect, analyze and summarize data under the leadership of the Director of Operations and Director of Investigations. This multidisciplinary team includes an investigator, an economist, an accountant, an industry analyst and an attorney in addition to supervisory personnel. ALJ factual findings would add little to the comprehensive report prepared by staff to summarize the evidence gathered.

Introducing an ALJ into injury determinations would also be an inefficient use of resources. To meet their responsibilities, Commissioners must fully evaluate the record. Reliance on ALJ conclusions is not likely or desirable. As noted above, material injury determinations must be made by a set of individuals who bring a broad range of experience to evaluation of the evidence. Reliance on an ALJ decision would severely undercut this key aspect of Commission determinations.

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[2] *See e.g.*, Comments of former chairman and commissioner Alfred Eckes, (February 19, 1996).

The Commission operates under tight statutory deadlines for completion of Title VII cases. Adding an ALJ review of evidence collected would merely increase time pressures with little or no gain in meaningful analysis.

II. THE ADMINISTRATIVE CONFERENCE RECOMMENDATIONS SHOULD BE ADDED TO THE LIST OF POSSIBLE COMMISSION REFORMS

We support serious consideration of the Administrative Conference of the United States Recommendations. 1 C.F.R. § 305.91-10 (December 13, 1991), 56 Fed. Reg. 67139, 67144-46 (December 30, 1991). The Conference recommended that the Commission:

> provide adequate time for oral presentations, taking into account factors such as multiple parties or countries under investigation, that may justify more time than normally allowed. The ITC should allow reasonable time for cross-examination in appropriate cases without reducing the cross-examiner's time for affirmative presentation at the hearing.

56 Fed. Reg. at 61746. The Conference also recommended that Congress consider exempting Commission deliberations on antidumping and countervailing duty cases from the Government in Sunshine Act, a recommendation intended to increase collegiality of decision-making.[3] The Conference believed that if the Commissioners could meet and exchange views, the analysis process might be enhanced and a spirit of cooperativeness might develop.

We believe the Conference Recommendations address important concerns, and particularly support the opportunity to meaningfully cross-examine witnesses at Commission hearings.[4] Time allocations are often restrictive enough before the Commission that parties tightly schedule their presentation. Thus, parties refrain from engaging in cross-examination to avoid expending valuable allocated time. Providing additional time to each party for a cross-examination period could contribute to development of the issues before the Commission. For example, cross-examination of technical witnesses and industry analysts could be conducted by the corresponding expert of the opposing party. These individuals are in the best position to identify weaknesses in proffered evidence.

We also note that the Conference recommendations contained more advice for the Department of Commerce than for the Commission. A recommendation that has continuing urgency is the suggestion that Commerce be encouraged to "eliminate its backlog of annual reviews of the actual duties owed by specific companies subject to AD/CVD orders." 56 Fed. Reg. at 61746.

The Conference recommendations did not address the issues identified by the Committee for discussion. If the subcommittee determines that further consideration of Commission operations is warranted, we urge the subcommittee to add the Conference's recommendations to its list of possible Commission reforms.

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[3] The Conference noted that the Commissioners "do not normally meet as a group to discuss their views of a case before their formal deliberation, evidently because of concerns stemming from the Government in the Sunshine Act."

[4] The Administrative Conference noted that the parties participation in the fact gathering process "could be made more useful if hearing at which the factual submissions of the two sides are tested could be conducted more effectively than at present." 56 Fed. Reg. 67139, 67145 (December 30, 1991).

Conclusion

Any administrative problems suffered by the Commission are not unusual given its composition. Changing the composition of the Commission in an effort to improve efficiency would have the unjustified effects of: (1) decreasing the Commission's independence; (2) compromising the Commissions's bipartisan nature; and (3) and weakening U.S. trade laws. Similarly, control over the Commission's professional staff should not be opened to partisan politics by investing absolute power in a chairman with a longer term office.

Creating an executive director position at the Commission is not warranted, rather the Commissioners should strive to achieve a collegial atmosphere, to avoid unnecessary conflicts over administrative matters. Neither does the Commission need the aid of an administrative law judge to supplement the large investigation team assigned to each material injury investigation. Any reduction in Commission analysis of data by reason of an ALJ opinion would directly conflict with the fundamental objective of Commission evaluation reflecting a broad spectrum of experience.

The Administrative Conference recommendations are possibly useful and worthy of consideration in any review of Commission operations. Nevertheless, none of the recommendations are vital to the effective implementation of the trade laws.

Customs and International Trade Bar Association

March 1, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U. S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Moseley:

Re: COMMENTS ON ITC REFORM LEGISLATION

In response to the request by the Subcommittee on Trade of the Committee on Ways and Means for comments on possible structural and procedural reforms to the International Trade Commission, the Customs and International Trade Bar Association ("CITBA") submits this statement. Several of the proposals for International Trade Commission reform are addressed collectively below based on the overall goal that appears to be sought by the proposal. In addition to addressing the proposed reforms, CITBA also takes this opportunity to address one, additional reform that it believes is appropriate at the International Trade Commission.

CITBA is a nation-wide bar association with approximately 450 members who practice primarily customs and international trade law. The comments were prepared for CITBA by its International Trade Committee, which has primary responsibility for monitoring developments within the international trade law area and reporting its recommendations for Association action to CITBA's Board of Directors. CITBA members represent both foreign and domestic interests in cases before the International Trade Commission. For this reason, its comments do not seek to advocate a "petitioner" or "respondent" position. Rather, the comments reflect the consensus belief of CITBA's members that interested parties will benefit if the proceedings before the Commission are fair and impartial, and do not impose excessive costs on the parties.

I. CITBA Opposes Proposed Reforms That Would Politicize the Commission

Several of the proposed reforms would likely result in increasing the politicization of the International Trade Commission: (1) reducing the number of commissioners from six; (2) providing for an odd, as opposed to an even, number of commissioners; (3) extending the term of the Chairman from two years; and (4) removing the current exemption from Office of Management and Budget oversight of the Commission's budget. CITBA opposes these proposed reforms as they would result in decreasing the independence of the Commission and increasing the potential for political influence in the Commission's exercise of its statutory role.

The International Trade Commission was established as an independent federal agency to conduct statutory, trade-related functions. By law, the Commission is comprised of six commissioners, and not more than three of the commissioners can be of the same political party. 19 U.S.C. § 1330. The President designates a chairman and a vice-chairman for fixed, two-year terms, and must choose chairmen of alternating party affiliation. Further, the chairman and vice-chairman cannot be of the same political party. In 1974, the Commission was granted an exemption from Office of Management and Budget oversight of its budget, again to maintain the independence of the Commission.

The Commission's structure and composition were designed to ensure its political balance and independence. Indeed, a review of the legislative history to the statute structuring the Commission shows clear congressional intent to maintain an independent, politically-balanced agency that would be as free as possible from influence by the executive branch. The proposed reforms would upset that political balance and permit more intrusive executive branch influence over the Commission, thus increasing the likelihood of politicization in Commission decision-making.

A. Odd Versus Even Number of Commissioners

Several proposed reforms would alter fundamentally the manner in which the Commission functions, leading to greater politicization of the Commission. For example, the proposal to alter the number of commissioners from an even to an odd number of members would automatically lead to an imbalance in the political affiliations of the

commissioners. A six-member Commission -- i.e., an even-numbered membership -- was designed to ensure political balance. It is unclear why an odd-numbered membership is preferable.

To the extent the proposal is intended to address a concern with tie votes that may result from an even number of commissioners, Congress has provided a statutory provision addressing that eventuality. See 19 U.S.C. § 1677(11). Given the differing views of its members on the tie vote provision, CITBA does not express a view on the merits of the provision. But if the proposal to have an odd number of commissioners is an attempt to alter indirectly this statutory provision, CITBA believes that the tie vote issue should be addressed directly, rather than by revising the membership of the Commission. The Commission's politically-balanced structure was a critical component in its creation and one that should not be eliminated absent compelling justification for doing so.

B. Reducing the Number of Commissioners

The proposal to reduce the number of members of the Commission (to an unspecified number) raises the same concerns as the proposal to change to an odd number of commissioners. To the extent that this proposal is merely another means of obtaining an odd number of commissioners, it has the same flaws identified above. If, on the other hand, the proposal would reduce the number of Commission members to a specified even number, it presents other concerns.

Even with a designated composition of six commissioners, there have been a number of occasions (particularly in the early 1980s) in which the number of commissioners, or the members of the Commission participating in a vote, has fallen to only three as a result of vacancies on the Commission or recusals by a commissioner. The time it may take to fill the slot vacated by a departing commissioner is often substantial, leaving the Commission with well below its designated complement of six commissioners under the present statute.

As Congress recognized, it is important that the membership of the Commission not be "so small as to unduly limit the expertise and consideration brought to bear on the subject." S. Rep. No. 1298, 93d Cong., 2d Sess. 115 (1974). Congress further noted its concern that past problems with sickness, vacancies, and other matters had led to several members of the Commission not participating in a decision. Id. If the statute were revised to allow for less than six commissioners, there could well be times when only one or two members participated in a Commission decision. Such individual decision-making authority would be far removed from the six-member, bi-partisan body that Congress envisioned when the International Trade Commission was designed.

C. Extension of Chairman's Term

The proposed extension in the term of the Chairman would pose further problems in terms of potential politicization of the Commission. The requirements that the chairmanship alternative between political parties and that the term of the Chairman be relatively limited (two years) ensure that no Chairman is permitted to exercise undue power within the Commission, since the Chairman necessarily reflects only one of the political persuasions represented on the Commission. Extension of the Chairman's term would permit whichever party controlled the executive branch to exercise considerably more influence over the day-to-day operations of the Commission, decisions that can have both procedural and substantive effects. Again, with an eye toward maintaining a political balance within the Commission's overall structure, CITBA opposes extension of the term of the Chairman.

D. Removal of Exemption from OMB Budget Oversight

The proposal to remove the current exemption from Office of Management and Budget ("OMB") oversight of the Commission's budget by repealing 19 U.S.C. § 2232 would also create greater opportunities for the politicization of the Commission. The Trade Act of 1974 created a statutory exemption preventing OMB from making changes to the Commission's proposed budget when that budget passes through OMB. Congress was emphatic in the need for this exemption to minimize the ability to politicize the Commission through budget oversight: "The Committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of the Congress." S. Rep. No. 1298, 93d Cong., 2d Sess. 118 (1974). Congress further emphasized that the statute would identify the Commission as an agency independent from the executive departments to help to insulate it from political pressure. Id.

The independence of the Commission that Congress sought in creating the exemption from OMB oversight is a goal that should be preserved. Moreover, the International Trade Commission is not unique in its exemption from OMB oversight. Several other federal agencies, including the Federal Reserve System Board of Governors, are exempt from OMB oversight in order to insulate them from political interference. Given that the International Trade Commission is an independent, quasi-judicial investigative agency, its exemption from OMB oversight is justifiable. Based on the independence afforded by this exemption as originally intended by Congress, CITBA opposes the proposal to eliminate this exemption for the International Trade Commission.

II. CITBA Opposes Increasing the Power of the Chairman

A second, major goal apparent from the proposed reforms is an effort to increase the power of the Chairman of the Commission. This goal would be accomplished through several proposals: (1) increasing the term of the Chairman from two years; (2) changing the budget approval process so that other commissioners have authority only to approve the Chairman's budget; (3) providing the Chairman with greater authority in hiring decisions; and (4) providing the Chairman with greater authority in making other administrative decisions. CITBA opposes the proposed reforms to increase the Chairman's power and, thus, alter the fundamental structure established by Congress that currently requires input by other members of the Commission in these decisions.

In establishing the powers of the Chairman vis-a-vis other commissioners, Congress was mindful of the powers employed by chairmen of other agencies and commissions, but was sensitive to the particular needs of the International Trade Commission to maintain a political balance. Congress was expressly concerned that the powers of the Chairman of the Commission not be so expansive as to permit the Chairman to become unduly powerful. Accordingly, a system was established whereby other commissioners would be given authority to address and override Chairman decisions in order to maintain a balance of power within the Commission. As the Senate indicated:

> The committee recognizes that a strong Chairman could dominate the other Commissioners on substantive issues. For that reason, the committee believes administrative decisions of the Chairman should be subject to disapproval by the full Commission and the chairmanship should continue to rotate among Commissioners. This will ensure that no individual and no political party can exercise undue influence over the Commissioners on substantive issues.

S. Rep. No. 122, 95th Cong., 1st Sess. 5 (1977). Similarly, the House Report expressly acknowledged the need to maintain balance among the commissioners by granting members of the Commission other than the Chairman the ability to have input into important decisions affecting the Commission:

> By reserving to the Commission as a whole the three key areas of administrative matters [i.e., hiring of key personnel, administrative decisions, and budget decisions], the Committee is being responsive to the need to maintain a degree of independence for Commissioners to exercise their individual obligation for research, analysis, and judgment fully supported by the staff.

H.R. Rep. No. 217, 95th Cong., 1st Sess. 9-10 (1977).

The proposed reforms would dilute considerably the ability of the other commissioners to maintain a check on a dominant Chairman. The budget approval process under the new proposal, for example, would be tantamount to a "fast-track" approach, with only an up or down vote permitted by other commissioners and no meaningful input into the process. Similarly, removing the ability of other commissioners, by majority vote, to overrule administrative decisions or to disapprove hiring decisions would give the Chairman unchecked ability to implement his or her interests without regard for the other commissioners.

CITBA's concern with increasing the power of the Chairman is that such decisions, while couched as administrative, budget or personnel decisions, could well have an impact on the substantive operations of the Commission. As the 1992 GAO Report indicated, the difference between an administrative decision and a substantive decision can often be difficult to distinguish: "For example, a decision to cut the travel funds of an

investigation could be viewed as either an administrative or substantive decision, or both." General Accounting Office, International Trade Commission: Authority is Ambiguous, GAO/NSIAD-92-45 at 9, February 1992. Indeed, while the GAO report stated that there could be some benefits to enhancing the power of the Commission Chairman, such changes "might have a profound effect on substantive decision-making." Id. at 37. The GAO Report further acknowledged that Congress had deliberately chosen to limit the Chairman's power in order to ensure the independence of the Commission. Id.

A limitation to the Chairman's powers at the Commission is not only important to maintain a political balance but also to encourage the type of consensus building that Congress envisioned in structuring the Commission as it did. The absence of a strong Chairman fosters a more collegial approach to decision-making and requires the Chairman to build a consensus for decisions before taking action. CITBA believes that this form of decision-making should be continued by maintaining the present structure of the Commission.

Thus, with a goal of maintaining the independence of the Commission, perpetuating the consensus-building process Congress envisioned, and preventing the inevitable impact on substantive decisions that expansion of the Chairman's powers would have, CITBA opposes the proposals to expand the International Trade Commission Chairman's powers beyond those that are statutorily authorized at present.

III. Creation of an Executive Director

The Subcommittee has proposed the creation of an executive director to make administrative decisions at the Commission. CITBA is not clear exactly what is envisioned by the creation of such a position. The 1992 GAO Report cited by the Subcommittee identifies the creation of an executive director at the Commission as an option that might be considered in terms of managing day-to-day administrative matters, but also acknowledges that, from agency to agency, such a position varies widely in terms of the types of administrative responsibilities involved. Id. at 39. In some agencies, the executive director is merely the chairman's representative; in others, commissioners still approve all decisions despite the existence of an executive director. The GAO Report further notes that the International Trade Commission had such a position for several years before 1977, but the position was eliminated. Id.

Given the ambiguity in the definition of the position and the exact responsibilities entailed, CITBA believes that this position must be more carefully defined before the proposal can be addressed. Accordingly, in the absence of such added clarity, or any explanation of what benefits would be anticipated, CITBA opposes the proposal.

IV. CITBA Opposes Administrative Law Judges in Title VII Cases

The final proposal is to change the hearing and investigation process in antidumping and countervailing duty cases so that the injury determination is made by an administrative law judge ("ALJ"), subject to review by the Commission. CITBA opposes this proposal, as it would add significantly to the time and cost to conduct these cases for both the Commission and for all private parties, with no substantive improvement in the process.

CITBA members do have concerns about the time allocation and cross examination opportunities provided by the Commission, particularly in situations when many parties are involved. The Commission has made some improvements in recent years in the conduct of hearings. More needs to be done. Most CITBA members, however, do not believe an ALJ approach is justified.

The Subcommittee's notice setting forth this proposal states that it reflects suggestions made by the Administrative Conference of the United States ("ACUS") in a 1991 recommendation on ways to improve the Commission's administration. See Administrative Conference of the United States, Administrative Procedures Used in Antidumping and Countervailing Duty Cases, Recommendation 91-10, December 13, 1991. The final ACUS report, however, did not contain such a recommendation. Rather, the recommendation that ALJs make injury decisions (and other decisions at the Commerce Department) in cases conducted under Title VII of the Tariff Act of 1930, as amended, was set forth in a proposed report submitted by two professors of law, whose views were expressly identified as not necessarily reflecting the views of the members of the Conference. See J. Jackson and W. Davey, Report for Recommendation 91-10, "Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases." As a result of a number of comments submitted in opposition to the proposals made by Professors Jackson and Davey, the final ACUS report omitted this proposal.

The report of Professors Jackson and Davey is instructive, however, regarding the pros and cons of reliance on ALJs in these cases. For example, while the authors believe that use of ALJs would enhance agency decision-making, they also conclude that the use of ALJs would add considerably to the time and cost of these cases. "For the government, the installation of ALJs would clearly increase the cost of processing these cases and there would be no decrease in current spending if the staffs play the role that we envision for them." Id. at 964. Indeed, the International Trade Administration's Chief Counsel estimated that it would cost $7.5 million, or 50 percent of the agency's budget at that time for antidumping and countervailing duty cases, to add ALJs in the ITA decision-making process. Id., citing S. Powell, Chief Counsel for Import Administration, Dept. of Commerce, Speech, Federal Circuit Judicial Conference, May 9, 1991. 1

Given the current budget constraints facing the International Trade Commission, any reform that would substantially increase costs at the Commission cannot be justified absent compelling need. No such need can be ascribed to the proposed ALJ role. Indeed, to a large extent the ALJ would simply add another layer to the decision-making process, as members of the Commission would still need to approve or disapprove the ALJ's decision. Although the unique nature of section 337 cases may require the use of an ALJ, the same cannot be said of title VII cases. The Commission staff performs the investigative function and all parties are granted the opportunity to submit comments and to testify directly before the members of the Commission.

If anything, CITBA members would prefer to see more, not less, active involvement by members of the Commission in title VII cases. Use of an ALJ would only further remove the members of the Commission from the facts of the case. At the same time, use of an ALJ would increase significantly the costs of participating in these cases for all private parties involved. Accordingly, CITBA opposes the use of ALJs in the Commission's decision-making process for antidumping and countervailing duty cases.

V. Government in the Sunshine Act

In addition to setting forth proposed reforms, the Subcommittee has requested affirmative suggestions for improvements in the administration of the International Trade Commission. One proposal made in the 1991 ACUS final report, although not identified among the proposed reforms, was that Commission members exchange drafts, views and other information before entering into formal deliberations. See ACUS Recommendation 91-10 at 4. Under present practice, the members of the Commission do not meet as a group to discuss their views of a case or of key issues. Instead, each commissioner must vote on a case before he or she has had the benefit of other colleagues' views on the central issues in the case.

CITBA believes that the decision-making process of the International Trade Commission would be enhanced by the exchange of drafts, views and other information prior to formal deliberations and decision-making in a case. The reason for not engaging in this process, according to the ACUS findings, was a concern stemming from the Government in the Sunshine Act. The members of CITBA do not believe that this concern is justified. The Sunshine Act creates an exemption from the open-meeting requirements for dispositions of a particular case of formal agency adjudication pursuant to the procedures of 5 U.S.C. § 554 "or otherwise involving a determination on the record after opportunity for a hearing." (Exemption 10) Determinations under title VII are not made pursuant to 5 U.S.C. § 554 but should fall within the second clause of this exemption.

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1 It is also instructive that the ALJ recommendation in the report by Professors Jackson and Davey was tied to the recommendation that Court of International Trade review of antidumping and countervailing duty cases be eliminated and that appeals of such cases proceed directly to the Court of Appeals for the Federal Circuit. The authors perceived that elimination of the trial court review was defensible if an ALJ were inserted into the decision-making process to conduct a trial at the Commission as is currently done in section 337 cases. Given that the current proposal would not eliminate Court of International Trade review -- and CITBA would strongly oppose such a proposal -- the need for administrative law judges in antidumping or countervailing duty cases is less apparent.

Given the benefits that would be provided in terms of collegial sharing of information if closed deliberations were conducted by the Commission, CITBA urges the Subcommittee to recommend that the International Trade Commission claim Exemption 10 of the Government in the Sunshine Act. If the Subcommittee finds that the Commission's determinations are not within Exemption 10, it should consider appropriate legislation.

Respectfully Submitted,

Patrick D. Gill
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February 19, 1996

The Honorable Philip M. Crane
Chairman, Subcommittee on Trade
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As a former Chairman and Commissioner (1981-1990) of the United States International Trade Commission, I am delighted to respond briefly to your request for comments regarding proposed "reforms" to the International Trade Commission. My comments also reflect the personal perceptions of an historian who has studied the archival sources and written extensively about the Commission's institutional development over the last 75 years.

Like most federal commission-style agencies, the ITC has experienced periods of internal turmoil. Indeed, many of the administrative "reforms" suggested by your subcommittee have surfaced in the past, reflecting previous congressional frustrations. In 1929, for instance, the Ways and Means Committee, chaired by Rep. Willis Hawley (R-Oregon), proposed to appoint an odd number of Commissioners (7), hoping to reduce bickering in the Commission. That suggestion died in conference with the Senate. The Tariff Act of 1930 did, however, dismiss all sitting Commissioners, enabling President Hoover to fill six vacancies and so alter the Tariff Commission's composition.

