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November 9, 2026

Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street SW
Washington, DC 20436

Re: **Request for Comments Regarding Implementation of 19 U.S.C. 1338(g), Docket No. MISC-053, 91 Fed. Reg. 57387 (Sept. 9, 2026)**

Dear Secretary Barton:

The Consumer Technology Association (CTA)® welcomes the chance to comment on how the U.S. International Trade Commission (Commission) should carry out Section 338(g) of the Tariff Act of 1930.[1] We commend the Commission for asking for public input before it sets procedures. We agree that "thoroughness, impartiality, independence, and nonpartisanship are essential to carrying out this work."[2]

We also attach, as Annex A, a short list of sources on Section 338 that may help the Commission.

Our main points:

1. **The 2026 Canada actions show the cost of Section 338's missing guardrails.** With no investigation, public record or economic analysis, the duties against Canada set off a cycle of retaliation that has spread costs to U.S. states, industries, and workers outside of the disputed sectors. These include U.S. tech exporters who are now facing 50% Canadian duties on smartphones, monitors and video game consoles.

2. **Congress should repeal Section 338 or, at a minimum, require its approval of any Section 338 action.** Section 301 of the Trade Act of 1974 and the annual National Trade Estimate Report on Foreign Trade Barriers (NTE) already address foreign discrimination, with stronger transparency requirements and procedural safeguards. CTA has endorsed the bipartisan Trade Review Act, which would require congressional approval of new tariffs.

[1] 19 U.S.C. 1338(g).
[2] U.S. International Trade Commission, *USITC Requests Public Comments on Section 338 Responsibilities*, News Release 26-129 (Sept. 4, 2026).

3. **Until Congress acts, the Commission should build on the existing NTE report mechanism, not duplicate it.** The Commission should not set up a separate, duplicative petition process for identifying foreign discriminatory trade barriers.

4. **The Commission should meet the transparency standards of the Administrative Procedure Act (APA).** That means rules adopted through public notice and comment, with no less than 30 days for public comment on each inquiry, opportunities for public hearing, and required public reports that explain the basis for its findings and recommendations.

5. **The Commission should read "unreasonable" and "discriminatory" narrowly and in line with the statute.** The Commission should measure discrimination against the treatment of other foreign countries and require evidence of discriminatory design and actual discrimination, not merely disparate effects or assumptions.

6. **The Commission's recommendations should favor removing foreign barriers over tariffs.** Tariffs are taxes paid by American businesses and consumers and are seldom the most effective remedy for U.S. interests.

I. About CTA

As North America's largest technology trade association, CTA is the tech sector. Our members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES® – the most powerful tech event in the world.

Our members import, export, manufacture, sell and provide digital services. Section 338 directly affects them. Consumer technology importers paid $23.5 billion in tariffs in 2025, more than five times the $4.0 billion they paid in 2024. The industry's average tariff rate rose from 1% to 7%.[3]

Our members also face a growing number of foreign measures that discriminate against U.S. tech companies. CTA documents these measures each year in its NTE comments to the Office of the U.S. Trade Representative (USTR).[4] We support a credible, evidence-based record of foreign discrimination. We oppose tariffs as the response.

CTA has long defended Congress's power over tariffs. With the U.S. Chamber of Commerce, CTA filed amicus briefs in *V.O.S. Selections, Inc. v. Trump* in the Federal Circuit and the Supreme Court, which decided that case together with *Learning Resources, Inc. v. Trump*.[5] As we told the Supreme Court, "[w]hen it has delegated tariff power to the President in other statutes, Congress has done so explicitly, and subject to specific limits."[6] The Commission's role in Section 338(g) is one of the few limits Congress placed on executive authority in Section 338. Our comments explain how the Commission can - and should - give Section 338(g) meaning.

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[3]Consumer Technology Association, *Consumer Technology Industry Tariff Impact Snapshot: May 2026*.
[4]See, e.g., CTA comments on the 2026 NTE (Oct. 30, 2025) and the 2027 NTE (Oct. 29, 2026).
[5]Brief of the Chamber of Commerce of the United States of America and the Consumer Technology Association as Amici Curiae, *Trump v. V.O.S. Selections, Inc.*, No. 25-250 (U.S. Oct. 24, 2025); Brief of Amici Curiae, *V.O.S. Selections, Inc. v. Trump*, Nos. 25-1812, -1813 (Fed. Cir. July 8, 2025); *Learning Resources, Inc. v. Trump*, No. 24-1287 (U.S. Feb. 20, 2026).
[6]Brief of Amici Curiae, *Trump v. V.O.S. Selections, Inc.*, No. 25-250.

II. The Canada Experience Shows Why the Commission's Section 338(g) Role Matters

The Section 338 actions against Canada show what happens when tariffs are imposed without the safeguards Congress built into modern