Your suggested "reforms" focus on the Commission's administrative process, not on ways to improve the quality, and integrity, of ITC factfinding reports. In my opinion as a scholar, you should be more sensitive to the scope and quality of ITC reports. Rather than providing independent, impartial and

objective research to Congress and the Executive, many ITC factfinding reports mirror policy fashions and seem designed to satisfy the short-term agendas of requesting patrons in Congress and the Executive. At the Commission's creation, President Woodrow Wilson did not envisage a captive and passive factfinding mission for the Tariff Commission. Instead, Wilson sought to appoint Commissioners "who will make a scientific inquiry as to the facts and make an absolutely fearless and frank report . . . ." As a result, some of the Tariff Commission's most innovative and enduring studies were prepared during the period from 1917 to 1921.

In my judgment the Ways and Means Committee would be making a serious mistake to strengthen the office of Chairman, to remove exemptions from OMB oversight under 19 USC 2232, to create an office of executive director, or to delegate injury determinations to an administrative law judge. Strengthening the power of the chair may improve efficiency but come at a heavy cost to objectivity and diversity of thought.

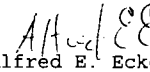
I am also troubled by your suggestion to delegate injury decisions to administrative law judges. That approach places an unrealistic emphasis on legal decision-making at the expense of economic, business and other policy considerations specified in various statutes. Few ALJs have the breadth of training and experience relevant to these complex determinations, nor should such important decisions be left to individual decisionmakers. The probable result of such a change is that Commissioners would review, and reverse ALJ findings, possibly without the advantage of first-hand exposure to the parties in public hearings. Thus, this recommendation might have the unintended consequence of weakening the Commission, and politicizing the decision-making process.

It is my experience that the Commission functions best when individual Commissioners are actively engaged in collegial discussion and decisionmaking. The Committee might consider a waiver to sunshine requirements that would enable a majority of the Commission to meet and discuss cases -- and so engage in the type of collegial decisionmaking envisaged in earlier years. Reducing the size of Commissioner's personal staffs from four to three would be a positive step, encouraging less reliance on personal staff and greater engagement on the part of Commissioners. Indeed, the current work load might allow even sharper cuts in personal staff.

While I have some misgivings about reducing the number of Commissioners, the ITC would probably function in greater harmony, if Congress decreased the number of Commissioners to four. However, this would come at the expense of diversity in skills and experiences. With six Commissioners, the panel has a more robust combination of individual talents and knowledge, and thus is more likely to have members with sector-specific experiences. In the past Congress has strongly adhered to the view that the Commission should include people with practical experiences in business and agriculture.

Thank you for providing an opportunity to comment.

Sincerely yours,



Alfred E. Eckes
Ohio Eminent Research Professor

Florida Sugar Marketing & Terminal Assn. Inc.

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March 1, 1996

BY HAND-DELIVERY

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington DC 20515

Re: TR-16: Written Comments on International Trade Commission Reforms

Dear Mr. Moseley:

The Subcommittee on Trade of the Committee on Ways and Means has recently requested written comments for the record concerning possible structural and procedural reforms to the U.S. International Trade Commission (ITC). These views are submitted by the Florida Sugar Marketing & Terminal Association, Inc., an industry association that has participated in past proceedings at the International Trade Commission.

The advisory requesting written comments refers to two prior investigations of the ITC, one by the U.S. General Accounting Office and one by the Administrative Conference of the United States. Not all issues on which comments are sought are in fact referenced in one or the other investigation. Specifically, neither investigation recommended a reduction in the number of Commissioners, the use of an odd versus an even number of Commissioners, or the use of administrative law judges in conducting injury investigations.

The comments of the Florida Sugar Marketing & Terminal Association are limited to addressing these three issues and the question of removing the current exemption of the Commission's budget from Office of Management and Budget oversight. The other issues identified in the notice pertain to the internal operation of the Commission. Hopefully, the Committee will canvass sitting and former Commissioners and senior staff to obtain a full set of views from those most directly involved and affected by the suggested internal reforms.

1. **Changing Commission from Even to Odd Number of Commissioners Should Not Be Considered**

Congress established the United States Tariff Commission in 1916, and renamed it the International Trade Commission in 1975. 19 U.S.C. § 2231(a), Pub.L. 93-618, § 171, Jan. 3, 1975, 88 Stat. 2009. The organization of the Commission is mandated in 19 U.S.C. § 1330. This section discusses the number of commissioners, their terms of office, the selection of chairman and vice chairman, and the effect of a divided vote in certain cases. Id.

Congress deliberately and intentionally chose to include an even number of commissioners on the ITC, as a means of making the Commission a non-partisan, independent entity. The House Ways and Means Committee originally envisioned the body as a "nonpartisan tariff commission to make impartial and thorough study" of various trade issues. H.R. Rep. No. 922, 64th Cong., 1st Sess., at 9 (1916) (committee report). In its opening statement of the purposes of the Trade Act of 1974, the Senate Finance Committee stressed the need "[t]o strengthen the independence of the United States Tariff Commission." Trade Reform Act of 1974, S. Rep. 93-1298, 93rd Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7187.

The existence of an even number of commissioners accomplishes several of Congress' objectives. First, it provides for political balance, by allowing three commissioners from each political party, as clearly specified in section 1330(a).

While it is true that there have been times when vacancies have remained unfilled for extended periods, the requirement of balance and equality in number of members from the two major parties creates and maintains an appearance of political objectivity to participants, whether domestic or foreign. Such political objectivity would be difficult to maintain if an odd number of Commissioners were statutorily mandated. While Commission terms of nine years suggest the possibility of continuity, in fact a significant number of Commission seats are filled only for partial terms. Thus, in such situations, the Commission's balance would swing between a majority of Republicans and a majority of Democrats, depending on the current Administration. In short, any change to an odd number of Commissioners would further politicize the appointment of commissioners, and, in turn, the appearance of the actions of the Commission itself.

In 1974, the Senate Finance Committee warned against any change that could have politicizing effects. "The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch." S. Rep. 1298, supra, at 115. Our industry strongly believes in the need to maintain the appearance and reality of political neutrality in the ITC's work.

Second, domestic industries that petition for relief from injurious imports (whether fairly or unfairly traded) already have an extraordinarily difficult task of obtaining affirmative determinations from the Commission. Since 1979, more than half of all antidumping or countervailing duty cases have been rejected by the Commission. Since 1974, roughly 80% of all escape clause cases have resulted in negative determinations. If Congress wishes to review the Commission's structure, it should examine why such a large percentage of cases are determined against domestic industries (whether it is the statutory terms or the constructions provided by various Commissioners). While relatively few cases are decided by tie votes, some are. Under the law, ties are viewed as affirmative determinations in antidumping and countervailing duty cases and permit the President to elect to provide relief in an escape clause action. By definition, change from an even to an odd number of Commissioners will make it harder for domestic industries to obtain relief--with a full Commission of five, three affirmative votes will still be needed but there will be one less Commissioner to consider the matter; for foreign producers seeking to defeat relief, instead of needing four votes as at present, three will suffice to defeat relief. Given the high rate of negative determinations that has existed over the last fifteen years, it is difficult to imagine a justification that would further reduce the likelihood of success for injured domestic industries.

2. Reduction in the Number of Commissioners Is Unwarranted

While a reduction of Commissioners to a lower even number does not raise the concerns identified above for changes from an even to odd number of Commissioners, there are reasons to believe such a change would not be wise: vacancies, recusals and need for diversity of backgrounds on the Commission.

In 1974, the Senate Finance Committee specifically counseled in favor of

> a number of Commissioners which is not so small as to unduly limit the expertise and consideration brought to bear on the subject; in the past, sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission.

S. Rep. 1298, supra, at 115. In fact, the original Senate bill called for an increase in the number of Commissioners. Id. at 115-16. In the last twenty years, there have been cases where because of vacancies and/or recusals the number of Commissioners voting on a case has been as few as two. Reducing the number of Commissioners from six to four or from six to two would significantly increase the risk of cases being decided by single Commissioners or, in some situations, being incapable of being decided at all.

Because the activities of the Commission, the Commerce Department and USTR pay for themselves many times over in terms of increased federal revenue (the collection of antidumping and countervailing duties alone covers the total costs of the ITC, ITA and USTR), it is not clear what advantage accrues to the Federal Government from a reduction in Commissioners. If streamlining the process is the objective, the reduction of the number of Commissioners is not the correct approach.

3. Administrative Law Judges Should Not Be Used To Make Injury Determinations

The use of administrative law judges in Title VII or section 201 cases at the ITC for injury investigations is an unnecessary addition of cost and complexity to proceedings which are already too costly to all parties.

The proposal to use administrative law judges in injury cases was considered extensively by the Administrative Conference of the United States in 1991 and was rejected, having been opposed by many practitioners representing domestic and foreign clients. For an ALJ system to work properly, discovery rights would be needed (not presently part of Title VII or section 201 cases) as is done in section 337 cases. Moreover, ALJ decisions would need to be reviewed by the Commission, adding a layer of decision making and adding costs for the parties to argue issues of importance at another level. Those who have promoted an ALJ approach seek to have extended hearings various items would significantly exacerbate the problems faced by many industries, including much of agriculture, in being able to afford the cost of the proceedings. There would also be questions of procedural fairness as it would presumably be much more difficult for domestic parties to obtain full discovery of their foreign opponents (who control most of the information relevant to the issue of threat of injury, as well as all information about price rebates and other issues affecting price comparisons). Again, with the large number of third parties that would be involved (importers, purchasers, distributors), the need to engage in discovery of these parties would make actions largely unaffordable for many industries.

There are many things that can be done to improve the Commission process that do not significantly increase the cost of the proceeding to the parties. For example, domestic parties are often very dissatisfied with information supplied by foreign producers on the threat criteria. The Commission has historically refused to verify or seriously challenge information submitted on threat by foreign producers. Coordination between Commerce and the Commission could permit relevant information on the foreign producers to be verified by Commerce at the time that it conducts its verification of foreign producers for the dumping portion of the case.

4. Repeal of 19 U.S.C. § 2232 is Unwarranted

As was noted by the Senate Finance Committee in 1974:

> The Committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of the Congress. Consequently, section 175 of the bill would more specifically identify the Commission as an agency independent from the Executive departments, would provide that the budget of the Commission shall not be subject to revision by the President under the Budget and Accounting Act, 1921, but rather shall be included by the President in the Budget without revision.

S. Rep. No. 93-1298, 93d Cong., 2d Sess. at 118 (1974).

Unless Congress intends to change the independence of the Commission, there is simply no justification for the modification suggested in the notice.

Thank you for the opportunity to submit these comments.

Sincerely,

Fred R. Hill

Fred R. Hill
Vice President and
General Manager

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February 29, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Bldg.
Washington, D.C. 20515

Dear Mr. Moseley:

I am writing to you concerning TR-16 (ITC Reform) and TR-17 (Miscellaneous Trade Proposals) released by the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives on January 31, 1996. The Gates Corporation and its major subsidiary, The Gates Rubber Company, the world's leading producer of rubber power transmission belts and hose, view these proposals with great concern. First, with regard to TR-16, we see the proposed structural and procedural reforms of the International Trade Commission as increasing the difficulty for domestic company to successfully press a case against unfair trade practices. We strongly believe that the status quo has worked to preserve domestic industry and jobs against the onslaught of imported products with low pricing supported by protected markets. Gates itself has benefited by a 3/3 decision when there was clear finding of dumping by foreign producers. The insertion of an administrative law judge to make injury determinations would just add an additional expense and difficulty for domestic companies and, therefore, provide a benefit for foreign producers.

With regard to TR-17, these discretionary proposals increase the ability for the process to be politically rather than economically determined and would, I believe, taint the entire process. Again, it will further burden domestic industry in making a case against unfair trade practices.

Again, it is our belief that TR-16 and TR-17 are anti-competitive and overly favorable to foreign interest.

Cordially yours,

James E. Nelson

8703 Ross Street
Bowie, Maryland 20720
February 27, 1998

Phillip D. Moseley
Chief of Staff
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1102 Longworth House Office Building
Washington, D.C. 20515

RE: 1/31/98 Release No. TR-16

Dear Mr. Moseley:

As an employee of the U.S. International Trade Commission ("ITC"), I am responding to the Advisory from the Subcommittee on Trade requesting written comments on ITC reforms (No. TR-16, January 31, 1998).

As you know, the longstanding debate on international trade has taken on renewed force in the Presidential campaign. The New Hampshire primary vote indicates that the voting public is scared that their jobs are being lost to foreign competition. For over 75 years, the ITC has provided a forum for the study of the impact of international trade issues on the U.S. economy as well as for the adjudication and remedy of international trade disputes.

As an investigative attorney with the ITC's Office of Unfair Import Investigations for almost five years, I have had the opportunity to participate in resolving many disputes involving unfair import practices as defined in Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. These matters have, for the most part, involved unfair import practices against domestic industries that practice U.S. patented technology. Many of my cases have resulted in the stopping of such practices either by the issuance of exclusion orders, consent orders, or settlement agreements. Other cases of mine have resulted in the allowance of importation when the patents involved are found to be invalid, unenforceable, non-infringed, or not practiced by a domestic industry.

Recently, I have been distressed over the intense pressure that Congress has brought to bear on the ITC's relatively small budget (by Federal agency standards) of approximately $40 million. This pressure has had a destructive impact on management-employee relations at the Commission. As you may know, in fiscal year 1998 the Commission subjected its non-senior management personnel to a reduction in force ("RIF") and all personnel except Commissioners and Administrative Law Judges to six furlough days, with six more planned by the end of the fiscal year. The RIF originally targeted 128 employees to be fired (almost one-third of our agency), but was scaled back and eventually cost 34 employees their jobs.

The manner in which the RIF and furloughs were carried out has raised serious questions about its propriety and lawfulness. The RIF and furloughs have fomented protracted litigation, picketing, animosity, and even an attempted suicide in the Commission's garage.

Incredibly, the Commission has insisted on carrying out the RIF and furloughs despite the fact that the Continuing Resolutions under which the Commission has operated during fiscal year 1998 provide adequate funding to avoid furloughs (and, by the same token, RIFs). Not only that, the Office of Management and Budget advised all agencies when the first Continuing Resolution was passed that furloughs were to be avoided under its provisions. Further, the Commission's own survey of contingency planning at other independent agencies affected by the same Congressional budget impasse confirmed to the Commission that, unlike itself, those agencies were taking a "wait and see" attitude to see how their final appropriations fare before taking such extreme personnel actions.

In my opinion, the RIF and furlough were the product of a flawed management structure at the ITC. The makeup of the Commission itself -- even-numbered, split equally along party lines, with a chairmanship that rotates between parties every two years -- encourages partisan warfare among Commissioners that tends to occur behind closed doors. Moreover, flaws in the whole civil service system have a negative impact on the ITC. Both the civil service in general, and the ITC in particular, are top-heavy with managers while light on "direct service" personnel.

The career civil servant is frustrated today by a lack of upward mobility and lateral diversification. Added to these problems is the emphasis on "reinvention" and "downsizing", which tends to be pushed downward by top management to the lower rungs of the General Schedule. As with the RIF at the ITC, the pressure to "downsize" falls most heavily on direct service personnel, particularly clerical and support staff who tend to be women and minorities. Commissioners, their staff, and senior management were untouched by the RIF, and generally feel little pressure to "reinvent" themselves.

The RIF of clerical and support personnel is no small loss. It is extremely difficult to perform the direct service tasks that Commission employees must do when there is no one to furnish supplies, fix computer problems, service copying machines, update docket files, maintain libraries, and handle mail. Even worse, the loss of institutional memory that the RIF of such people entails results in the wholesale loss of valuable data -- if the only person who knew where the microfilm on a five-year old case was stored is now gone in a RIF, it is as if all records of the case itself were lost.

Among the options suggested in the Advisory for consideration by the Subcommittee, the most effective in my opinion would be: (i) reducing the number of Commissioners, preferably to three, and eliminating the party affiliation requirement; and (ii) removing the current exemption from OMB oversight of the Commission's budget by repealing 19 U.S.C. § 2232.

Reducing the number of Commissioners to three, chosen without regard to party affiliation, would not only save the Commission a great deal of money, but would also solve the structural flaw of Commission deadlocks. A smaller, less partisan and more professional Commission may work together better and develop a more consistent international trade policy over time than the present structure.

Strengthening OMB oversight of the ITC budget is also a good idea. It would make the Commission rely more than it now does on being consistent with the budgetary practices of other agencies, and would provide an independent authority to monitor the Commission's expenditures more objectively.

On the other hand, I am opposed to the proposals before the Subcommittee to give the Chairmanship more power than it now holds over budget approval, personnel, and administrative decisions. The creation of an "executive director" position is, in my view, equally inappropriate and unnecessarily costly. The RIF and furlough experience demonstrates that it is apparently not too <u>little</u> power in the Chairmanship that contributes to the Commission's woes, but too <u>much</u>. Adding powers to the Chairmanship and creating an executive director position would, in my view, lead to less openness in decisionmaking than the little that now exists, since concentrating power in fewer hands tends to stifle new and different ideas.

I hope that the Subcommittee finds these comments useful. I sincerely appreciate this opportunity to offer my views to Congress.

Very truly yours,

Steven A. Glazer

FAIR TRADE FORUM
Of The Pro Trade Group

March 1, 1996

Mr. Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Re: Comments on International Trade Commission Reforms (Advisory No. TR-16)

Dear Mr. Moseley:

These comments are submitted on behalf of the Lawyers' Committee of the Fair Trade Forum pursuant to the above-referenced Advisory of the Subcommittee on Trade of the Committee on Ways and Means.

The Fair Trade Forum is a coalition of companies, trade associations and others concerned with the administration of the U.S. antidumping laws, organized under the auspices of the Pro Trade Group. The members of the Lawyers' Committee are all practitioners who represent clients before both the U.S. International Trade Commission ("ITC") and the Department of Commerce.

We would like to commend the Subcommittee for examining the issues listed in the Advisory, and for providing an opportunity for public comment. The possible reforms identified by the Subcommittee are important and could affect the operation of the ITC in significant ways.

Our comments address two principal issues relating to ITC injury investigations in antidumping cases:[1/] (1) the composition and voting structure of the ITC, and (2) the applicability of the Sunshine Act to meetings of ITC Commissioners.

ITC Composition and Voting Structure

One of the possible reforms listed in the Advisory is to provide for an odd, as opposed to an even, number of commissioners, with appropriate changes in political party composition. We strongly support this reform.

The ITC is composed of six commissioners, with no more than three commissioners being members of the same political party. This structure is very unusual. The GAO Report cited in the Advisory points out that most federal commissions are composed of an odd number of commissioners (usually five) with no more than a simple majority of the commissioners being from one political party. GAO Report at 34. Indeed, the ITC is one of only three commissions out of 16 studied by the GAO that had an even number of commissioners. The other two commissions were the Commission on Civil Rights and the Federal Elections Commission. Id. at 43.

Given the nature of the responsibilities of the CCR and the FEC -- involving fundamental civil and democratic rights -- one can easily appreciate the concern with and

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1/ Although this letter refers to the ITC's voting procedures in antidumping cases, those procedures are identical in countervailing duty cases. Accordingly, our comments apply equally to ITC injury determinations in countervailing duty investigations.

need for maintaining absolute equality in the political composition of those two commissions. The responsibilities of the ITC do not involve such fundamental rights, however. The ITC, much like the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission (all of which consist of an odd number of commissioners) has responsibility for regulating commerce. We simply do not see any reason to maintain the ITC's unusual structure given the nature of its trade regulatory functions.

With an even number of Commissioners, the ITC in Title VII cases has, on many occasions, split evenly on the question of injury to the domestic industry. Under the statute, a tie vote is deemed to be an affirmative determination of injury. We are not aware of any other regulatory agency that permits the petitioning party to prevail when it has not persuaded a majority of the agency's decision-makers. See GAO Report at 43.

This tie-vote rule contrasts with the FEC's voting requirements where a tie vote constitutes a negative determination and leads to no action for the benefit of the petitioning party. The tie-vote provision in ITC antidumping cases also differs from what is required for ITC action on administrative matters, where a majority vote is required, and in safeguards and market disruption cases, where the President is authorized to consider the determination of either group of commissioners to be the determination of the ITC. Compare 19 U.S.C. §§ 1330(d)(1) and 1331(a)(2) with 19 U.S.C § 1677(11).

In our view, there is no principled basis for distinguishing the voting procedures in antidumping cases from other ITC voting procedures. This built-in bias in ITC decisionmaking in antidumping cases creates a perception of unfairness in the administration of the U.S. antidumping law that is at odds with the spirit, if not the letter, of the Uruguay Round Agreements Act and the new WTO Antidumping Agreement, both of which strive to ensure fairer antidumping procedures. If this inherent unfairness is not rectified, we anticipate that our trading partners similarly will feel free to undermine this fundamental objective of the Agreement to the likely detriment of U.S. producers and exporters.

While we recognize that an odd-numbered Commission ordinarily would resolve the voting issue, there still will be cases where, due to vacancies or recusals, the quorum of the ITC for a particular case may be composed of an even number of commissioners. Consequently, we think that the voting requirements should be changed to require a true majority, not just a tie, vote for an affirmative determination. Without these changes, many ITC determinations in antidumping cases will continue to be inherently unfair.

Application of the Sunshine Act to ITC Meetings

An issue that is not listed in the Advisory, but which we think should be considered by the Trade Subcommittee, is the application of the Government in the Sunshine Act ("Sunshine Act") to meetings of ITC commissioners for the purpose of discussing ITC determinations in antidumping cases.

Currently, the ITC commissioners do not collectively deliberate in injury investigations under Title VII of the Tariff Act of 1930 (i.e., antidumping and countervailing duty cases). A recent report from the Administrative Conference of the United States addressed this issue and recommended that the ITC reconsider its decision not to collectively deliberate in closed session with respect to such cases.[2/] We strongly agree with that

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[2/] See Admin. Conf. of the U.S., "Reform of the Government in the Sunshine Act; Special Committee to Review the Government in the Sunshine Act; Recommendation 4 at p.6. (October 10, 1995) ("1995 ACUS Report"); Recommendation 91-10, 1991 Admin. Conf. of the U.S. "Administrative Procedures Used in AD and CVD cases," Part D ("1991 ACUS Report").

suggestion and recommend that the Trade Subcommittee urge the ITC to take advantage of Exemption 10 of the Sunshine Act. Claiming the Exemption would facilitate a more collaborative and deliberative process in reaching injury determinations.

Under the ITC's current policy in Title VII cases, the Commissioners simply announce their individual votes to the public, and often to each other for the first time, at a public meeting. The Commissioners generally do not provide further information to the public at this meeting. After this public ITC meeting, the Office of General Counsel attorney assigned to the case drafts the opinion for the majority of Commissioners, and those Commissioners concurring or dissenting write their own drafts. The drafts are circulated only to those Commissioners on the particular draft; Commissioners writing dissents generally never see the majority opinion, and the majority generally never sees either the concurrences or dissents until publication.

The Fair Trade Forum Lawyers Committee believes that the ITC's practice of not collectively deliberating, or even circulating opinions, has resulted in less information for the public, less fully reasoned determinations, and in some cases, an erroneous basis for a determination. Because Commissioners have not explained or debated their positions with each other, the opinions drafted by the General Counsel attorney often do not provide a clear articulation of the basis of the determination. Further, because Commissioners have neither discussed the case, nor circulated the opinions, they are not able to explain to the public on which points they disagree with their colleagues and on which points they simply are explaining the same point in different words. Finally, individual Commissioners, at times, have arguably misread the record and based their determination on factual errors, a problem that could be eliminated by collective deliberations. The majority of the current Commissioners have themselves stated that they believe it would be good policy for them to collectively deliberate. See Letter from Don E. Newquist, Peter S. Watson, Anne E. Brunsdale, Carol T. Crawford and Janet A. Nuzum to Thomas Susman, dated August 7, 1992 (attached). In addition, at least on judge of the U.S. Court of International Trade has expressed his frustration with the ITC's refusal to have individual Commissioners share their views with other Commissioners.[3/]

We believe that these concerns would be reduced, if not eliminated, if the ITC were to claim Exemption 10 of the Sunshine Act and collectively deliberate in closed session. Exemption 10 would allow the ITC to deliberate in closed session with respect to determinations that specifically concern "a particular case of formal agency adjudication pursuant to the procedures in section 554 [of title 5] or otherwise involving a determination on the record after opportunity for a hearing." 5 U.S.C. § 552b(c)(10). The legislative history and judicial precedent clarify that Exemption 10 applies to proceedings beyond those required by statute to be conducted under section 554, as long as the proceedings themselves are open to the public.

There is no question that the ITC's determinations under § 337 of the Tariff Act of 1930 are formal adjudications under section 554, and hence fall within Exemption 10. Likewise, the ITC's determinations in Title VII investigations fall within the scope of

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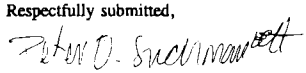
[3/] See Borlem S.A.-Empreedimentos v. United States, 718 F. Supp. 41, 49-50 (Ct. Int'l Trade 1989)("In this proceeding, as in other investigations, certain Commissioners among the Commission majority have declined to share their written views with dissenting Commissioners. This Court, especially in light of its obligations to give substantial weight to the agency's interpretation of the statutes subject to its administration, expresses great frustration with this practice. . . . The Court expresses the hope that this practice will come to an end.")

Exemption 10.[4/] Title VII cases are now formal proceedings open to the public: amendments to the law in 1988, granting interested parties access to all information under Administrative Protective Order, and in 1995, requiring the ITC to release all information to the parties and allowing parties an opportunity to comment on it, have opened the underlying proceedings fully. See James T. O'Reilly and Gracia M. Berg, "Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-making Process of the International Trade Commission," 10 Harvard Int'l Law J. 425 (Spring 1995). Therefore, the ITC has legal authority to claim Exemption 10 in Title VII cases. See 1995 ACUS Report; 1991 ACUS Report.

Because the ITC has the legal authority to claim Exemption 10 and because collective deliberation would be good policy, we urge the Trade Subcommittee to formally express its support for the ITC's use of this exemption in Title VII cases.

Respectfully submitted,



Peter O. Suchman
on Behalf of the Lawyers' Committee of the Fair Trade Forum

POWELL, GOLDSTEIN, FRAZER & MURPHY
Suite 600
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 347-0066

Attachment

[4/] See S. Rep. No. 354, 9th Cong., 1st Sess. 25-26 (1975)(The exemption was broadened "in order to include formal agency adjudications on the record not governed by section 554 of the Administrative Procedures Act.") See also H.R. Rep. No. 880, 9th Cong., 1st Sess. pt. 1 at 12 (1975).

ATTACHMENT TO FAIR TRADE FORUM
of the Pro Trade Group

CHAIRMAN

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

August 7, 1992

Mr. Thomas Susman, Chair
Section of Administrative Law and Regulatory Practice
American Bar Association
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Susman:

Thank you for providing the International Trade Commission with a draft of your Committee's views on the application of the Sunshine Act to the Commission's proceedings. We appreciate your addressing this issue and welcome the opportunity to comment.

We concur with you that closed deliberations by the Commission would result in more consistent, unified and fully-reasoned opinions. The benefits of this policy would include better understanding of Commission decisions and increased predictability for the parties and the public and, therefore, improved public accountability for Commission decisions.

We would therefore very much appreciate your sharing a draft of the monograph to which you refer in your letter. We would welcome a thorough legal analysis of this issue and look forward to providing a more specific response.

Don E. Newquist
Chairman

Peter S. Watson
Vice Chairman

Anne E. Brunsdale
Commissioner

Carol T. Crawford
Commissioner

Janet A. Nuzum
Commissioner

PPG Industries, Inc.
One PPG Place Pittsburgh, Pennsylvania 15272 USA Telephone: (412) 434-2788 Facsimile: (412) 434-2545

John C. Reichenbach, Jr.
Director
Government Affairs

March 1, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington DC 20515

Re: Comments on International Trade Commission (ITC) Reforms (TR-16)

Dear Mr. Moseley:

These comments are submitted by PPG Industries, Inc. in connection with proceedings of the Committee on Ways and Means, Subcommittee on Trade on possible reform of the U.S. International Trade Commission (ITC). PPG is a U.S. producer of flat glass, fiberglass, chemicals, and coatings and resins products, and has been the petitioner, or otherwise participated, in numerous proceedings before the ITC.

In PPG's view, several of the reforms being considered would unnecessarily increase the politicization of the Commission and the costs for the Commission and interested parties. Accordingly, PPG asks the following.

1. The proposals to change the Commission from six to an odd number of commissioners should be rejected. Partisanship is minimized in the existing statute, which seeks to ensure that the Commission be an independent body. It was in that connection that Congress deliberately provided for six commissioners, insisted on a balance between their political affiliations (no more than three of one party, and the chairman and vice-chair not of the same party), and defined the significance and effect of a tie vote.

Moreover, an odd-number of commissioners would represent an additional barrier to U.S. industries' attempts to obtain trade relief. The statute presently treats a tie vote as an affirmative finding of injury. Adding or subtracting a commissioner, and thereby requiring a majority rather than simply a tie vote, would favor foreign merchandise over U.S. merchandise in trade relief proceedings. That is because, whereas a 3-3 vote is deemed an affirmative injury/threat finding under the present statute with six members, in a five-member Commission, for instance, three votes would still be needed for an affirmative determination but there would be one commissioner fewer to render an affirmative vote.

There is no reason to politicize the Commission now, or to limit relief for U.S. industries, by disrupting the delicate balance struck by Congress decades ago.

2. The proposal to reduce the number of commissioners should also be rejected. To the extent the separate proposal to reduce the number of commissioners is a short-hand for having an odd number of commissioners (e.g., going from six to five), the need to reject that approach is addressed above. Additionally, reducing the size of the commission, whether to an odd or even number, would limit the expertise and consideration brought to bear on decisions and impinge upon fundamental fairness. Even with a six-member Commission, there have been occasions in which as few as two commissioners voted on a subject. A reduced number of commissioners would be even more likely to leave one or two commissioners, or even no commissioners, to participate in votes (given the inevitability of unfilled vacancies, sickness and recusals). Fundamental fairness and breadth of consideration would be undermined by a reduction in the size of the Commission. It should remain at six members.

3. A layer of administrative law judges should not be added to the process. The introduction of administrative law judges in title VII cases (or other trade remedy cases in which they are not presently involved) would represent an unnecessary, additional layer of decision making. It would add substantially to the costs and complexity of cases for the Commission. Yet there is no indication that the layer would provide any significant results not presently obtained. The increased complexity and costs for petitioners would also further restrict U.S. industries' access to these vital remedies. Accordingly, administrative law judges should not be inserted into the process.

4. Because the Subcommittee's notice indicates it is considering prior investigations of the ITC conducted by the General Accounting Office (GAO) and the Administrative Conference of the United States, it is important to note that neither of those studies recommended an odd number of commissioners, a reduction in the number of commissioners or the introduction of administrative law judges. That is, the proposals recommended for rejection above do not carry whatever weight might attach to suggestions of those two bodies. Indeed, it is important to note that the proposal to use ALJs in Title VII cases was carefully considered and then rejected by the Administrative Conference investigation.

PPG is grateful for this opportunity to submit written comments.

Sincerely,

John C. Reichenbach, Jr.

COMMENTS OF THE PRO TRADE GROUP

OVERVIEW

This comment is designed to address a number of issues of special concern to the Pro Trade Group (PTG) and its participants. It is intended, in part, to serve as a supplement to our December 21, 1995 submission to the U.S. International Trade Commission on possible changes to its procedures. It also is designed to compliment the March 1, 1996 technical comments of the Fair Trade Forum, a project and subdivision of the PTG, as well as those of the Temporary Duty Suspension Group, which comments we endorse and incorporate by reference here.

We commend the Subcommittee for considering the efficiency and effectiveness of U.S. International Trade Commission procedures, as well as possible changes to our antidumping, countervailing duty and safeguards laws.

As to our views, generally we believe that the Committee should, in developing its analysis restrict proposed changes to those which faithfully implement the Uruguay Round (UR) Agreement and resist efforts to transform these laws and procedures into punitive, trade restricting barriers. During the pendency of Congressional consideration of UR legislation, over 100 companies and trade associations signed a letter to Amb. Kantor, that we submitted to the Commission last April, which sets forth our goals and concerns regarding the enactment of UR implementing legislation. We have the same goals and concerns regarding the possible changes now being considered. As to USITC procedures, a number of our concerns were reflected in comments we filed in our December 21, 1995, comments to the Commission. Both of these documents are included here as Appendix 1.

The PTG is a broad coalition of U.S. companies and organizations that represent U.S. exporters, importers and consumers, including manufacturing, agricultural, wholesaling, retailing, service and civic interests, which actively seek to develop competitive markets and promote trade. It was founded in 1986 and is committed to expanding, not restricting, trade and promoting polices which achieve that goal and resultant economic prosperity. We were actively involved in the development and passage of the Omnibus Trade and Competitiveness Act of 1988 and played an equally active role in the consideration and enactment of UR implementing legislation. We are committed to helping develop and implement constructive, trade expanding policies, laws and regulations. The positions of the PTG represent a consensus view although PTG participants may have varying views on particular issues.

Proposed Changes to U.S. Safeguards Law (H.R. 2795)

We commend the Committee's decision to seek comments on H.R. 2795, a bill which would change the U.S. safeguards Law.

Under this legislation, the United States would unilaterally change the long-accepted global definition of a "domestic industry" to recognize separate "seasonal industries." This is a sweeping change that would enable certain industries to obtain import restrictions despite the fact that their case has already been rejected by the U.S. International Trade Commission. The recent tomato case is an example.

Existing trade law has served our economy and U.S. business interests well. As the Committee considers this legislation, we urge you to remember that it is unwise to make substantial changes to our trade laws where a very strong case has not been made that that law is ineffective.

Although this legislation is driven by narrow interests, its negative ramifications for U.S. trade are broad. The passage of H.R. 2795 would put U.S. trade interests in immediate jeopardy because it violates the principles of international trade commitments made by the U.S. within NAFTA and the World Trade Organization. As a result, in addition to Mexico, the actual target of this legislation, 15 countries have already put the U.S. on notice on this matter. If H.R. 2795 or similar legislation becomes law, we would invite these countries and more to retaliate against U.S. exports. We also would invite a challenge before the WTO. We enclose as Appendix 2 an analysis of this legislation in terms of its possible violation of both the WTO Safeguards Agreement and the GATT 1994, and possible compensation issues which might arise against the United States if the legislation were enacted and utilized.

Passage of H.R. 2795 would signal that Congress has embraced protectionist legislation during this election year. As you know, the United States is the world's largest exporter, with exports accounting for 50 percent of our domestic economic growth in the last five years. We must not jeopardize this growth, and the jobs it creates.

Current political rhetoric in some circles has portrayed international trade agreements as enemies of economic prosperity. Nothing could be further from the truth. International trade agreements (e.g., WTO and NAFTA) assure that we can sell into foreign markets. They open foreign markets to U.S. exports and they give us levers to assure that these markets remain open. But if the United States fails to live up to its trade commitments by passing H.R. 2795 or similar legislation, we will do the reverse. In short, we will encourage others to renege on their commitments to us.

Temporary Duty Suspension

The PTG strongly supports H.R. 2822, a bill introduced by Chairman Crane which would permit the U.S. Department of Commerce, under conditions of short supply, to temporarily suspend antidumping and countervailing duties. This could occur with respect to specific products needed by American firms when these products are unavailable from U.S. producers. We do not believe that this legislation would interfere with the effectiveness of U.S. trade laws. Rather, we feel it would enhance U.S. competitiveness.

This issue is addressed in greater detail in submissions being filed with the Committee by the Fair Trade Forum and the Temporary Duty Suspension Group, both of which the PTG concurs in and aligns with.

Amendments to USITC Procedures

We note that the Committee's Advisory not only addressed specific proposed changes to the procedures of the U.S. International Trade Commission but also invited comments on other possible reforms. Accordingly, we address here two of the proposals covered in the Subcommittee's Advisory, as well as a series of other proposed changes. The first two include: (a) changes to the Commission's composition and voting structure; and (b) possible application of the Government in Sunshine Act to certain USITC meetings. In addition, we also invite the Committee's attention to certain reforms to USITC procedures which we proposed in our 12/21/95 submission to the USITC and which we enclose here as Appendix 2.

Commission Composition and Voting Structure

As noted, we concur with, and incorporate by reference, the detailed comments on this subject being filed by the Fair Trade Forum. In essence, we believe that a legitimate goal of this Committee is to seek ways to facilitate a more collaborative and deliberative process by the USITC in reaching injury determinations. We believe that this could and would be facilitated by several reforms, including:

(a) provision for an odd, as opposed to even, number of commissioners; and

(b) elimination of the current procedure wherein the USITC votes are deemed to constitute affirmative injury determinations.

Possible Application to the USITC of the Sunshine Act

Furthermore, we support the application of the Sunshine Act to meetings of USITC Commissioners for the purpose of discussing USITC determinations in antidumping and countervailing duty cases. As indicated, we concur with, and incorporate by reference here, the more detailed discussion of this issue in the comments being filed by the Fair Trade Forum. Essentially, we believe that collective or collaborative USITC determinations would result in more fully reasoned decisions which better protect the public interest.

Possible Changes in USITC Regulations

In addition, as noted in our 12/21/95 submission to the USITC, we recommend a number of other changes to USITC procedures. These include possible changes related to the following topics:

(a) filing of petitions (service, content and completeness requirements);

(b) determination of petitioner's standing;

(c) procedural rights of consumers and industrial users;

(d) disclosure of business proprietary information under APO;

(e) producer questionnaires;

(f) verifications;

(g) use of "facts otherwise available";

(h) possible investigative activity between preliminary and final determinations;

(i) prehearing briefs;

(j) institution of final investigations; and

(k) final comment procedures

These concerns relate to the USITC's ongoing effort to develop implementing regulations related to changes in U.S. antidumping and subsidy law. Obviously, this is an extraordinarily complex exercise. We believe that our trading partners are watching this exercise closely and urge the Subcommittee, in its oversight of these issues, to help ensure that the USITC develops regulations that do not reopen old debates, or distort the intent of the UR Agreement.

Edward J. Black

Edward J. Black
President, Computer & Communications
Industry Association
Chairman, Pro Trade Group

TEXT OF 12/21/95 SUBMISSION TO U.S. INTERNATIONAL TRADE COMMISSION

OVERVIEW

This comment is designed to highlight a number of issues of special concern to the Pro Trade Group (PTG) and its members. It is intended to serve as a supplement to our April 18, 1995 comments filed with the Commission and as a compliment to the December 21, 1995 technical comments of the Fair Trade Forum, a project and subdivision of the PTG, both of which comments our incorporate by reference.

We commend the Commission for its effort to improve the effectiveness and efficiency of its procedures for conducting antidumping and countervailing duty investigations and reviews. As to our views, generally we believe that the Commission should, in developing its implementing regulations, attempt to faithfully implement the Uruguay Round (UR) Agreement and resist efforts to produce implementing regulations that would transform these laws into punitive, trade restricting barriers. Over 100 companies and trade associations signed a letter to Amb. Kantor, which we submitted to the Commission last April, which sets forth our goals and concerns regarding the enactment of UR implementing legislation. A copy is enclosed as Appendix 1. We have the same goals and concerns regarding the development of implementing regulations. A number of our concerns were reflected in comments we filed on April 3, 1995 in comments to the U.S. Department of Commerce (DOC), and in our April 18, 1995, comments to the Commission, on this subject, which are available upon request and incorporated by reference here.

The PTG is a broad coalition of U.S. companies and organizations that represent U.S. exporters, importers and consumers, including manufacturing, agricultural, wholesaling, retailing, service and civic interests, which actively seek to develop competitive markets and promote trade. It was founded in 1986 and is committed to expanding, not restricting, trade and promoting policies which achieve that goal and resultant economic prosperity. We were actively involved in the development and passage of the Omnibus Trade and Competitiveness Act of 1988 and played an equally active role in the consideration and enactment of UR implementing legislation. We are committed to helping develop and implement constructive, trade expanding policies, laws and regulations. The positions of the PTG represent a consensus view although PTG participants may have varying views on particular issues.

The Commission Should Recognize the Implications for U.S. Exporters of Its Regulations and Practice

With respect to both the Commission's and DOC's regulations, we strongly endorse the key themes in the comments submitted to DOC on Feb. 3, 1995 by another PTG participant, Cargill, Inc. In that submission, Cargill called on DOC, at p.3, to:

> *"take into consideration the impact of U.S. laws, regulations and practices on U.S. exports as well as on U.S. imports."*

This comment noted, at p. 7, that the number of countries with antidumping laws has jumped from only 10 in 1980 to over 40 today. Further, it noted, at p. 12, that the proliferation of antidumping laws, and of antidumping investigations, in our export markets can act as a disincentive to U.S. exporters from participating in that market. It made the point that a foreign exporter to the U.S. market may have a greater incentive to respond to a U.S. antidumping or countervailing duty investigation than U.S. exporters facing foreign antidumping cases, because the market in that country is too small to justify the time and expense of responding. Noting that such cases can "act as a virtual, instantaneous barrier to U.S. goods," it concluded, at p. 14, as follows:

> "costs of such trade cases are a major concern to both big and small businesses, especially in low-margin, highly competitive trade... *antidumping cases could easily force U.S. exporters to abandon smaller markets.*"

The point is that, quite literally, the "world is watching" what U.S. authorities do in implementing these aspects of the UR. To the extent that the Commission develops regulations which reopen old debates, or distort the intent of the Agreement, it is reasonable to expect our trading partners to do the same. We strongly oppose any regulatory proposals which create this risk and call on the Commission to strictly construe the intent of the agreement in attempting to develop regulations pursuant to the U.S. implementing legislation.

Particular Issues of Concern

The Commission's effort to develop implementing regulations related to changes in U.S. antidumping and subsidy law is, obviously, an extraordinarily complex exercise. We make no effort here to comment on all the issues of concern to our members, or even to adjudge which issues are more important than others, because individual participants' interests vary. Nonetheless, given the foregoing goals of the PTG, and the fact that various proposals were made to the Commission last spring, from a variety of sources, we take particular note of certain issues where proposals have been made which appear to do violence to the criteria we set forth above for developing implementing regulations. As noted, the PTG filed comments with the Commission last April. We appreciate the fact that a number of our suggestions and comments were incorporated and/or referenced in the current Commission request for comments. Yet, we note that not all of the issues of concern to the PTG members were addressed in the current rulemaking notice. According, this comment is designed to reiterate our concerns and to add additional issues. This filing includes comments on the following topics:

(a) filing of petitions
  (i) service
  (ii) contents and completeness;
(b) determination of petitioner's standing;
(c) procedural rights of consumers and industrial users;
(d) disclosure of business proprietary information under APO;
(e) producer questionnaires;
(f) verifications;
(g) use of "facts otherwise available";
(h) investigative activity between preliminary and final investigations;
  (i) issue preclusion
  (ii) participation, timing & cost;
(i) prehearing briefs;
(j) institution of final investigations;
(k) final comment procedures; and
(l) short supply conditions and sunset provisions.

As discussed below, with respect to the Commission's 10/3/95 request for comments, we are particularly concerned about the proposal for continuous investigations and about the possibility of a requirement for a preclusive issues brief. We also reprise here our concerns regarding other issues not addressed in this notice.

The following sets forth some background as to the PTG's goals with respect to the UR implementing legislation. This may provide some context for our specific comments on regulatory proposals which we filed last April and the additional specific comments being filed concurrently by the Fair Trade Forum.

Filing of Petitions

Service

Given its importance and the shortness of Commission deadlines in preliminary investigations, service of the business proprietary version of the petition should be required within one calendar day, rather than two, as contained in Sec. 207.10(b) of the proposed regulations.

Contents and Completeness

In order to comply with Art. 5.2 of the Antidumping Code and Art. 11.2 of the Subsidies Code, the Commission's regulations should require the petition to include: (a) production data by volume and value; (b) identification of known exporters and/or foreign producers; (c) evolutionary import volume data; (d) specific, three-year piece data; and (e) data on import impact. Further, the regulations should specify the types of "reasonably available" documentation required to be filed with a petition. Also, the Commission's regulations should require that complete sets of a petition must be filed simultaneously with the Commission and the Commerce Department.

Petitioner Standing

As we indicated last fall in expressing our views to the Administration and the Congress regarding UR implementing legislation, and in our filing with the Commission last spring, the opportunity for potential respondents to comment on standing prior to initiation can be a meaningless opportunity. This is because without access to the confidential version of the petition prior to initiation, respondents may not have access to a meaningful description of how petitioners describe their standing. Accordingly, we believe that the Commission's regulations should require communication to the Department of Commerce, prior to its initiation, of all relevant information as to standing.

Procedural Rights for Consumers and Industrial Users

In communicating with the Administration and Congress regarding the implementing legislation last year, we urged that interested parties be defined to include industrial users, to ensure that they have access to APO information and that their participation in investigations and reviews is meaningful. The legislation (Sec. 227, p. 206) includes a general requirement for providing industrial users and certain consumer organizations an opportunity to submit relevant information. We believe that their opportunity for review of record information should be equivalent to parties in the investigation, as discussed more fully in Appendix 2 of our April, 1995 submission to the Commission. In short, we believe that the Commission's notice of institution should indicate that consumers and industrial users have the right to submit pertinent information to the Commission and to be considered under Sec. 201.11(a) of the regulations to be persons with a "proper reason for participating in the investigation."

Disclosure of Business Proprietary Information Under APO

The suggestion in proposed Sec. 207.7(2) of the proposed regulations to establish an additional deadline for application for access to certain business proprietary information under Administrative Protective Order for "other authorized applicants", seems both unnecessary and potentially confusing. We suggest that this proposal be dropped. Furthermore, we believe that counsel for consumer organizations and industrial users permitted to submit information to the Commission, under Sec. 201.11(a) of the Commission's regulations, should be authorized to make an application for access to business proprietary information under Administrative Protective Order.

Producer Questionnaires

In order to avoid exaggerated claims by domestic producers of potential production levels, hypothetical capacity should not be disconnected from historical data. The current definition of "full production capability" in the Commission's proposal appears to do just that. Accordingly, and consistent with past Commission practice, we recommend that producer questionnaires include the following instruction, which was contained in prior producer questionnaires: "[d]o not assume number of shifts and hours of plant operations under normal conditions to be higher than that attained by your plant at any time during the past 5 years."

Verifications

We believe that the Commission should continue its present practice of using its discretion to determine verification of importer and purchaser questionnaires on a case-by-case basis. The information provided in these questionnaires is generally straightforward and would not seem to justify more onerous verification requirements.

"Use of Facts Otherwise Available"

In communicating to the Administration and the Congress last year, we took the position that the reasons for rejecting information deemed unsatisfactory should be provided to the supplying party with an opportunity to provide further explanation. As indicated in our submission to the Commission last spring, since Sec. 207.8 of the Commission's interim amendment to its rules does not draw a distinction between information suppliers who are simply unable to (as opposed to refuse to) provide the requested information, a further clarification seems appropriate. We believe that the Commission should draw this distinction and limit the punitive use of "facts otherwise available" to persons who refuse to cooperate.

Investigative Activity Between Preliminary and Final Investigations

With respect to the Commission's proposal for continuous activity between the preliminary and final investigations, we support the Commission's proposal for formalizing the distribution of questionnaires for review and comment and to attempt to focus the investigation at an early stage. However, for a variety of reasons, we do not support the proposals for an "issues brief" and "issues conference."

Issue Preclusion

The language of the proposal regarding an issues brief is unclear as to the scope of preclusion, since the waiver wording is ambiguous as to whether it covers only identification of additional data collection issues or also arguments related to factual issues. Not only is it difficult to distinguish between the two, but the proposal appears to preclude supplemental questionnaires. In short, we are concerned that the proposed prohibition against raising data collections issues beyond the issues brief, may not permit the development of a full record under certain circumstances and, as such, represents possibly improper shifting of the investigative burden to the parties, from the Commission.

Participation, Timing & Cost

Beyond the foregoing, we are concerned that the proposal could prejudice the participation of parties, or counsel, who did not actively participate in the preliminary phase of the investigation. Furthermore, the proposal to require an issues brief not later than 28 days before the scheduled issuance of the preliminary determination could create unrealistical deadlines in countervailing duty cases. Also, it fails to account for circumstances in which the Commerce Department postpones its preliminary determination less than 28 days before the scheduled date. Finally, the addition of a complex and necessarily prospective brief and conference would increase costs and could prejudice smaller respondents.

Preliminary Briefs

We support the Commission's effort to encourage parties to present arguments clearly in prehearing briefs, including a required table of contents, and recommend requirements for an Executive Summary and Table of Exhibits. However, we are concerned about the proposal, in Sec. 207 23 of the proposed regulations, for a 50-page limit on prehearing briefs, including textual exhibits. Not only could the proposal prejudice a party's ability to fully present its arguments, but it also appears to be conceptually flawed. Limits on this brief are unlikely to reduce the scope and/or number of arguments presented to the Commission, since a prehearing brief necessarily cannot address the full factual record, which is not yet developed.

Institution of Final Investigations

Since "like product" information often is raised initially in prehearing briefs, the Commission's Questionnaires may not adequately produce a factual record relevant to all like product issues. Accordingly, we believe that the Commission should, at the outset of the final injury investigation, establish a period for parties to identify like products they intend to raise in the investigation.

Final Comment Procedures

Since statutory limitations on submitting new information may present significant difficulties for parties, we believe that the Commission, among a series of procedural steps discussed in our April, 1995 submission, should seek to reduce the presentation of unexpected information but tighten the procedures for acquiring information in order to issue parties adequate and timely access to this information. Also, the Commission should establish the latest possible deadline for accepting information from Commerce concerning its dumping and subsidy margin findings.

Final Comment Procedures

Since statutory limitations on submitting new information may present significant difficulties for parties, we believe that the Commission, among a series of procedural steps discussed in our April, 1995 submission, should seek to reduce the presentation of unexpected information but tighten the procedures for acquiring information in order to issue parties adequate and timely access to this information. Also, the Commission should establish the latest possible deadline for accepting information from Commerce concerning its dumping and subsidy margin findings.

Short Supply Conditions and Sunset Provisions

In communicating our views to the Administration and the Congress last year regarding the implementing legislation, we took the position that products not available domestically should be eligible for exclusion from the scope of a dumping order, in the context of either a scope determination or a changed circumstances review. As to the Commission, we believe its regulation should clarify its authority to revoke an order in part due to changed circumstances in instances of short supply. Similarly, we feel that the regulations should specify that the lack of domestic supply of a product subject to a dumping or subsidy order should permit "sunset" revocation of that order under certain circumstances, as discussed more fully in our submission to the Commission earlier this year.

TEXT OF 9/9/94 LETTER TO USTR KANTOR
(Attachment to 12/21/95 USITC Submission)

September 9, 1994

The Honorable Michael Kantor
United States Trade Representative
Washington, D.C.

Dear Ambassador Kantor:

The undersigned wish to convey our views on a few critical matters related to the legislation implementing the Uruguay Round (UR) trade agreement. At the outset, we wish to reiterate our congratulations to you and the President for the successful conclusion of the Uruguay Round, and to offer our support to your efforts to seek a fair, faithful and prompt implementation of that Agreement.

While this letter primarily focuses on our concerns regarding antidumping provisions, we want to strongly indicate our support for the Administration's successfully achieving the overwhelming number of trade objectives desired by American business and laid out by Congress, including the strengthening of the GATT by the creation of the World Trade Organization.

We are concerned, however, that proper implementation may not be forthcoming for three reasons: the proposals of narrow special interests that would transform the antidumping and countervailing duty laws into punitive, trade restricting barriers; opposition to the UR purportedly based on the need to abide by the budget rules requiring offsetting revenues or spending reductions in order to pay for the loss of identifiable tariff revenues; and the misplaced concern that adoption of these agreements might undermine our sovereignty.

The Pro Trade Group is a broad coalition of U.S. companies and organizations that represent U.S. exporters, importers and consumers, including manufacturing, agricultural, wholesaling, retailing, service and civic interests, which actively seek to develop competitive markets and promote trade. It was founded in 1987 and is committed to expanding, not restricting, trade and promoting policies which achieve that goal and the resultant economic prosperity. We were actively involved in the development and passage of the Omnibus Trade and Competitiveness Act of 1988, which resulted in sweeping amendments to U.S. trade laws. The Pro Trade Group has continued to provide information, briefings, and position papers for members of Congress and Administration officials over the past six years in an effort to help develop and implement constructive trade expanding laws and policies. The positions of the PTG represent a consensus view although individual PTG participants may have varying views on particular issues. The following describes our positions and concerns in detail.

THE AGREEMENT MUST BE FAITHFULLY IMPLEMENTED

In most UR areas the United States was a big winner, and in various other trade agreements now being, or to be negotiated, the U.S. is likely to negotiate good agreements on paper. The United States needs to set an example that even where our negotiating goals are not fully realized, we stand by our agreements. Indeed, whether the benefits of our agreements actually accrue to us depends on others living up to their obligations, and we must preserve our credibility.

However, many of the dumping-related proposals apparently under consideration by the Administration and Congress for inclusion in implementing legislation will be perceived, and in most cases correctly, as violating the letter--and definitely the spirit--of the UR.

The United States should not violate the new agreement by adopting legislative provisions that are inconsistent with the agreement and which would subject us to valid complaints under the new dispute resolution mechanisms of the WTO.

The overall goal for the UR was to open and expand markets. The UR dumping agreement was explicitly a balance between legitimate, competing interests and it includes solid, balanced protections for U.S. businesses harmed by truly unfair competition, or we wouldn't have signed it.

Implementing legislation which makes the law and its effects punitive does not reflect the balance that was struck in Geneva. At the very least, the full effect of the proposed changes should be understood before they are seriously considered, and the fast-track process for implementing this agreement is not the place for such consideration.

PROTECTIONIST DUMPING PROPOSALS WOULD DISTORT AND RESTRICT TRADE

The underlying conceptual purpose of U.S. dumping laws is to prevent, unreasonable, improper pricing policies by companies exporting into other nations markets, especially pricing policies which are designed to be predatory or unfair.

In practice, we know that among those special interests most aggressively seeking to tilt the dumping laws in favor of those alleging dumping are those who may not be truly internationally competitive, and/or who seek an insulated domestic market.

These particular proposals are highly technical and are only beginning to be fully understood; but our initial assessment is that just a few of the proposed changes would have the severe effect of multiplying current dumping margins five or even tenfold. Those seeking protection for themselves should do so openly, not distorting an important trade law under the fast-track process.

RESTRICTIVE TRADE LAW REVISION WOULD HARM EXPORTS AND JOBS

Our concerns regarding restrictive trade law revision stem from certain broad principles. First, a growing number of other countries have adopted and are utilizing similar antidumping and subsidy laws. Even now, in the past three years, more American products have been the subject of antidumping actions around the world than those of any other country. Indeed, U.S. exporters will almost certainly have to face foreign laws that follow whatever the United States does in implementing these agreements.

If U.S. dumping law is allowed to become overly tilted in favor of those who wish to make it more difficult for reasonable exporters to conduct business internationally, there is little doubt that a significant number of other nations will follow the U.S. lead and use the U.S. laws and practices as a model, and the world's largest exporter will be the loser. Especially in countries with less commitment to an impartial and reliable judicial system, we risk inviting the creation of dumping-based non tariff barriers. Once established, they are likely to discourage U.S. exporters and harm export employment.

RESTRICTIVE TRADE LAW REVISION WOULD HARM PRODUCERS, CONSUMERS AND THE ECONOMY

In addition, restrictive dumping law provisions would have a damaging effect on the national economy as they would negatively affect the economic welfare of U.S. consumers -- industrial consumers as well as purchasers of retail goods -- who have a lot to gain from the trade expansion and liberalization negotiated in the UR.

In the context of today's multinational business world, imported parts and components are often critical to the competitiveness of American manufacturers. Increasing the supply risks and uncertainties for domestic producers undermines their competitiveness in domestic and foreign markets.

Consumers of retail products would be faced with inflated prices and with less availability of affordably-priced goods in the market place. Lower-income consumers would bear the highest economic burden.

Therefore, we urge the Administration and the Congress to join together in fashioning a fair and consistent implementing bill and to reject the restrictions proposed by the special interests in the name of "tough" laws. If those proposals move forward, the benefits to the American economy of the new agreement will be quickly overwhelmed by the damage caused by these new barriers to fair trade.

BUDGET CONCERNS MUST BE PLACED IN THEIR PROPER CONTEXT

We also are concerned that the benefits of the agreement could be lost due to the proverbial "bean counting" related to the budget agreement requirements. Any theoretic loss from the UR, of course, will be more than offset by the increase in economic activity in the United States and the corresponding increase in tax revenues of other types. We believe that the immediate concern about budgetary effects should be resolved as swiftly as possible to allow the benefits of the agreement to be realized now. Since the enormous UR benefits for the U.S. economy, and for the U.S. Treasury, will only be realized after implementation, we urge you to explore a Congressional waiver of the budget rules related to UR implementation. We offer our help in that regard.

DISPUTE SETTLEMENT SHOULD NOT RAISE SOVEREIGNTY CONCERNS

Finally, the international dispute resolution mechanisms were negotiated at the behest of the United States in order to provide more certain means of resolving disputes of concern to American interests and should be supported as such. We believe American businesses gains from these provisions, which do not adversely affect U.S. sovereignty. We urge those who have raised concerns about a supposed loss of sovereignty due to these mechanisms to work constructively with you and your colleagues to ensure that these mechanisms provide the tangible benefits for United States interests that were their genesis.

CONGRESSIONAL CONSIDERATION

Our members represent a large proportion of the overall economy of the United States. We support legislation which fully implements the GATT Agreement. We oppose implementing legislation which would undermine the agreement's overall benefits to the United States. Our concerns stem primarily from the apparently serious consideration being given to legislative proposals put forward by some in Congress, and by certain narrow, special interests in the private sector (including those of the so-called Committee to Support U.S. Trade Laws). We believe that clean, faithful implementing legislation can pass Congress far more easily than some are asserting. The gains in the agreement are very significant, even for most of the protectionist sectors who want, but do not need, the changes they advocate. The great risk comes from encumbering the implementing legislation with dumping and other trade law proposals that overburden this legislation, which are likely to cause delay and will seriously undermine Congressional support for future fast-track authority. We call upon you to reject these proposals and, instead, to adhere to the market-opening thrust of the overall agreement in adopting fair proposals to ensure that all U.S. interests are protected, and the agreement promptly ratified.

The undersigned companies and associations subscribe to the foregoing letter:

- A A A Spanish Translation Service
- ABS Corporation
- Agriculutural Trade Council
- A.J. Rose Manufacturing Company
- American Association of Exporters and Importers
- American Architectural Manufacturers Association
- American Association of Port Authorities
- American International Automobile Dealers Association
- American International Diversified
- Argents Air Express Ltd.
- Associated Merchandising Corporation
- America Overseas, Inc.
- American Racing Equipment Co
- Apple Computer Co.
- Association of Home Appliance Manufacturers
- Association of International Automobile Manufacturers
- AST Research, Inc.
- Austin-San Antonio Corridor Council
- Beadex Manufacturing Co.
- Business Technology Association
- Chesterfield Steel Self Company
- Color Tile, Inc.
- Compaq Computer Corporation
- Computer and Communications Industry Association
- Consumer Alert
- Consumers for World Trade
- Cosmar Corporation
- Continental Bank
- Convex Computer Corporation
- Cotterell, Mitchell & Fifer, Inc.
- Craig Consumer Electronics
- Crown Iron Works Company
- Dean Witter Reynolds, Inc.
- Denar Chartering, Inc.
- Diamond V. Mills
- Diagraph Corporation
- Dicker International
- Direct Marketing Association
- Dodge-Regupol, Inc.
- Ecology International Ltd. Corp.
- Elan International, Inc.
- Falcoln Products, Inc.
- Fortec, Inc.
- F.S.I.
- Gateway 2000, Inc.
- Gaymar Industries, Inc.
- Gilbert & Van Campen Executive Search International
- Harlingen Industrial Foundation, Inc.
- Hawkeye Steel Products, Inc.
- Haworth, Inc.
- Hawthorne Lift Systems, Inc.
- HHS Export Trading Company
- Image Systems Technology, Inc.
- Indiana University, Dept. of Political Science
- International Electronics Mfrs. and Consumers of America, Inc.
- International Orbits, Inc.
- Inventia Global Latino Advertising
- Jetstream International
- John V. Carr Customs Brokers
- JSJ Corporation
- Kap-Pel Fabrics, Inc
- Kingston Technology Corporation
- Lindsay Forest Products, Inc.
- Lip Orbits, Inc.
- Lockwood Greene International, Inc.
- Lynden International
- Master Chemical Corp.
- Mosler Inc.
- Millers National Federation
- Millipore Corporation
- Morrison Express
- Motorcycle Industry Council
- MTE Corporation
- MITA, Inc.
- National Association of Beverage Importers, Inc.
- National Grain Sorghum Producers
- National Grange
- Newgen Systems Corporation
- Norphland Corporation
- Northrup Grumman Corporation
- North American Export Grain Association
- Nucor Corporation
- OMNI Manufacturing Inc
- Prassas Metal Products
- Precision Metalforming Association
- Regional Business Partnership
- Sea-Land Corporation
- Southwest Radiological Sales
- Saniseru
- Sparling Instruments Co., Inc.
- Sun Microsystems, Inc
- Transport Express
- USA-ITA
- Viking Freight
- Ventana, Inc.
- Weld Bend Company
- West Bend Company
- Western Atlas, Inc.
- Whirlpool Corporation
- Wilmarth & Associates Trade Advisory Services

TOTAL: 102

ANALYSIS OF PROPOSED SAFEGUARDS
CHANGES FROM H.R. 2795 IN TERMS OF WTO/GATT

The following discusses the issue of whether H.R. 2795, if enacted, would violate the World Trade Organization (WTO) Safeguards Agreement, and GATT 1994, as well as issues that could arise regarding appropriate compensation against the United States if utilized.

A. Violation of WTO Safeguards Agreement

1. The H.R. 2795, if enacted, would amend the U.S. safeguards statute by adding the following provisions:

(a) The definition of "domestic industry" would be supplemented by the following paragraph:

". . . in the case of one or more domestic producers who produce a like or directly competitive perishable agricultural product during a particular growing season, limit the domestic industry to those producers if the producers sell all or almost all of their production of the article in that growing season and the demand for the article is not supplied, to any substantial degree, by other domestic producers of the article who produce the article in a different growing season."

(b) The definition of "like or directly competitive product" would be supplemented with the following two paragraphs:

"In the case of a perishable agricultural product produced by a domestic industry described in paragraph (4)(D), the term 'like or directly competitive article' means only the articles produced by the industry during the applicable growing season."

"In the case of perishable agricultural product, the Commission may limit its consideration to imported articles that are entered, or withdrawn from warehouse for consumption, during the same growing season as the like or directly competitive product."

2. It appears that the legislation would violate the WTO Safeguards Agreement. The term "directly competitive," as used in the WTO agreements, is intended to be applied in situations in which products are not "like," but are substitutable. Any seasonal goods imported from any country during a specific season are "like" such goods grown in the United States during the entire year, not just during the specific season. The legislation, in effect, would allow the U.S. International Trade Commission (ITC) to limit the scope of "like" products to those that are "directly competitive" -- an interpretation which is not supportable. Under this proposal, the United States would consider any seasonal product to be "like" products only if they were also "directly competitive." However, the Safeguards Agreement states that the goods must be "like or directly competitive" -- not "like and directly competitive."

3. Article 4(1)(c) of the Safeguards Agreement states that:

"a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products." (Emphasis added)

To be consistent with this provision, the legislation would require an assertion that the tomatoes grown during the winter season constitute the "total domestic production" of those products. However, sales of the same good during the other eight months of the year cannot legitimately be excluded from "total domestic production."

4. Article 4(2)(a) of the Safeguards Agreement requires the competent authorities, in investigating whether there is serious injury, to "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry." A refusal by the ITC to examine the condition of the U.S. industry other than during a specific season would seem to be inconsistent with the obligation to evaluate "all relevant factors" -- especially (i) when growers sell such goods during other times of the year, and (ii) because the growers almost certainly maintain their financial records on an annual basis.

5. Prior to the amendment, the U.S. safeguards statute defined "domestic industry" in a manner very similar to the definition in the WTO Safeguards Agreement. The ITC, in its April 1995 decision in the tomatoes safeguards proceeding, found that limiting the domestic industry to production during a particular season would be both illogical and contrary to the statute. By extension, therefore, it can be argued that the ITC's ruling supports the

position that defining a domestic industry by seasonality is contrary to the WTO Agreement.

6. The WTO Safeguards Agreement definition states:

> "a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products."

7. The U.S. definition states:

> "the term 'domestic industry' means, with respect to an article, the producers as a whole of the like or directly competitive article or those producers whose collective output of the like or directly competitive article constitutes a major proportion of the total domestic production of such an article."

8. In its April 1995 decision, the ITC stated:

> "Petitioners' proposed domestic industry definition leads to the arguably illogical result of two separate industries producing tomatoes with identical characteristics and uses, some produced in the identical facilities, where the only distinction between them is that one produces products which are 'directly competitive' with imports entering at certain times of the year."
>
> "[O]ur industry concept under Section 201 can be distorted to reach an absurd outcome, and we must avoid industry definitions that are drawn artificially narrow simply to make relief more likely."
>
> "The question raised is -- on the assumption that decision to enter and remain in business are based or annualized expectations, rather than expectations for part of the year -- does the analysis of an industry during a 4 month period represent a valid assessment of the health of the industry?"
>
> "Another similar question raised is whether the statute contemplates that petitioners may, through the mechanism of a narrowly tailored scope of investigation such as the one in the instant investigation, define the domestic industry in such a manner that the Commission only examines a narrow window (the time the industry competes with imports) in determining injury. A related issue is that, through a narrowly tailored scope, petitioners in subsequent cases could potentially define certain months which would show an increase in imports (while full-year statistics would not), as required for an affirmative determination under section 202."

The comments should could be considered in an analysis of the requirements of the WTO agreement. The approach reflected in the U.S. amendment, if carried to its logical conclusion, would allow an argument that the WTO agreement allows a domestic industry to be defined by a season even shorter than the four months contemplated in the tomatoes situation, and that this may be done for goods that are not perishable. For example, a petitioner might attempt to argue that it was entitled to relief because it was harmed by imports during the one-month Christmas shopping season. Put another way, the U.S. amendment significantly undermines the requirement that imports have caused, or are threatening to cause, serious injury. Furthermore, if the U.S. approach to defining "domestic industry" is deemed acceptable under the Safeguards Agreement, it could also be justified under the Antidumping and Subsidies Agreement for use in antidumping and countervailing duty proceedings.

B. GATT Inconsistency (Articles II and XI)

1. If the proposed amendment actually resulted in a safeguards action against perishable produce under these circumstances, the United States would be in violation of GATT Article II (if the safeguards action were an increase in U.S. duties beyond the current MFN level) or Article XI (if the action were a quantitative restriction), because the action would not have been authorized by GATT Article XIX.

C. Compensation Issues

1. If the United States were to impose higher duties or a quantitative restriction under the safeguards statute, it likely would be required to provide compensation to the affected country. In theory, such country should be entitled to double compensation -- once for the effects of the withdrawal of a concession, and again for the fact that the United States was not entitled to take the action at all.

2. A possible approach to this issue would be to seek compensation in a WTO dispute settlement proceeding for the violation of the WTO Safeguards Agreement represented by the amendment to the statute, while separately claiming compensation for the safeguards action itself under NAFTA Article 802(6). The fact that a dispute is pending under the WTO regarding the U.S. safeguards statute should not prevent the affected country from claiming compensation under Article 802(6) in cases the affected country is party to this agreement.

Comments of Robert L. Randall
on possible reform of the
International Trade Commission

I am an industrial economist, employed for more than 10 years as a commodity analyst in the Office of Industries at the International Trade Commission. Previously, I was employed in the private sector in product and market development functions by Dupont Co., Battelle Memorial Institute, Kennecott Copper Corp., and my own consulting business, acquiring a broad exposure to normal American and foreign business practices and modes of competition.

I have a Master's degree in chemistry, with a minor in statistics, and an M.B.A., both from the University of Chicago. During my employment at the ITC, I have worked on statutory investigations (antidumping cases), trade agreement and GSP studies, bill reports (duty suspension proposals), compilations and staff studies, and served on internal task forces considering 'customer satisfaction' and 'strategic planning' for the agency.

The administrative problems various observers have identified at the International Trade Commission appear to have four sources or underlying causes:

- The statutory basis of U.S. trade law
- Lack of business experience by Commissioners and staff
- Lack of practical management experience by agency staff
- Chronic over-staffing at all levels.

Comments and observations expanding on these points comprise the remainder.

Statutory Basis of U.S. Trade Law

The organizational structure, staffing, and procedures employed should be reflective of the agency's substantive functions, which in the ITC's case comprise two main activities: determinations of injury in anti-dumping and countervailing duty cases and providing technical advice on trade-related matters.

AD and CVD cases are complaint driven, with the petitioners sick companies, often in sick industries. Every AD case I have worked on, which might not be typical of all cases received, has been a moribund domestic monopoly producer (the other producers already having gone out of business) offering higher prices, lower quality, poorer customer service, and, not infrequently, products that do not meet present-day customer needs as well as the import sources.

Rather than correcting competitive deficiencies, the petitioners obviously have concluded that it is preferable for them to try to get punitive duties put on the foreign sources so foreign suppliers will have to withdraw from the U.S. market.

The central problem of U.S. trade law is like that of the domestic 'fair trade' laws that were eventually overturned in the courts as anti-competitive, namely, should the ineffective and inefficient businesses have protection from their more effective and efficient competitors? Are such things as effectiveness and efficiency, product and process innovation, adaptation, and responsiveness to customer needs unfair competitive advantages to be handicapped?

The statutory bases for a finding of injury, or threat of injury, are numerous and disparate. My observation is that quantitative information developed during the ITC's investigation is rarely dispositive, and usually very ambiguous, providing a basis in the record for any possible decision by the Commission. The ITC staff carefully compiles the information, but stays away from analysis or interpretations that might intrude on the Commission's decision-making prerogatives. As a general rule, information is available only on the domestic industry as the foreign sources seldom wish to justify their actions in a hostile foreign forum (ITC or ITA) and the critical question of competitiveness--whether the imports are "a cause" of the domestic industry's problems--is seldom joined, with or without disclosure of CBI under protective order.

Partly because of the ambiguity of U.S. trade law, I must question whether the ALJ approach would be of substantive benefit. The ALJ system works quite well when the issues are very technical, invoke intricate regulations, and are simply factual determinations under clear law or regulations.

Another reservation is that anti-dumping cases are capital cases: either the petitioner or the import suppliers are likely to be put out of business (at least on that product) by the Commission's decision, and it wouldn't be just to treat these cases as merely technical matters that an administrative law judge might reasonably decide. On AD/CVD determinations, the Commission functions more like a jury than a judge, making an integrated determination of where commercial justice lies.

While not many AD/CVD cases could be determined on a statistical analysis, it doesn't help that the Commission limits statistics to approaches devised before the Commission's establishment in 1907. There have been great advances in statistical inference, that might be illuminating if applied as additional background information. It is ironic that one of the roots of effective foreign competition is application of statistical quality control, largely developed in the United States, but much more enthusiastically adopted abroad, particularly in Japan.

Lack of Business Experience

Any alleged dumping is a series of commercial transactions entered into with the normal business expectation of making a satisfactory profit. Dumping theory is a theoretical construction of economists that has little foundation in business reality. No business loses money on every sale simply to spite foreign business rivals.

Acting under the law, Commerce just makes up foreign costs using a series of suppositions and published information. Many of the products have no market at home and are produced only for export. In accord with U.S. law, ITA's calculations must be done in U.S. dollars, however distortive of the commercial motivation for the export business this practice might be in many circumstances.

Without some business experience, only highly formalistic analysis is possible, such as that produced by ITC's Office of Economics. While possibly illuminating in some cases, absent interpretation from some quarter of what is going on in a business sense, purely theoretical analysis of highly ambiguous data of only one side of the case is a triumph of effort over sense and reason. The ITC's hearings are not of much assistance, because sworn witnesses from industry are reluctant to speak about any other firm's motivations because that lies outside their personal knowledge (basic rule of evidence) and cross examination is strongly discouraged (if cross-examination were permitted, industry witnesses with any substantive knowledge of their company's business practices would not appear because any candid responses might be used against them in other, unrelated contexts).

Perhaps because ITC proceedings are quasi-judicial in character, they are dominated by the lawyer's approach, i.e., an over-reliance on testimony rather than on drawing reasoned inferences from all available sources, including staff knowledge of normal business, marketing, and manufacturing practices in different industries. (Of course assumptions should not be allowed to over-ride specific information, but some perspective is helpful in determining what is going on in a business sense.) If a witness says the Moon is made of green cheese, that is taken as fact unless and until refuted by another witness. Slavish reliance on testimony causes problems with a petitioner's sales and financial reports, where the ITC is a prisoner of the petitioner's interpretation of why costs went up and why sales, profits, and employment went down. Needless to say, petitioners have constructed a good story on these elements they control before petitioning for trade relief. What seldom can be elucidated is what actions, if any, the petitioner has taken to become more competitive in the market for this particular product before applying for relief from government in the form of punitive, and often prohibitive, duties.

Lack of Management Experience

Neither the Commissioners nor staff are hired for their management ability or experience. They are selected primarily on the basis of their expected contribution to the substantive work of the agency. Government has no competitors in the services it provides (where else can one get a driver's license than from the motor vehicle bureau or seek trade relief than from the ITC/ITA?), so there is lack of a competitive spur to promote efficiency and effectiveness in operation. The incentives in government are for thoroughness (never be caught in some error of over-sight) and building a larger organization to warrant a higher grade rating. There is no reward for improved effectiveness and efficiency. Accordingly, government 'management' experience is of limited value in a candidate.

It seems doubtful whether different procedures or distribution of administrative authority between the Commission and staff would overcome this basic limitation on effective agency operation.

Over-Staffing

Perhaps because of the support of some protectionist-minded members of Congress, the ITC has been generously funded during the last 15 or more years. The most charitable comment one can make is that the agency is geared up for a trade war the like of which the world has never seen heretofore.

The military command model of organizational structure at the ITC, complete with issuance of detailed orders on everything, is not appropriate to the agency's professional functions. With most of its functions being carried out by cut-and-dried procedures, with most of its staff having been doing the same work for a decade or two, the 7 to 9 levels of review of routine matters is not needed.

It may be significant that the agency's strategic plan indicated that the ITC's 'existence' functions were its most important, and heavily funded, activities. By my count, more than 50 percent of the agency's employees are in management and administration, and I would estimate about 70 percent of the agency's spending goes for internal coordination and administration (these people are paid more than the people actually doing substantive work).

With all of these 'idle hands' at all levels, it is not surprising that feuds and back-biting are the operational norm at the agency.

As an employee, I find it noteworthy that the proportion of waste (in the strictest sense, expenditures on activities for which use of appropriated funds is prohibited by statute) went up as a result of the recent ITC RIF, as only low-level employees were released, and that management harassment has been stepped up, apparently on the premise that we should be very grateful we weren't all fired.

The agency's personnel actions over the past months have generated grievances, complaints of unfair labor practices, discrimination complaints, and law suits. In hearing one employee's unsuccessful application for a restraining order against employee abuse, U.S. District Judge Stanley Sporkin, who had a long and distinguished career at the Securities and Exchange Commission before appointment to the federal bench, was outspokenly critical of agency management for not treating its employees as valuable resources, rather than as impediments, to the agency's functioning, and of the agency's not seeking more constructive and collaborative solutions to its appropriations problems.

Considering how far outside the civil service statutes the agency is operating, it would not be surprising if the International Trade Commission will be litigating against its employees for many years. Needless to say, whatever the outcome of particular proceedings, court orders and decrees will not rectify the ITC's administrative deficiencies that lead to the need for such judicial intervention.

General Conclusions

With regard to the Commission-level structure question that GAO examined, it seems doubtful whether tinkering with the Commission structure would provide any real or lasting solution to perceived administrative problems at the International Trade Commission.

With regard to the AD/CVD procedures, and possible interposition of an Administrative Law Judge, it seems questionable whether changing access to (partial) information would substantially improve results and questionable whether making a single administrative law judge responsible for preliminary industrial death sentences would be a good procedure or public policy.

In my view, the administrative problems at the International Trade Commission are rooted in the factors discussed above and would not be ameliorated by the reforms so far proposed.

COMMENTS OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION ON INTERNATIONAL TRADE COMMISSION REFORM PROPOSALS

SUBMITTED TO THE SUBCOMMITTEE ON TRADE COMMITTEE ON WAYS AND MEANS

MARCH 1, 1996

The Semiconductor Industry Association ("SIA") appreciates this opportunity to comment on proposed reforms to the structure and operation of the U.S. International Trade Commission ("Commission"). SIA supports the maintenance of strong U.S. trade laws to provide a remedy against foreign unfair trade practices. The Commission, through its injury determinations, plays a critical role in the operation of the antidumping and countervailing duty laws. Because the proposed reforms of the Commission will call into question the continued independence of the Commission and the ability of the six Commissioners to make decisions solely on the basis of the facts presented and the legal standards for injury determinations set forth by the Congress, SIA opposes adoption of these proposals.

The Role of the International Trade Commission

The Commission is an independent, quasi-judicial agency that conducts investigations, prepares reports and studies, and makes recommendations to the President and the Congress on a wide variety of trade policy issues. Most significant from the perspective of the SIA is the Commission's role in determining whether U.S. industries are materially injured by imports found by the Department of Commerce to be dumped or subsidized. Because of the importance of such determinations to U.S. industry, as well as the risk that such determinations might be improperly influenced by political or foreign policy concerns, the Congress went to great efforts to insulate the Commission from either partisan politics or the policy views of the Executive Branch.

To insulate the agency from political control, no more than three Commissions may be from the same political party, and the Chairmanship of the Commission changes every two years, with a required rotation between the two political parties. Likewise, the even number of Commissioners makes it extremely difficult for either party to gain control over the Commission.

Similarly, to prevent any given Administration from directing the Commission to follow a particular policy direction, the terms of the Commissioners are nine years -- one year longer than that of a two-term President. Furthermore, since the Commissioners generally may not be reappointed for a second term, they may act with full independence and free from fear of reprisals.

SIA believes that this structure has served the United States and U.S. economic interests well and should not be altered along the lines suggested by the Subcommittee on Trade's request for public comment.

Comments on Specific Reform Proposals

Reducing the number of Commissioners from six. This proposal could easily politicize the decision-making of the Commission. Under the current structure, neither party has a working majority. Administrative activities are performed and determinations are made along nonpartisan lines. With an odd number of Commissioners, the Commission would no longer be immune to political pressures from the Executive Branch and political parties. As a practical matter, one political party would have majority control of the Commission, subjecting all of its determinations to potential political influence.

While many Federal independent commissions have an odd number of members, these are generally regulatory agencies which administer the policies and programs of the Executive Branch. Usually the President is free to appoint a Chairman for those agencies without regard to his or her political party, and the practice is that the President has working control of these

agencies. The International Trade Commission, however, like a relatively few other independent commissions -- e.g., the U.S. Commission on Civil Rights and the Federal Election Commission -- has an even number of members. These commissions are not intended to be controlled by the policy-making apparatus of the Executive Branch. The importance of ensuring that the Commission's determinations be based purely on the factual record makes it essential that the agency remain truly independent. Reduction of the number of Commissioners to an odd number would undermine that independence.

Increasing the term of the Chairman. Increasing the term of the Chairman of the Commission would likely lead to a demonstrable increase in the power of the Chairman compared to that of the other members of the Commission, as well as creating at least the appearance that the political party of the Chairman has some increased influence over the agency for that extended period of time. The existing two-year term for the Chairman is designed in part to ensure shared authority among all Commissioners. Shared authority promotes cooperation and the independence necessary for a quasi-judicial body. The two-year term should be maintained.

Providing the Chairman with greater authority. Providing the Chairman with greater authority to make administrative and personnel decisions would likewise increase the power of the Chairman and limit the independence of the other Commissioners. Over the years, the Congress has taken pains to assure that Commissioners can exercise their judgment free from constraint not only by the Executive Branch, but also by other Commissioners, especially the Chairman. In 1977, Congress adopted legislation to increase the powers of the Chairman, but also made certain that individual Commissioners would retain a degree of independence. While the Chairman has the authority to run the daily activities of the Commission, a majority can overrule his or her administrative actions. Similarly, the Commission's budget may be proposed only if a majority of the Commission approves.

If a majority of the Commission is no longer permitted to veto administrative decisions of the Chairman, this balance among the Commissioners would be seriously upset. Especially with respect to personnel, it is imperative that Commissioners have confidence in the impartiality of the staff. Having staff beholden solely to the Chairman is not conducive to the efficient operation of the Commission.

Removing the current exemption from OMB oversight. Without the current exemption for the Commission's budget from oversight by the Office of Management and Budget ("OMB"), the Commission would no linger be truly independent from the Executive Branch. Through OMB oversight, the Executive Branch would be in a position not only to control the Commission's budget, but also to influence its policy decisions. Therefore, the Commission's current OMB budget oversight exemption should be maintained.

Providing for injury determinations by administrative law judges. Changing the hearing and investigation process so that injury determinations are made by administrative law judges, subject to review by the Commission, could increase the cost of investigations and remove the Commissioners from the particular facts of a proceeding, making it much more difficult for the Commission to make the thoughtful determinations on which industry relies. In fact, the use of administrative law judges would call into question the need for maintaining a six-member Commission altogether. The most important function the Commission now serves is making these injury determinations in antidumping and countervailing duty cases. If the Commission is to continue to have a role in the administration of the trade laws, it should maintain the responsibility to make these determinations.

Conclusion

Given the important role of the Commission in the operation of U.S. trade laws, especially those relating to the antidumping and countervailing duty laws, SIA strongly urges the Subcommittee on Trade to reject the proposals discussed above.

BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON TRADE

Comments Of The Southern Tier Cement Committee
Opposing Proposed Changes To The U.S. International Trade Commission

March 1, 1996

These comments are filed on behalf of the Southern Tier Cement Committee, a coalition of 25 U.S. cement producers. The Committee represents 65 percent of U.S. production capacity and 75 percent of capacity located in the southern tier states extending from California to Florida. A list of the members of the Southern Tier Cement Committee, together with the locations of their headquarters offices and their 71 production plants, is attached to these comments.

Summary

The Southern Tier Cement Committee opposes proposed changes to the U.S. International Trade Commission identified in the January 31, 1996 advisory issued by the House Ways and Means Subcommittee on International Trade because they would adversely affect the Commission's independent and impartial administration of the U.S. unfair trade laws. Congress intended for the Commission to be a quasi-judicial agency for conducting investigations and fact-finding without undue political influence from Congress or the Executive Branch. The proposed changes would endanger the Commission's independent decision-making by subjecting deliberations to the short-term domestic and foreign policy objectives of Congress and the President. The changes would also destroy the diversity of views that contribute to objective and well-reasoned Commission decisions and would otherwise undermine the credibility of the Commission in conducting its investigations.

All of the proposed changes would adversely affect the independence and balanced operation of the Commission. Reducing the number of Commissioners would undermine the independent and bipartisan nature of the Commission by exacerbating the effects of vacancies and by diminishing the diversity of experience and knowledge on the Commission. An odd number of Commissioners would destroy the fundamental bipartisan structure of the Commission as an independent and quasi-judicial agency. Expanding the power of the Chairman by increasing the Chairman's term or authority over administrative decisions would undermine the delicate balance of power within the Commission and preclude independent and collegial decision-making. Office of Management and Budget review of the Commission's budget would restrict the independence of the Commission by increasing Executive Branch influence over Commission decisions. The creation of an executive director to handle routine administrative activities would duplicate responsibilities of the Chairman's senior staff and is otherwise unnecessary given the existing authority of the Commission to manage its internal affairs. Incorporating an administrative law judge into Title VII procedures

would simply increase the cost and complexity for all parties and would diminish the Commission's active involvement as an independent, bipartisan decision-maker.

Parties before the Commission must be confident that the Commission is conducting an unbiased investigation based on the facts of record and is rendering independent decisions based on the requisite statutory standards. The proposed changes to the Commission represent an unnecessary intrusion into the delicate balance that Congress intended between safeguarding independent, objective decision-making and maintaining an efficient administrative structure. Moreover, the proposed changes would make investigations more expensive, more time-consuming, and more susceptible to undue political influence. Accordingly, the Southern Tier Cement Committee opposes changes to the Commission.

The Proposed Changes Would Unnecessarily Politicize The Commission

If enacted, the proposed changes to the Commission's structure and administration would substantially increase the amount of political influence over Commission decision-making. The Subcommittee's request for comments identifies the Commission as "an independent and quasi-judicial agency that conducts studies, reports, and investigations, collects data, and makes recommendations to the President and Congress on a wide range of international trade issues." See also H.R. Rep. No. 279, 102d Cong., 1st Sess. 1 (1991). In establishing the Commission, Congress repeatedly emphasized its intent to maintain the independent nature of the Commission's decision-making and factfinding. In 1916, Congress created the United States Tariff Commission as:

> [A] nonpartisan tariff commission to make [an] impartial and thorough study of every economic fact that may throw light either upon our past or upon our future fiscal policy with regard to the imposition of taxes on imports with regard to the changed and changing conditions under which our trade is carried on. . . . [We] declare ourselves in sympathy with the principle and purpose of shaping legislation within th[e] field [of international trade] in accordance with clearly established facts, rather than in accordance with trade demands of selfish interests or upon information provided largely, if not exclusively, by them.

H.R. Rep. No. 922, 64th Cong., 1st Sess. 9 (1916).

In the Trade Act of 1974, Congress renamed the United States Tariff Commission the United States International Trade Commission and endeavored to strengthen its independence from political influence. According to the Senate Finance Committee Report:

> The Tariff Commission, which was established in 1916, is a permanent, independent, nonpartisan agency whose principal function is to provide technical and fact-finding assistance to the Congress and the President upon the basis of which trade policies may be determined. The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch. For this reason, many of

> the amendments offered in this bill with regard to the Commission are directed at strengthening its independence.

The judiciary has also commented on the independent role of the Commission. The United States Court of Appeals for the Federal Circuit recently stated:

> Antidumping duties are not simply tools to be deployed or withheld in the conduct of domestic or foreign policy. In particular, the independent status of the International Trade Commission was intended to insulate the Government's decision to impose antidumping duties from narrowly political concerns.

Federal Mogul Corp. v. U.S., 63 F.3d 1572, 1581 (Fed. Cir. 1995).

The proposed changes identified in the Subcommittee's advisory would politicize the role of the Commission and endanger the legitimacy of the Commission's objective consideration of trade disputes. Retaining the statutory safeguards that foster an independent Commission is critical to maintaining confidence in the impartiality of Commission decisions and to ensuring that decisions are not based on the short-term domestic or foreign policy objectives of the President or Congress.

The very nature of trade disputes provides that Commission decisions will generate opposition from the domestic or foreign party adversely affected by a particular ruling. A Commission that retains independence through its statutory institutional structure enhances foreign and domestic confidence in Commission procedures and in the substantive outcome of Commission decisions.

Reducing The Number of Commissioners Would Undermine The Independent And Bipartisan Nature Of Commission Decisions

The proposal to lower the number of Commissioners would exacerbate problems already experienced at the Commission when illness, recusals, or vacancies prevent the participation of all six Commissioners. As the number of participating Commissioners declines, the bipartisan balance is destroyed, and the opportunity for political influence and biased decision-making increases. If the number of Commissioners is reduced, the occurrence of vacancies could result in decisions by only one or two Commissioners.

Moreover, in fostering independent and bipartisan deliberations, Congress intended that the Commission include members with a wide-range of talent and experience. In fact, Congress recognized that the membership of the Commission should not be "so small as to unduly limit the expertise and consideration brought to bear on the subject." S. Rep. No. 1298, 93d Cong., 2d Sess. 115 (1974). A six-member Commission has traditionally resulted in a membership with a vast diversity of backgrounds, including not only representatives of both political parties but also economists, lawyers, former Congressional staff, and individuals with industry, labor, finance, and agricultural experience. With a reduced membership, the diversity of personal experience and knowledge of a six-

member Commission would diminish. Accordingly, a six member Commission should be retained.

The Opportunity For Political Influence Over Commission Decisions Increases With An Odd Number Of Commissioners

The proposal to provide for an odd number of Commissioners would fundamentally alter the bipartisan structure of the Commission and would subject the Commission to undue political influence, contrary to the intent of Congress in establishing the Commission as an independent, quasi-judicial agency. Establishing an odd number of Commissioners would destroy the balance of political affiliations on the Commission and would politicize decisions in accordance with the short-term will of the controlling party. Given Congressional intent to establish and preserve the independence of the agency, a reform aimed at specifically undermining the Commission's independence would endanger the fair and impartial administration of U.S. unfair trade laws.

Absent an intent to reduce the Commission's independence, there seems to be no reason for changing to an odd number of Commissioners. The Subcommittee's January 31, 1996 advisory requesting comments cites Recommendation 91-10 of the Administrative Conference of the United States ("ACUS") as one source for the proposals. In a report prepared for the ACUS during consideration of Recommendation 91-10, Professors John Jackson and William Davey wrote that:

> In the course of our study, several complaints were made about the structure of the ITC. One was the undesirability of having an even number of commissioners. While this does lead to tie votes, the relevant statutes deal with that eventuality and we do not think that it poses a serious problem.

John H. Jackson & William J. Davey, Report for the Administrative Conference of the United States Recommendation 91-10, Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases 969 [hereinafter ACUS Report for Recommendation 91-10].

The potential problems posed by tie votes are sufficiently addressed by statute and do not present any structural difficulty in the operation of the Commission. Further, the perceived problem with three-three tie votes is vastly overstated. From 1980 to 1994, only 36 out of 635 final investigations in antidumping and countervailing duty cases resulted in a three-three tie.

Increasing The Power Of The Chairman Prevents Independent And Collegial Decision-making

A number of changes set out in the Subcommittee's advisory would effectively increase the power of the Commission's Chairman, including: (1) increasing the Chairman's term from two years; (2) changing the budget approval process by giving other Commissioners only the opportunity to approve or

disapprove the Chairman's budget; (3) enhancing the authority of the Chairman in hiring decisions; and (4) providing the Chairman greater authority in other administrative decisions. If enacted, in whole or in part, these changes would increase the politicization of the Commission and would reduce the independence and contributions of the other Commissioners.

The legislative history indicates that, following lengthy deliberations about the appropriate balance of power within the Commission, both the House and Senate intended to bar the Chairman from having disproportionate influence and power:

> The committee recognizes that a strong Chairman could dominate the other Commissioners on substantive issues. For that reason, the committee believes administrative decisions of the Chairman should be subject to disapproval by the full Commission and the chairmanship should continue to rotate among Commissioners. This will insure that no individual and no political party can exercise undue influence over the Commissioners on substantive issues.

S. Rep. No. 122, 95th Cong., 1st Sess. 5 (1977).

> By reserving to the Commission as a whole the three key areas of administrative matters [i.e., hiring of key personnel, administrative decisions, and budget decisions], the Committee is being responsive to the need to maintain a degree of independence for Commissioners to exercise their individual obligation for research, analysis, and judgment fully supported by the staff.

H.R. Rep. No. 217, 95th Cong., 1st Sess. 9-10 (1977).

Senate Finance Committee Chairman Lloyd Bentsen commented in 1991 on the delicate balance achieved in 1977 relating to the role of the Commission's Chairman:

> Congress struggled for years to find a workable administrative structure for the ITC which would not compromise the agency's mission as both an independent source of knowledgeable trade advice to the Congress and the executive branch and as an independent arbiter of trade cases. The solution found in 1977 ensured that no single political party or individual could exercise undue influence over the Commission on substantive issues. . . . Throughout that 2-year debate, we maintained that we should avoid politicizing the agency, undermining its independence, or creating a situation in which one Commissioner or one political party could unduly influence the substantive agenda of the Commission.
>
> The balance that we stuck [sic] in our 1977 legislation was a careful one. We provided that the President appoint a Commissioner as Chair and Vice Chair for a 2-year term. We vested the day-to-day administrative responsibilities in the Chair, subject to disapproval by a majority vote of the Commissioners. We made the Chair responsible

> for initiating budget matters, and provided the chair with the authority to dismiss senior supervisory employees--both responsibilities subject, however, to majority approval of the Commissioners.
>
> As a counterweight, we provided that the chairmanship should rotate between political parties every 2 years, and that the vice chairperson be of a different political party than the chairperson. We stated clearly at the time that the new structure we adopted was intended to strengthen the independence of the Commission--and not permit the Commission to become merely another tool of the executive branch.

137 Cong. Rec. S 17239-17240 (Nov. 20, 1991).

The proposed changes threaten to upset the fundamental balance of power within the Commission. Increasing the term of the Chairman would directly add to the Chairman's influence over substantive decision-making and would thereby undermine the independence and bipartisan nature of the Commission. Granting the Chairman more authority over administrative decisions would necessarily dilute the ability of the other Commissioners to check any abuse of that power. With increased power, the Chairman could diminish the effectiveness of input from other Commissioners and, accordingly, could prevent the implementation of truly independent and bipartisan decisions. Further, removing the ability of the other Commissioners to play a meaningful role in important administrative decisions destroys the incentive for the Chairman to build collegial relationships that promote objective, well-reasoned substantive decisions.

Increasing the power of the Chairman in administrative decisions will likely have a direct impact on the development of substantive decisions. As the 1992 U.S. General Accounting Office ("GAO") Report cited by the Subcommittee states, the distinction between administrative and substantive decisions is not clear: "For example, a decision to cut the travel funds of an investigation could be viewed as either an administrative or substantive decision, or both." U.S. General Accounting Office, International Trade Commission: Authority is Ambiguous, GAO/NSIAD-92-95, at 9 (Feb. 1992). The GAO reiterates that the Chairman's power is limited "to prevent upsetting the balance of power among commissioners in making substantive collegia [sic] decisions." Id. at 10. The Subcommittee proposals would restrict the ability of other Commissioners to check the power of the Chairman and would destroy the delicate balance achieved in 1977 between "achieving administrative efficiency and safeguarding the independence and objectivity of a commission's substantive work." Id. The direct effect of upsetting this balance is that the Chairman is given more power, and as the GAO indicates, ceding additional power to the Chairman without the appropriate checks "might have a profound effect on substantive decision-making." Id. at 37. According to the GAO, the unique statutory structure of the Commission was designed by Congress to prevent a reduction in "the independence of the [Commission] by giving the Chairman and/or the President too much influence."

Thus, the balance of power within the Commission must be preserved in its present form to ensure both that the bipartisan, independent institutional

safeguards are maintained and that the incentive for collegial decision-making is preserved.

OMB Oversight Over The Commission's Budget Would Increase The Influence Of The Executive Branch Over Commission Decisions

The proposal to remove the current exemption from Office of Management and Budget ("OMB") oversight of the Commission's budget by repealing 19 U.S.C. § 2232 would significantly increase the influence of the Executive Branch over the Commission's procedural and substantive decisions. The statutory exemption from OMB oversight was created under the Trade Act of 1974 and prevents the Executive Branch from making changes to the Commission's budget prior to its submission to Congress. In creating the exemption, Congress specifically intended to minimize the ability of the Executive Branch to undermine the independence of the Commission by exercising undue influence over the Commission's budget process: "The Committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of the Congress." S. Rep. No. 1298, 93d Cong., 2d Sess. 118 (1974).

With the ability to change the Commission's budget, the Executive Branch would have the power to dictate the amount of resources that may be appropriated to carry out the quasi-judicial and investigative functions of the Commission. Such an increase in the Executive Branch's influence over the Commission would result in substantive decisions and fact-finding investigations that are more consistent with current Executive Branch policies than with independent assessments based on impartial consideration of the facts of a particular investigation.

The Commission was established as an independent and quasi-judicial agency, in part, to investigate and make findings relating to alleged injury from dumped or subsidized goods. As part of its quasi-judicial function, the Commission holds hearings, accepts testimony, and finds facts, in many ways similar to judicial proceedings. Moreover, Commission decisions often affect entire sectors of the economy. Congress originally intended that the Commission budget be exempt from OMB review to preserve the independence of the Commission's quasi-judicial decisions that may have broad economic effects. The budget of the federal judiciary is also exempt from OMB oversight to remove the potential for political interference by the Executive Branch. The budget of the Federal Reserve System Board of Governors is also exempt from OMB changes to its budget. Because of the substantial effect of Board decisions on the U.S. economy, the exemption prevents undue Executive Branch influence over Board deliberations.

Thus, an exemption from OMB oversight over the Commission's budget is consistent with similar exemptions granted to agencies with similar roles. Accordingly, the original intent of Congress to exempt the Commission's budget from OMB oversight should be upheld and is clearly justified in preserving the independence of the Commission.

Creating The Position Of Executive Director Is Unnecessary Given The Existing Role Of The Chairman's Senior Staff

The proposal to create an executive director to make administrative decisions represents an unnecessary reform given the existing role of the Chairman's senior staff. In the context of existing operations, an executive director may simply duplicate the senior staff functions with the requisite increased costs to the Commission. Although the 1992 GAO Report cited by the Subcommittee suggests that an executive director could be established to handle routine administrative matters, it is unclear why legislation is justified, given the existing authority of the Commission to manage its own internal affairs. See U.S. General Accounting Office, International Trade Commission: Authority is Ambiguous, GAO/NSIAD-92-95, at 39 (Feb. 1992).

An ALJ Would Increase The Cost And Complexity Of The Process And Would Diminish The Role Of The Commission

Finally, the Subcommittee's advisory includes a proposal to reform the hearing and investigation process for antidumping and countervailing duty investigations so that the injury determination is made by an administrative law judge ("ALJ"), subject to review by the Commission. The addition of ALJ fact-finding as part of Title VII procedures would add another procedural level to antidumping and countervailing duty cases and would increase the cost and complexity for petitioners, respondents, and the government. Further, ALJ procedures would limit the active role of the Commission in making independent decisions.

Although the addition of an ALJ was discussed in the ACUS report to supplement Recommendation 91-10, the proposal was not approved as part of Recommendation 91-10, and the views expressed in the supplemental report explicitly did not represent the views of the ACUS. See ACUS Report for Recommendation 91-10; Administrative Conference of the United States, Administrative Procedures Used in Antidumping and Countervailing Duty Cases, Recommendation 91-10 (Dec. 13, 1991). In their supplemental report, Professors Jackson and Davey included ALJ procedures as part of broader reforms that included eliminating review of antidumping and countervailing duty cases by the U.S. Court of International Trade ("CIT"). See ACUS Report for Recommendation 91-10 at 970. Replacing CIT review with ALJ procedures was patterned, in part, on the procedures used in Section 337 cases, where the use of an ALJ is necessary to handle discovery and other aspects of Section 337 formal adjudications. The proposal in the Subcommittee's advisory, however, does not suggest any limitation on CIT review in antidumping and countervailing duty cases.

Moreover, Professors Jackson and Davey concede that the addition of ALJs to the decision-making structure would substantially increase the time and cost of antidumping and countervailing duty procedures. Id. at 964.

Finally, providing for ALJ decision-making with only after-the-fact Commission review would substantially reduce the role of the Commission in rendering decisions. Commissioners would not hear the testimony, would not be

able to assess the credibility of witnesses, would not be able to question witnesses, and would not be able to direct the factual investigation. Providing for an ALJ would diminish the role of the Commission as an independent arbiter of trade cases, would remove the Commissioners' ability to apply their experience and knowledge after reviewing the facts first-hand, and would undermine the credibility of Commission decisions.

Because of the increased costs to all parties of adding ALJs to the process and because the Commission's role as an independent, bipartisan decision-maker would be seriously diminished, ALJ review of injury determinations should not be incorporated into Title VII procedures.

Conclusion

The intent of Congress in the creation and development of the Commission was to preserve the independent decision-making of the Commission through the enactment of numerous institutional safeguards. The removal of any of these safeguards would politicize the role of the Commission and provide an avenue for special interests to influence the Commission's decision-making under U.S. law. The independence of the Commission must be maintained to ensure that all parties, foreign and domestic, are confident in the legitimacy of the Commission's decisions.

THE SOUTHERN TIER CEMENT COMMITTEE

Company/Headquarters	Plant Locations	
Alamo Cement Company San Antonio, TX	San Antonio, TX	
Arizona Portland Cement Co. Glendora, CA	Rillito, AZ	
Ash Grove Cement Company Overland Park, KS	Chanute, KS Durkee, OR Foreman, AR Inkom, ID	Nephi, UT Louisville, NE Clancy, MT Seattle, WA
Blue Circle Marietta, GA	Atlanta, GA Harleyville, SC Sparrows Point, MD	Calera, AL Ravena, NY Tulsa, OK
Calaveras Cement Co. Walnut Creek, CA	Redding, CA Monolith, CA	
California Portland Cement Co. Glendora, CA	Colton, CA	Mojave, CA
Florida Crushed Stone Co. Leesburg, FL	Brooksville, FL	
Florida Rock Industries, Inc. Jacksonville, FL	Gainesville, FL	
Giant Cement Company Harleyville, SC	Harleyville, SC	
Kaiser Cement Corp. Pleasanton, CA	Cupertino, CA	
Lafarge Corporation Reston, VA	Alpena, MI Davenport, IA Fredonia, KS Grand Chain, IL Independence, MO	Paulding, OH Tampa, FL Whitehall, PA
Lehigh Portland Cement Company Allentown, PA	Gary, IN Leeds, AL Mason City, IA Mitchell, IN	Union Bridge, MD Waco, TX York, PA
Lone Star Industries Stamford, CT	Cape Girardeau, MO Greencastle, IN Sweetwater, TX	Oglesby, IL Pryor, OK
Medusa Corporation Cleveland, OH	Charlevoix, MI Clinchfield, GA	Demopolis, AL Wampum, PA
National Cement Co. of Alabama, Inc. Birmingham, AL	Ragland, AL	
National Cement Co. of California, Inc. Encino, CA	Lebec, CA	
North Texas Cement Company Dallas, TX	Midlothian, TX	
Phoenix Cement Company Phoenix, AZ	Clarkdale, AZ	
Riverside Cement Company Diamond Bar, CA	Riverside, CA	Oro Grande, CA
RC Cement Co., Inc. Bethlehem, PA	Stockertown, PA Chattanooga, TN	Festus, MO Independence, KS
RMC Pleasanton, CA	Davenport, CA	
Southdown, Inc. Houston, TX	Louisville, KY Pittsburgh, PA Fairborn, OH Brooksville, FL	Knoxville, TN Lyons, CO Odessa, TX Victorville, CA
Tarmac America, Inc. Medley, FL	Medley, FL	
Texas Industries, Inc. Dallas, TX	New Braunfels, TX Midlothian, TX	
Texas-Lehigh Cement Company Buda, TX	Buda, TX	

STATEMENT OF MICHAEL H. STEIN, DEWEY BALLANTINE

Regarding the United States International Trade Commission
Reorganization Proposals
Submitted to the Committee on Ways and Means
Subcommittee on Trade
March 1, 1996

From 1977 through 1984 I held a number of senior staff positions at the United States International Trade Commission, including Deputy General Counsel, General Counsel and Senior Advisor to the Commission. Since that time I have been in private practice, and have appeared before the Commission on numerous occasions. These comments are based on my extensive experience with the Commission. These are my personal views, and ought not be attributed to my law firm or my clients.

In brief summary, adoption of the ITC reorganization proposals for which comment has been requested would make the Commission subject to control by the executive branch, entirely eliminating the purpose for which it was originally established by the Congress -- assisting the Congress in the discharge of its obligations under Article I of the Constitution to regulate foreign commerce. Adoption would also subject individual Commissioners to unwarranted control by the Chairman. The minor problems identified in the GAO and ACUS reports do not justify the wholesale changes in Commission structure that have been proposed. Oversight of the Commission's investigative and decisionmaking process could prove productive. However, the proposed changes would not be helpful in improving the quality of the Commission's substantive work.

1. Congress has safeguarded the Commission's independence from the Executive Branch, and the independence of individual Commissioners from control by the Chairman.

The Congress has taken extraordinary steps to insure that the Commissioners can carry out their obligations free from executive branch interference. Under current law, no more than three of the six Commissioners can be of the President's political party. The President is limited in his choice of Chairman of the Commission, half the time forced to choose a Chairman not of his party. Commissioners generally may not be reappointed, and so need not curry favor with the President. The President cannot control submission of the Commission's budget. The Commission has authority to represent itself in court.

The Congress has taken equal pains to assure that individual Commissioners can exercise their judgment free from constraint not only by the executive branch but by other Commissioners. Until 1977, the Chairman had no administrative powers, and a majority of the Commission was required for all administrative actions. The 1977 legislation increased the powers of the Chairman but insured that individual Commissioners would retain their independence. In this regard, senior staff are protected from control by the Chairman alone. Their employment may be terminated only with majority approval. Similarly, the Commission's budget may be proposed only if a majority of the Commission approves. The Chairman retains authority to run the Commission's day-by-day activities. A majority is required to overrule administrative actions by the Chairman. Given the fact that generally the Commission is composed of three members of each political party, the Chairman now has more than ample authority to administer the Commission. The Chairmanship rotates every two years.

The purpose of this extraordinary independence is to insure that Commissioners take their decisions as far as possible purely on the basis of the facts and the law, without regard to their

political or foreign relations ramifications. Our trading partners can be assured that action under the trade laws is not taken to further special interest supporters of the President. Industries seeking action against unfair trade practices or seeking import relief can equally be assured that foreign policy concerns will not override their legitimate claims to relief under the trade laws.

2. Whatever administrative problems the Commission has do not warrant the drastic measures proposed.

Attempts by past Chairmen of the Commission to impose their wills on a resisting majority in regard to the Commission's budget and certain senior staff appointments led to a GAO investigation in 1991-92. The GAO report suggested that certain structural changes to the Commission be considered, principally increasing the powers of the Chairman and changing to an odd, rather than even, number of Commissioners. If the changes were to be adopted, the fundamental character of the Commission would change to the point where the Commission would no longer serve the purpose for which it was created.

At the outset, it is worth considering why any change at all should even be proposed. The minor problems documented in the GAO report are not new. They have recurred throughout the Commission's history, and certainly are no worse today than 20 years ago, when I first came to work at the ITC. These minor administrative problems do not appear to have affected the substance of the Commission's work. Reports and decisions were timely issued, and there is no suggestion that the quality of the Commission's work was adversely affected. The GAO report correctly notes (p. 37) that the proposed changes could "have a profound effect on substantive decision-making." Caution in making fundamental changes to the basic structure of an agency that is generally regarded as carrying out its substantive work in an acceptable manner should be the Congress' watchword.

3. The Commission must retain an even number of Commissioners and political balance to insure its independence from executive branch control.

The GAO report notes that most U.S. Commissions and Boards have an odd number of members, and a stronger Chairman than the ITC does. As well, the President is free to appoint Chairmen of these Commissions and Boards without regard to the Chairman's political party. This gives the President working control of these agencies, most of which are regulatory agencies, charged with carrying out programs. It is generally recognized that the President should have an FTC that mirrors his views on antitrust enforcement, or an FCC with similar views on the appropriate amount of competition in the telecommunications sector, for example.

But the entire purpose of the Congress in providing protections to ITC Commissioners is to <u>prevent</u> the President from having that sort of control of the decisions of the ITC. The two other agencies the GAO report notes as having an even number of members are, like the ITC, not regulatory agencies. They are the U.S. Commission on Civil Rights and the Federal Elections Commission, both of which, like the ITC, have unusually strong policy rationales for freedom from Presidential control. Like those two agencies, the sensitive nature of the decisions the ITC makes, and the need that the decisions be, and be seen to be, based purely on the factual record, warrant the limited potential for inefficiency that may result from an even number of

Commissioners and potential override by the Commission majority of administrative actions of the Chairman.

Although not mentioned in the GAO report, those dissatisfied with Congress' decision that tie votes be considered affirmative determinations have sometimes argued in favor of an odd number of Commissioners. Whether or not Congress were to provide for an odd number of Commissioners, a tie vote provision would still be required for those cases where there was a vacancy or recusal. Therefore, the tie vote question is logically distinct from the question of whether to continue to provide for an even number of Commissioners. That is, Congress could consider requiring a majority of Commissioners to vote in the affirmative before relief could be imposed, regardless of the number of Commissioners. This would be a fundamental change in the administration of the import relief law, and not one I would advocate. The point is that dissatisfaction with the tie vote provision ought not be the driving force behind proposals for an odd number of Commissioners.

Reducing the number of Commissioners to four would not be helpful, either. Vacancies occur regularly, and the appointment process can be lengthy. A collegial body should have substantial diversity of views on it. The amount of money saved by reducing the number of Commissioners (less than $1 million in a $40 million per year agency) is too small to justify such a change.

Commission independence from executive branch budget control remains essential if the Commission is to avoid coercion by the executive branch. The current OMB budget oversight exemption serves an important function in maintaining the Commissions independence and should be maintained.

4. The Chairman has sufficient power to administer the ITC efficiently.

The current structure of the ITC leads to inefficiencies only in the unusual case where a Chairman is seeking to act in ways that four of the five remaining Commissioners believe to be inimical to the best interests of the agency. In such circumstances, it is naive to believe that simply giving the Chairman the power to override such objections will lead to a more smoothly-functioning agency. Moreover, why the Congress should wish to make it possible for a Chairman to take actions opposed by so many of his colleagues is far from clear.

Increasing the term of the Chairman from two years would not be productive. The lengthy terms of Commissioners and frequent rotation of the Chairmanship lead to a situation conducive to increased collegiality, as Commissioners anticipating their chairmanships cooperate with current Chairmen who will shortly go back to being simply Commissioners.

Increasing the length of the Chairmanship is likely to lead to the very situation the GAO found -- bickering on some administrative issues caused by entrenched positions of the Chairman and the Commission majority. In fact, it appears that this is precisely what happened, as at the time of the GAO report, the immediate past Chairman had served for three and one-half years, with the administrative situation deteriorating towards the end of that unusually long term. Thus, the experiment of a lengthened Chairmanship has not proved a success.

Providing the Chairman with greater personnel and administrative authority simply moves the conflict areas elsewhere. With respect to personnel, it is imperative that all

of the Commissioners have confidence in the competence and impartiality of the staff. Having staff beholden solely to the Chairman for continued employment is not conducive to the efficient operation of the Commission or, more importantly, the objective analysis necessary for the Commission to render fair and impartial determinations.

5. Administrative law judges would increase expense and undermine reasoned decisionmaking.

If the Commission structure is to be jettisoned, it would be far more efficient simply to move the Commission's investigatory functions to the executive branch -- the Commerce Department or the Office of the United States Trade Representative for example -- and, at that point, consider whether to utilize administrative law judges to conduct the investigations.

Use of administrative law judges in Title VII cases at the Commission would have two unfortunate consequences. It would raise the costs of pursuing or defending investigations very considerably. These costs already are prohibitive, deterring industries from seeking relief and potential respondents from opposing relief.

Second, and more importantly, it would undermine reasoned decisionmaking at the Commission by removing Commissioners from direct contact with the fact-gathering process. If Commissioners did not participate in the hearing, they would have no way of assessing the credibility of witnesses, to take just one example of the mischief adoption of this proposal would cause. In my experience, Commissioners take quite seriously their obligations to familiarize themselves with the investigative record and come to independent conclusions regarding the issues presented. Insertion of an administrative law judge into the process would short-circuit this essential process. The result would likely be Commissioners relying more on their political predilections and less on the record itself when determining whether to affirm or reverse the administrative law judge.

6. The Commission's decisionmaking process is a better candidate for oversight than the minor administrative problems being focused upon in these proposals.

To the extent there are problems at the Commission, they are substantive rather than administrative. Commissioners do not agree on whether injury must be caused by unfair imports, or by the dumping and subsidization itself. Information provided in questionnaire responses tends to be assumed to be correct, most of the time without being verified, even when contradicted by reliable publicly available information. In fact, the Commission's proposed rules eliminate even the possibility that information supplied by importers or purchasers will be subject to verification. Investigations have become amazingly complex, to the point where it is difficult for the Commission to process and consider much of the information it receives. None of these problems would be affected one way or the other by these administrative reform proposals.

Although comment was not requested on this point, there is general agreement that the Commission's procedures could be improved by encouraging more collegial decisionmaking. At the present time, the Commission interprets the Government in the Sunshine Act as prohibiting a quorum of Commissioners from meeting privately for the purpose of discussing investigations. Experience has proved that Commissioners are unwilling to discuss

their tentative views or take issue with each other in robust debate in public. Clarification of the Sunshine Act or exemption of the Commission to permit collegial discussion would be a most helpful step.

7. Conclusion

In summary, these proposals are a cure for which there is no disease. The provisions that insure Commission independence from the executive branch remain as necessary today as when the Commission was created in 1916. Tampering with them would destroy the very rationale for the ITC's existence. Nor has the case been made that it is essential for a Chairman to be able to have his way over the opposition of his colleagues. To the contrary, providing the Chairman increased powers and a longer term will diminish collegiality. Proponents of these changes have not claimed that the Commission's fact-gathering procedures are currently so defective that drastic change is required. If it ain't broke don't fix it.

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March 1, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Re: *TR-16: Written Comments on International Trade Commission Reforms*

Dear Mr. Moseley:

The Subcommittee on Trade of the Committee on Ways and Means has recently requested written comments for the record concerning possible structural and procedural reforms to the U.S. International Trade Commission (ITC). Stewart and Stewart is a law firm that has appeared in many proceedings at the International Trade Commission and its predecessor, the Tariff Commission, from the 1950s to the present time. Almost all of our appearances at the Commission have been on behalf of domestic clients. I submit these views in my individual capacity. The views do not necessarily reflect the views of our firm's clients or of other members of the firm. I submit the following views and would appreciate their inclusion in the official hearing record.

The Subcommittee has properly framed the issue for discussion by seeking views not only on various proposals but also on the basic issue of whether reform is needed at all. It not clear from the reports cited in the Subcommittee's notice or from my personal experience with the Commission over the years that there is a significant need for reform. At best, reforms should be limited. Moreover, with regard to several of the proposed structural and procedural "reforms" listed in the January 31 advisory, I believe that such changes are at best unnecessary and at worst harmful to the ITC's purpose and its mission.

The advisory requesting written comments refers to two prior investigations of the International Trade Commission, one by the U.S. General Accounting Office and one by the Administrative Conference of the United States. General Accounting Office, International Trade Commission: Authority is Ambiguous, GAO/NSAID-92-45 (February 1992) [hereinafter GAO Report]; Administrative Conference of the United States, Administrative Procedures Used in Antidumping and Countervailing Duty Cases, Recommendation 91-10 (December 13, 1991) [hereinafter ACUS Report]. The following comments will focus on several of the reform proposals listed in the Committee advisory. I take no position on any reform proposals not specifically discussed below.

As a preliminary matter, it may be useful to distinguish between the recommendations made in the GAO report and those made in the ACUS report. The GAO study focused primarily on the need for procedural reforms which would clarify the authority of the Commission and its Chairman. Such clarification may be appropriate and worthy of the Committee's consideration, although I express several concerns as noted in section 5, infra. Because these items pertain mainly to the internal operation of the Commission, it would be appropriate for the Subcommittee to canvass sitting and former

Commissioners and senior staff to obtain a full set of views from those most directly involved and affected by the suggested internal reforms.

On the other hand, the 1991 Administrative Conference recommendation focused largely on methods of addressing a perceived lack of impartiality in the ITC's hearing and investigation process. See, e.g., ACUS Report, at 2 & 5 (referring to the impartiality of the process). Neither I nor most members of the bar who appear before the Commission agreed in 1991 or now that there is a problem with impartiality. Changes which flow from such a premise should be rejected as unnecessary.

Finally, not all issues on which the Committee seeks comment were in fact supported by one or the other investigation. Specifically, neither investigation specifically recommended a reduction in the number of Commissioners, the use of an odd versus an even number of Commissioners, or the use of administrative law judges in conducting injury investigations. The ALJ issue was debated extensively before the ACUS; the other issues have been explored in the past. None of these proposals merit adoption.

1. Changing Commission from Even to Odd Number of Commissioners Should Not Be Considered

Congress established the United States Tariff Commission in 1916, and renamed it the International Trade Commission in 1975. 19 U.S.C. § 2231(a), Pub.L. 93-618, § 171, Jan. 3, 1975, 88 Stat. 2009. The organization of the Commission is mandated in 19 U.S.C. § 1330. This section discusses the number of commissioners, their terms of office, the selection of chairman and vice chairman, and the effect of a divided vote in certain cases. Id.

The Tariff Commission was originally created to provide the President with expert findings as a premise for flexible tariff adjustments as well as to investigate and report to Congress concerning the impact of the Underwood tariff act and the customs laws generally upon Federal revenues, domestic industries, and U.S. labor. Congress deliberately and intentionally chose to include an even number of commissioners on the ITC, no more than three of which could be of the same political party, as a means of making the Commission a non-partisan, independent entity. The House Ways and Means Committee originally envisioned the body as a "nonpartisan tariff commission to make impartial and thorough study" of various trade issues. H.R. Rep. No. 922, 64th Cong., 1st Sess. 9 (1916) (committee report). The Ways and Means Committee report endorsed the view that legislation within the field of international trade should be based upon "clearly established facts, rather than in accordance with trade demands of selfish interests ...." Id.

The Commission thus began as an even-numbered body in order to preserve its nonpartisan and independent character. The present ITC was created in 1974 by renaming and strengthening the U.S. Tariff Commission, but was intended to continue in this tradition. Trade Act of 1974, Pub. L. 93-618, § 171. In its opening statement of the purposes of the Trade Act of 1974, the Senate Finance Committee stressed the need "[t]o strengthen the independence of the United States Tariff Commission." Trade Reform Act of 1974, S. Rep. 93-1298, 93rd Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7187. The Committee expanded on this goal further:

> The Committee strongly believes in the need to prevent the [U.S. Tariff] Commission from being transformed into a partisan body or an agency dominated by the Executive Branch. For this reason, many of the amendments offered in this bill with regard to the Commission are directed at strengthening its independence.

Id. at 115, reprinted in 1974 U.S.C.C.A.N. 7186, 7259-60.

a. Necessity of Maintaining the Commission's Independent and Non-Partisan Nature

The existence of an even number of commissioners accomplishes several of Congress' objectives. First, it provides for political balance, by allowing no more than three commissioners from each political party, as clearly specified in section 1330(a).

While it is true that there have been periods in which vacancies have remained unfilled for extended periods of time, the requirement of balance and equality in number of members from the two major parties creates and maintains an appearance of political objectivity to participants, whether domestic or foreign. Such political objectivity would be difficult to maintain if there was a statutory structure for an odd number of Commissioners. While Commission terms of nine years suggest the possibility of continuity, in fact a significant number of Commission seats are filled for part terms only. Thus, in such situations, the Commission's balance would swing between a majority of Republicans and a majority of Democrats, depending in most cases on the current Administration. In short, any change to an odd number of Commissioners would likely be viewed as politicizing the appointment of Commissioners, and, in turn, the appearance of the actions of the Commission itself.

Notably, the 1974 reform proposal originally would have expanded the number of ITC Commissioners from six to seven. S. Rep. No. 1298, 1974 U.S.C.C.A.N. at 7260. The Senate Finance Committee, while recommending this amendment, cautioned that it "should not be read as in any way encouraging or condoning the politicization of the Commission." Id.

In conference, the House Ways and Means Committee rejected this proposal, which would have created an odd-numbered Commission. Conf. Rep. No. 1644, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7367, 7378. The conference preserved the independent and non-partisan nature of the ITC, and instead created tie-breaking provisions for the Commission to address the concern about tie votes. 19 U.S.C. § 1677 (11).

In 1977, Congress again considered various measures to improve operations at the ITC. As noted in the 1977 Ways and Means Committee report, however, the independent and non-partisan nature of the Commission was not to be altered. The Committee underscored "the role of the Commission as an independent agency...." H.R. Rep. No. 217, 95th Cong., 1st Sess 3 (1977).

In short, Congress has rightfully been concerned since the creation of the ITC (and its predecessor) about any changes that could have politicizing effects on the Commission. These concerns remain true today: it is important to maintain the appearance and reality of political neutrality in the ITC's work.

b. Difficulty of Obtaining Relief Under the Current Commission Structure

Second, domestic industries that petition for relief from injurious imports (whether fairly or unfairly traded) already have an extraordinarily difficult task of obtaining affirmative determinations from the Commission. Since 1979, more than half of all antidumping or countervailing duty cases have been rejected by the Commission. Cf., The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, Inv. No. 332-344, USITC Pub. 2900 (June 1995) at x (affirmative determinations on only 33 percent of all AD/CVD investigations from 1980 to 1993). Since 1974, roughly 80 percent of all escape clause cases have resulted in negative determinations. If Congress wishes to review the Commission's structure, it perhaps should examine why such a large percentage of cases are determined against domestic industries (i.e., whether these determinations are governed by statutory terms or the constructions provided by various Commissioners).

While relatively few cases are decided by tie votes, some are. Under the law, ties are viewed as affirmative determinations in antidumping and countervailing duty cases and permit the President to elect to provide relief in an escape clause action. See, e.g., 19 U.S.C. § 1677(11). Change from an even to an odd number of Commissioners by definition will further weaken the ability of domestic industries to obtain relief. With a full Commission of five, three affirmative votes would still be needed, but there would be one less Commissioner to consider the matter; for foreign producers seeking to defeat relief, instead of needing four votes as at present, three would suffice to defeat relief. Given the high rate of negative determinations that has existed throughout the last fifteen years, it is difficult to imagine a justification that would further reduce the likelihood of success for injured domestic industries.

2. Reduction in the Number of Commissioners Is Unwarranted

While a reduction of Commissioners to a lower even number of Commissioners does not raise the concerns identified above for changes from an even to an odd number of Commissioners, there are reasons to believe such a change would be unwise: vacancies, recusals and need for diversity of backgrounds on the Commission.

In 1974, the Senate Finance Committee specifically counseled in favor of

> a number of Commissioners which is not so small as to unduly limit the expertise and consideration brought to bear on the subject; in the past, sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission.

S. Rep. 1298, supra, at 115. As noted earlier, the original Senate bill called for an increase in the number of Commissioners due to these concerns. Id. at 115-16.

Any reduction in the number of Commissioners raises potential problems during periods when one or more Commission posts are vacant, or when a Commissioner must recuse himself or herself. In the last twenty years, there have been cases where because of vacancies, recusals, or both, the number of

Commissioners voting on a case has been as few as two. Reducing the number of Commissioners from six to four or from six to two would significantly increase the risk that a case might be decided by a single Commissioner or, in some situations, might not be capable of being decided at all.

The activities of the Commission, the Commerce Department and the Office of the U.S. Trade Representative pay for themselves many times over in terms of increased federal revenue. Indeed, the collection of antidumping and countervailing duties alone, as reflected in Customs/Commerce annual reports, more than covers the budgets of the ITC, ITA (Commerce) and USTR. Therefore, it is unclear what advantage accrues to the federal government from a reduction in Commissioners or the Commission's overall budget. If streamlining the process is the objective, a reduction in the number of Commissioners may in fact be counterproductive. I would note that in the recent past both the International Trade Commission and the Commerce Department's ITA have worked with the various bar associations to determine mutually agreeable ways to streamline the administrative protective order process. If streamlining of other procedures/processes is desirable, the Subcommittee may simply wish to encourage further cooperation between the agencies and the bar association for finding "neutral" changes acceptable to both petitioner and respondent interests.

3. Administrative Law Judges Should Not Be Used To Make Injury Determinations

The use of administrative law judges in Title VII or section 201 cases at the ITC for injury investigations is an unnecessary addition of cost and complexity to proceedings which are already too costly for many parties.

The proposal to use administrative law judges in injury cases was considered extensively by the Administrative Conference of the United States in 1991 and was rejected, due to the opposition of many practitioners representing domestic and foreign clients. For an ALJ system to work properly, discovery rights would be needed, as are currently afforded in section 337 cases. Such rights are not presently part of Title VII or section 201 cases. Moreover, ALJ decisions would require Commission review, adding a layer of decision making and adding costs for the parties who would be required to argue issues of importance at another level.

The use of ALJs would clearly lengthen injury proceedings. Those who have promoted an ALJ approach seek to have extended hearings (proceedings ranging from one day to a week or more). See ACUS Report, supra, at 41 (estimating that ALJs would add one to two months to the length of an investigation). Importantly, any overall delay in these proceedings could make the U.S. system inconsistent with the GATT requirement that investigations normally be completed within one year. Such a result, even if permissible under the WTO, would be unacceptable to domestic parties.

Delays would significantly exacerbate the problems faced by many industries in being able to afford the cost of the proceedings. The introduction of administrative law judges into the process also would raise questions of procedural fairness. Domestic parties would presumably face much greater difficulty in obtaining full discovery of their foreign opponents (who control most of the information relevant to the issue of threat of injury, as well as all information about price rebates and other issues affecting price comparisons). Again, with the large number of third parties that would be involved (importers, purchasers, distributors), the need to

engage in discovery of these parties would make actions largely unaffordable for many industries.

The use of ALJs in making injury determinations also is inconsistent with many of the other Committee reform proposals, which seek to give greater authority to the Commission and the Chairman. The use of ALJs would distance the Commissioners themselves from the facts and the witnesses, and limit the amount of information received by the Commissioners and their staffs. Commissioners would lose the opportunity to question witnesses and to form their own opinion about the veracity and reliability of the claims made. In short, the Commission's authority and its stature would suffer if it was stripped of its role in making injury determinations.

Finally, the addition of ALJs, along with attendant briefings and hearings, would surely increase the operating costs of the Commission. Given the significant budget cuts to the ITC's 1996 budget, it is evident that now is a particularly inopportune time for "reforms" which would merely add to the administrative and procedural burden of the Commission.

For all of these reasons, the use of ALJs for injury investigations appears to be both costly and unnecessary. However, there are many things that can be done to improve the Commission process that do not significantly increase the cost of the proceeding to the parties. See section 6, infra.

4. Repeal of 19 U.S.C. § 2232 is Unwarranted

As was noted by the Senate Finance Committee in 1974:

> The Committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference or influence by the Executive Branch is to place its budget directly under the control of the Congress. Consequently, section 175 of the bill would more specifically identify the Commission as an agency independent from the Executive departments, would provide that the budget of the Commission shall not be subject to revision by the President under the Budget and Accounting Act, 1921, but rather shall be included by the President in the Budget without revision.

S. Rep. No. 93-1298, 93d Cong., 2d Sess. at 118 (1974).

Unless Congress intends to change the independence of the Commission, there is simply no justification for the modification suggested in the notice.

5. Changes in the Role and Authority of the ITC Chairman

Several of the GAO's recommended administrative changes deserve the Subcommittee's careful attention. At the same time, the subcommittee must consider these potential changes in light of Congress' underlying goal: to strengthen the Commission while avoiding its politicization. As the GAO has noted, there may be sound efficiency rationales for giving the Chair greater personnel authority and authority over other administrative decisions. However, these efficiency rationales should be secondary to Congress' main objective: a nonpartisan and independent Chair and Commission. These comments are not intended to call into question the qualifications or competency of the sitting or prior chairpersons, all of whom have striven to carry out the role of the chair in an honorable and creditworthy manner.

With regard to the Chair's term of office, extending the chairmanship from two to four years would reduce the ability of future Commissioners to evaluate different styles of leadership, and could result in members serving under as few as one chairperson. Such results are potentially unhelpful to the smooth functioning of the Commission through transition periods and could result in a reduction of perceived independence that flows from regular rotation of the chair position.

Notably, the House Ways and Means Committee in 1977 was careful to limit the Chairman's authority, expressing concerns about the independence of individual Commissioners. See H.R. Rep. No. 217, supra, at 10. The policy of checks and balances in the present system, while perhaps unwieldy at times, is intended to preserve the nonpartisan and independent nature of the ITC. The Committee should therefore bear these concerns foremost in mind, and consult extensively with present and past Commissioners, Chairs, and staff, before enacting any well-intentioned changes.

6. Changes Not Identified By the Subcommittee

Stewart and Stewart recommends for the Subcommittee's consideration the following proposals, which were not listed in the January 31 advisory.

a. Clarification of Sunshine Act Exemption 10

In their report to ACUS, Professors Jackson and Davey noted that the Commissioners do not meet as a body to review antidumping and countervailing duty cases in private and to share views and opinions. This is true of other matters on which the Commission is required to take a position. Unlike a court of appeals or the Supreme Court, Commissioners do not discuss cases together before voting. While recent experience has been somewhat better, the Commission's record of multiple decisions and different constructions of the same statutory language has created difficulties for participants. One consequence of this procedure is that Commission opinions tend to become a litany of facts, followed by an ultimate conclusion. There is often no discussion of the critical issues that made the Commission decide one way or another and no real indication to the parties of the basis for a decision. Nor do Commissioners even share their written opinions, so that individual Commissioners might attempt to sway the opinion of their colleagues. Instead, the views of individual Commissioners are unknown until the vote and are thereafter set forth in footnotes to the opinion or in separate opinions.

The reason that the Commission does not meet in private to discuss the pros and cons of a given case is the concern that such meetings would be prohibited by the Sunshine Act. 5 U.S.C. § 552b. Some commentators have disputed this view claiming that pursuant to Exemption 10 of the Sunshine Act, 5 U.S.C. § 552b(c)(10), the ITC could have closed meetings with respect to "disposition by the agency of a particular case of formal agency adjudication ... involving a determination on the record after opportunity for a hearing." James T. O'Reilly & Gracia M. Berg, "Stealth Caused By Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission," 36 Harvard Int'l L. J. 425-464 (Spring 1995). Whether in fact permitted or prohibited, the current Commission practice is not to meet to discuss matters before the vote. Closed sessions would be likely to lead to more well-reasoned decisions, greater predictability, and public understanding of the basis for ITC decisions. Indeed, in a 1992 letter to the Section of Administrative Law and Regulatory Practice, American Bar Association, five Commissioners endorsed the view that

"closed deliberations by the Commission would result in more consistent, unified and fully-reasoned opinions." Letter from then Chairman Don E. Newquist, then Vice Chairman Peter S. Watson, and Commissioners Anne E. Brunsdale, Carol T. Crawford, and Janet A. Nuzum to Mr. Thomas Susman, Chair, Section of Administrative Law and Regulatory Practice, American Bar Association (August 7, 1992).

To the extent, therefore, that Exemption 10 of the Sunshine Act does not presently permit closed sessions by the ITC to deliberate concerning AD/CVD, Section 201 and other matters, the operations of the Commission could be improved by amending the law to expressly provide that ITC deliberations in such cases may be closed to the public.

b. Coordination Between the Commission and the Commerce Department

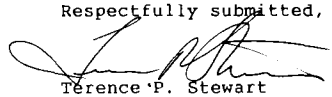
Domestic parties are often very dissatisfied with information supplied by foreign producers, particularly with regard to the threat criteria. The Commission has historically refused to verify or seriously challenge information submitted on threat by foreign producers. Coordination between the Commerce Department and the Commission could permit relevant information on the foreign producers to be verified by Commerce at the time that it conducts its verification of foreign producers for the dumping portion of the case.

c. Oversight of the Administration of U.S. law

There is a need for regular oversight of the administration of U.S. law. Because of the broad discretion that is provided to the Commission in the evaluation of individual cases, judicial review has not generally resulted in a more predictable system of administration from the Commission. There have been many cases where seemingly identical fact patterns have resulted in different findings by the Commission. Moreover, statistically, the Commission has rejected substantially more than 50% of all cases brought before it. More consistently applied and better understood standards should permit a much higher affirmance rate. Neither domestic industries suffering harm nor foreign producers who become involved in cases have an interest in cases being filed which are not likely to be successful. Despite a number of statutory changes over the years to the definition of injury, the criteria for injury and threat, modifications to cumulation and now captive consumption, the law on injury remains largely unpredictable in application. Congressional oversight might significantly improve predictability.

Thank you for the opportunity to submit these views.

Respectfully submitted,



Terence P. Stewart
Managing Partner

TIMKEN

WORLDWIDE LEADER IN BEARINGS AND STEEL

March 1, 1996

Phillip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Moseley:

Re: Written Comments on Proposed International Trade Commission Reforms

The following comments are submitted on behalf of The Timken Company, a United States and multinational producer of tapered roller bearings and specialty steel, with headquarters in Canton, Ohio. They are being submitted in response to the Committee's request for written comments on proposed International Trade Commission reforms.

On behalf of the domestic tapered roller bearing industry, The Timken Company has sought relief from unfairly-traded imports under the antidumping (AD) laws for over a quarter of a century. In support of its efforts, Timken has appeared before the U.S. International Trade Commission (ITC) on a number of occasions. As a participant who has sought relief from unfair trade practices, The Timken Company is concerned about some of the suggested changes which might adversely affect the perceived objectivity of Commission proceedings and increase the costs of private participants.

Many of the reform proposals the Committee seeks comments on have to do with internal management of the Commission. On these, The Timken Company takes no position. Some of the proposals, while they are arguably procedural in nature, will have the substantive effects of making trade relief harder and more expensive to obtain. It is these that concern Timken: (1) proposals for change in the number of Commissioners and (2) the proposal to interpose proceedings before an administrative law judge to determine injury in trade cases.

In Timken's experience, the hurdles to meaningful trade relief have already been set very high. Indeed, since 1979, more than half of all countervailing and antidumping duty cases have been rejected by the Commission. Since 1974, approximately 80% of escape clause cases have resulted in negative determinations. As any domestic industry will not go to the effort or the major expenses of a trade case without firm knowledge of the existence of dumping or subsidization, it is the injury determination by the Commission that provides the element of uncertainty for an industry that would like to avail itself of a trade remedy. Rather than making relief harder and more expensive to obtain, the Congress should consider whether there need to be changes in the statute or in the constructions put on the statute by Commissioners.

1. The Congress Should Not Reduce the Opportunities for Relief.

One of the possible reforms proposed to the Committee is the change from an even number of Commissioners to an odd number. This proposed change would affect the substance of the Commission's decisions. A change to either five or seven Commissioners would decrease the chances of an affirmative vote for domestic industries, such as Timken, which may be harmed by unfairly-traded imports. At present, three affirmative votes (i.e., a "tie" in the votes of six Commissioners) constitute an affirmative vote of the Commission. If the number of Commissioners is dropped to five, three votes will still be necessary but there will be one less Commissioner available to vote in the affirmative. Similarly, if the number is increased to seven, the domestic industry will always need to win an additional vote for an affirmative determination.

The Committee has also identified a proposal to reduce the number of Commissioners by an even number. Such a reduction would harm the ability of the Commission to perform its assigned tasks. As noted in 1977 when there was a proposal to increase the number of Commissioners to seven, there have been periods of time when the number of Commissioners participating in the Commission's business has been significantly reduced because of sickness, recusals, and/or periods where there have been vacancies due to the resignation of one Commissioner and delay in the appointment of another. See S. Rep. No. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. at 7260.

There have been cases in the last twenty years where, because of such reductions, the number of Commissioners voting on a case has been as low as two. A reduction in force from six to four would significantly increase the frequency of such votes. In 1974, the Senate Finance Committee specifically recommended:

> a number of Commissioners which is not so small as to unduly limit the expertise and consideration brought to bear on the subject; in the past, sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission.

S. Rep. 1298, 1974 U.S.C.C.A.N. at 7260.

It is important to note that the revenues derived from the imposition of antidumping and countervailing duties are more than sufficient to pay the total costs of the ITC, the International Trade Administration in the Department of Commerce, and the Office of the U.S. Trade Representative. Given the likely reduction in affirmative determinations and consequent reduction in the imposition of remedial duties, a change in the number of Commissioners would not make practical sense.

2. The Use of Administrative Law Judges Would Significantly Increase the Costs of and Delay Relief Under U.S. Trade Laws.

Another reform being considered by the Committee is altering the hearing and investigation process so that the initial injury determination for trade cases is made by an administrative law judge subject to review by the Commission. In its 1991 Recommendations and Reports, the Administrative Conference of the United States (ACUS) identified two concerns as foremost among trade law practitioners. (1) reduction in the time and expense of AD and CVD proceedings and (2) improvement in the decision making process. ACUS Recommendation 91-10. These two concerns are shared by The Timken Company.

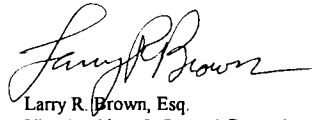
The addition of a new layer of review would necessarily increase costs. By their nature, proceedings before an ALJ are more adversarial than the present system of briefing and a hearing before the Commission. Discovery rights, such as those employed for section 337 cases, are necessary for an ALJ system to work properly. Such rights are not presently provided for in AD, CVD, or escape clause proceedings.

Moreover, ALJ proceedings would take longer (with resulting cost increases for participants) than the present system. In many trade cases, numerous domestic and foreign participants submit briefs and participate at hearings which usually take less than a day. In an ALJ proceeding, each party that presently appears before the Commission would likely wish to appear so that the proceedings may extend for weeks. The addition of discovery periods would also tend to increase the time necessary for an ALJ determination. This would impose greater burdens on domestic parties which are already suffering financially because of unfair trade practices.

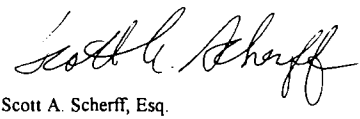
In connection with ACUS' review of ITC proceedings, Professors Jackson and Davey prepared a study which advocated the use of ALJs for trade cases. This recommendation was rejected in ACUS' final recommendation. However, the professors stated that "installation of ALJs would clearly increase the cost of processing these cases and there would be no decrease in current spending if the staffs play the role that we envision . . . " J. Jackson and W. Davey, "Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases," at 42. They also predicted that the use of ALJs would result in hearings lasting from three days up to three weeks and would add one to two months to the overall time needed to reach a final determination. Id. at 41.

Despite the professors' recommendation, the Administrative Conference ultimately decided to reject the proposal to add ALJs. The addition of another procedural layer of even greater complexity and cost to a process that already imposes great burdens on an industry seeking relief would reduce even further the number of companies that would be able to seek relief. This Committee should also reject this proposal.

Sincerely



Larry R. Brown, Esq.
Vice President & General Counsel
The Timken Company
Law Admin/GNE 14



Scott A. Scherff, Esq.
Director - Legal Services &
Assistant Secretary
The Timken Company
Law Admin/GNE-01

TORRINGTON
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March 1, 1996

Philip D. Moseley
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Moseley:

Re: Structural and Procedural Reforms to the International Trade Commission

The following comments are submitted on behalf of The Torrington Company, a subsidiary of Ingersoll-Rand Company, with its headquarters in Torrington, Connecticut. Torrington is a United States and multinational manufacturer of antifriction bearings. On behalf of the U.S. antifriction bearing industry, Torrington has for many years sought relief from unfair import competition under the antidumping (AD) and countervailing duty (CVD) laws. In these efforts, Torrington has frequently appeared before the U.S. International Trade Commission (ITC) and participated in proceedings of that independent commission. With appreciation to the Committee for this opportunity, Torrington herein comments on various proposed structural and procedural reforms to the ITC.

At the outset, it is important to consider the function and purpose of the ITC, as established by the Congress. The predecessor Tariff Commission was created in 1916 to investigate and report to the Congress concerning the impact of the Underwood tariff act and the customs laws generally upon Federal revenues, domestic industries, and U.S. labor. Revenue Act of 1916, §702, 1915-17 Stat. 756, ch. 463. For this purpose, Congress created an even-numbered Commission, consisting of six commissioners, so that the findings of the Commission would be "nonpartisan" and "impartial." H.R. Rep. No. 922, 64th Cong., 1st Sess. 9 (1916). The Ways and Means Committee report endorsed the view that legislation within the field of international trade should be based upon "clearly established facts, rather than in accordance with trade demands of selfish interests ...." Id.

The Commission thus began as an even-numbered body, as is the Federal Election Commission, in order to preserve its nonpartisan and independent character. The present-day ITC was created in 1974, by re-naming and strengthening the United States Tariff Commission, but was intended to continue in this tradition. Trade Act of 1974, Pub. L. 93-618, § 171. The Senate Finance Committee, at the creation of the ITC, well expressed its intended independence from the Executive Branch, its nonpartisan nature, and its role in providing unbiased information to the Congress, as well as the Executive, to inform the trade policy decisions of the United States:

> The Tariff Commission, which was established in 1916, is a permanent independent, nonpartisan agency whose principal function is to provide technical and fact-finding assistance to the Congress and the President upon the basis of which trade policies may be

> determined. The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch. For this reason, many of the amendments offered in this bill with regard to the Commission are directed at strengthening its independence.

S. Rep. No. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7186, 7259-60.

Article I, section 8 of the Constitution bestows on the Congress the authority to "lay and collect ... duties" and to "regulate Commerce with Foreign nations ...." That the ITC is an even-numbered and independent body, reflects the position of the Commission relative to the Congress and the Executive Branch. In principle, the Congress should resist any changes to the structure and operations of the Commission that would tend to increase the power of the Executive Branch to influence Commission decisions and that would erode the constitutional authority of the Congress. For this reason, among others, the Congress should not provide for an odd number of Commissioners, should not subject the Commission to OMB review, and should not increase the authority of the Chairman where that would increase indirectly the power of the President. In the resolution of AD and CVD actions, both domestic industries and import interests should be able to rely on the Commission to render nonpartisan determinations, grounded in independent judgment.

1. An Even Numbered Commission

As just reviewed, the history of the Commission reflects the important reasons for its even-numbered composition, the requirement that not more than three Commissioners be of the same political party, and the requirement that the Chairman and Vice-chairman be of different party affiliation. These features of the ITC's structure give the institution its independent character. Under the present statutory scheme, there are six Commissioners with staggered, nine-year terms. Given vacancies, early retirement, and the need to fill some Commissioner positions earlier than the full nine-year period, the President would ordinarily appoint at least two and frequently more than two Commissioners during his tenure. Hence, an odd-numbered Commission would inevitably reflect the President's political party, and the independence of the ITC would be jeopardized.

With an even-numbered Commission, parties participating in AD/CVD or §201 suits before the Commission can expect that the merits of the action, and not the political party of the President, will determine the outcome. Notably, it was proposed in 1974 to expand the number of ITC Commissioners from six to seven, in order to

> secure consideration of the important matters which come before the Commission by a number of Commissioners which is not so small as to unduly limit the expertise and consideration brought to bear on the subject; in the past, sickness, vacancies, and other problems have sometimes resulted in two or more Commissioners not participating in the business of the Commission.

S. Rep. No. 1298, 1974 U.S.C.C.A.N. at 7260. Although advocating an odd number of Commissioners, however, the Senate Finance Committee cautioned "that this necessary and practical amendment not be read as in any way encouraging or condoning the politicization of the Commission. The Committee emphasizes that the Commission, as indeed the staff also, must be selected on the basis of merit." Id.

In conference, however, this proposal was rejected by the House Ways and Means Committee, as it would have created an odd-numbered Commission. Conf. Rep. No. 1644, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7367, 7378. The independence and non-partisan nature of the ITC were preserved, notwithstanding that an even-numbered Commission would inevitably result in tie votes. To address that concern, the Congress specifically created a tie-breaker provision. 19 U.S.C. § 1677(11). Given "sickness, vacancies, and other problems," an even-numbered Commission would likewise require a tie-breaker provision. More important, the even number of Commissioners protects the political balance and independence from the Executive office.

In 1977, the Congress considered the ITC's budget and certain amendments to improve operations. As noted in the 1977 Ways and Means Committee report, however, the independent, non-partisan nature of the Commission was to be preserved, notwithstanding that an even-numbered Commission might have difficultly resolving administrative matters. The Committee on Ways and Means underscored "the role of the Commission as an independent agency advising both the Congress and the Executive on trade and tariff matters and with a semijudicial role of decisionmaking under the various statutes affecting U.S. commerce." H.R. Rep. No. 217, 95th Cong., 1st Sess. 3 (1977).

Torrington strongly urges the Committee on Ways and Means to protect the independent and nonpartisan nature of the Commission. Although we are mindful of the need for austerity in government, past experience suggests that there is a need for the existing number of Commissioners and that the cost savings in reducing the number of Commissioners are not large. If the size of the present ITC is to be reduced, however, the number of Commissioners and the political affiliation requirements should continue to be evenly distributed.

As a petitioner for relief from dumping and foreign subsidies before the Commission, Torrington has obtained mixed results. The Congress should take account of the fact that, overall, even with an even numbered Commission and with the existing tie-breaker rules, the ITC has voted against relief to domestic industries nearly 80% of the Escape Clause (§201) actions brought before it and over one-half of the antidumping and CVD investigations. To the extent that an odd-numbered ITC, perhaps led by a strengthened Chairman, would reduce the instances in which relief is granted, the Congress should resist such a change in principle. In particular, any perceived need to improve administrative decisionmaking and, hence, efficiency, should not come at the sacrifice of fairness inherent in an

independent, nonpartisan Commission.[1]

Finally, the United States serves to a significant extent as an example for our trading partners. In part, Canada and Mexico insisted upon binational panels to review AD and CVD determinations because of their belief that U.S. decisions were politically motivated. Under the GATT 1994 and WTO, many countries now have or will adopt antidumping and countervailing duty codes and will apply these disciplines to our exports. The United States should strive, by its example, to encourage all of our trading partners to resolve AD and CVD cases with independent and nonpartisan decisionmakers. The United States should provide a model that will best serve our interests as an exporting nation, as well as our interests in fair determinations on behalf of domestic interests.

2. Independence from OMB Oversight

For the same reasons that the ITC is even-numbered and does not have more than three members from a single political party, so too, it should not be subject to oversight by the Executive Branch with regard to its budget. Again, the 1974 Senate Finance Committee report was clear in emphasizing the need for "strict independence" from Executive Branch influence. 1974 U.S.C.C.A.N. at 7276. Not only did the Congress insulate the ITC budget from Presidential control, but it permitted the ITC to represent itself before Federal Courts so that the Commission would not have to rely upon the Department of Justice. Id. To preserve Congress' own priority under the Constitution, ITC independence should not be removed.

3. Use of Administrative Law Judges

The ACUS recommendation cited in the Subcommittee's invitation to comment identified two foremost concerns with ITC proceedings: (1) reducing costs and (2) improving the decisionmaking process. ACUS Recomm. 91-10. Use of an administrative law judge, subject to review by the Commission, would not accomplish either objective. First, an additional layer of review would increase costs. Second, by removing the Commissioners from the direct questioning of witnesses, an ALJ process would hardly improve the decisionmaking process (at least to the extent that it is the Commissioners who are ultimately to be the decision makers). Significantly, although ACUS considered the use of ALJ's at length, ACUS' final recommendation did not include such advice.

Antidumping and countervailing duty cases are already tremendously expensive for the parties. Particularly where a domestic industry is injured by unfair foreign competition, relief under the law is hollow if the entry barriers to pursue an action are prohibitive. As the Congress recently considered the

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[1]Professors Jackson and Davey, in their report to ACUS, observed that "[t]he hallmark of the U.S. AD/CVD system is its overall fairness.... We would hesitate to give up the fairness associated with the U.S. system solely for minor efficiency gains." J. Jackson and W. Davey, "Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases," 47 (report to ACUS, Nov. 1991).

various amendments to the trade statutes brought on by the Uruguay Round, it was undoubtedly aware of the real concerns of parties, both domestic and foreign, with the costs of these proceedings.

Moreover, addition of an administrative law judge, and the attendant briefings and hearings, would surely increase the ITC's operating costs. In the ACUS study, for example, the two proponents of ALJ's, Professors Jackson and Davey, found that "installation of ALJs would clearly increase the cost of processing these cases and there would be no decrease in current spending if the staffs play the role that we envision ...." J. Jackson and W. Davey, "Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases," at 42. Professors Jackson and Davey predicted that the use of ALJs would allow for hearings lasting from three or four days up to three weeks, and would add 1 to 2 months to the overall time needed for a final determination. Id. at 41.

The reason cited for recommending an ALJ was that participants in ITC proceedings believed the ITC hearing process was deficient. The purpose of inserting an ALJ into the process was to isolate the fact finding and decisionmaking from the political process, and to allow the parties more fully to present facts. It should be noted that subsequent to the ACUS report, the ITC has implemented certain changes to its hearing procedures, including the use of in camera proceedings to review confidential information, the use of 5 minute opening statements, and a change to the method of computing each party's time limits in order to encourage cross examination. Fundamentally, however, inserting an ALJ into the process would distance the Commissioners themselves from the facts and the witnesses. With an ALJ process, Commissioners would lose the opportunity to question witnesses and to form their own opinion about the veracity and reliability of the claims made. ALJs thus would not promote greater involvement by the Commissioners themselves.

In sum, ALJ proceedings would increase the costs to the government and to private parties at the expense of removing the Commission itself from the decisionmaking process. For these reasons, such a structural change is not advisable.

Respectfully submitted,

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Vice President, Secretary, and General Counsel

David D. Gridley
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COMMENTS OF UNITE, UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES
ON PROPOSED REFORMS TO THE INTERNATIONAL TRADE COMMISSION

SUBMITTED BY JAY MAZUR, PRESIDENT

REQUESTED BY THE TRADE SUBCOMMITTEE OF THE HOUSE WAYS AND MEANS COMMITTEE

PHILIP CRANE, CHAIRMAN

CHAIRMAN CRANE AND MEMBERS OF THE SUBCOMMITTEE.

The Trade Subcommittee has requested reaction to a number of proposed structural and procedural changes regarding the International Trade Commission (ITC). The ITC has a wide variety of responsibilities regarding trade matters, concentrating mainly on enforcement of our trade laws and gathering the information necessary to the President and Congress for establishing trade policy. While the General Accounting Office has suggested several changes in ITC operation and administration, our experience over a number of cases suggest very little, if any, of the cited recommendations would have a positive effect on the functioning of this agency.

UNITE, a recent merger of the International Ladies' Garment Workers' Union and the Amalgamated Clothing and Textile Workers Union, has been involved in a substantial number of dumping, countervailing duty and Section 201 cases via its two predecessor unions. We have likewise been very active on trade policy and trade legislation for more than 35 years.

In general, the specific reforms stated in the Subcommittee's announcement of January 31, 1996 would lead to a much greater politicization of the ITC. Our union has consistently opposed such tendencies. In its role as arbiter of trade disputes the Commission of 6 members - with a maximum of 3 from any political party - was specifically designated to prevent it being a handmaiden to the trade and foreign policy positions of the Executive Branch. We maintain the Commission can only carry out its responsibilities credibly if deemed immune from other governmental influence.

By reducing the Commission to an odd number and greatly expanding the powers of the Chairman, Congress would be undermining the respect and confidence with which the ITC is viewed. The Commission has a long tradition of seeking to be independent and objective in its judicial capacity and impartial in its advice on policy issues. Giving one party predominance and the Chairman greater authority will cause much of business, labor and the general public to loose faith in the ITC capability to handle unfair trade practices or trade disputes in an equitable manner. And to do so at this time of major expansion of international trade's role in our economy, and with major new trade agreements coming into fruition, is especially dangerous.

Trade law is somewhat unique in that while the government has powers to self-initiate cases it very rarely does so. In all criminal and most civil law (ie., all cases that are not disputes between non-governmental parties) the government has the obligation to investigate and bring legal action against anyone deemed to be in violation of our law. Trade is the only area where private parties must do the majority of investigative fact finding and present a preponderance of evidence before a case can even be initiated. This places a substantial burden upon small businesses, trade unions and individual patent or copywrite holders who want their trade rights upheld. The process

before the ITC is far too expensive and such a great obligation of time and effort that many actions are never brought by those who suffer from illegitimate practices.

Our Union and the small businesses that make up the majority of the textile and apparel industries have long advocated making the recourse to trade remedy laws much simpler and less expensive. The proposals listed by the Subcommittee do not move us closer toward that goal. In fact, by asking aggrieved parties to present their cases to an administrative law judge, in addition to review by the Commission, just makes the process more expensive and burdensome.

If, however, the Congress would give the administrative law judges full investigative powers and resources, such as the National Labor Relations Act gives to NLRB administrative law judges, we would endorse this change in ITC procedures. Under labor law, all an aggrieved party has to do is bring a complaint, and the agency assumes the primary responsibility in securing the facts necessary to come to a decision. It is our strong view that trade law should be administered in the same way.

Trade law has far too long been treated by Congress in sort of a second class manner. Government has never been mandated to assume its full responsibility for ensuring its enforcement. We need to move in that direction. Secondly, trade issue decision - making has been too greatly influenced by the current foreign policy concerns of the President. It would be our recommendation that the most needed reform is Presidential discretion on ITC recommendations be substantially reduced from current law and practice, rather than enhanced, which the cited Subcommittee proposals would do.

Sincerely,

Jay Mazur
President

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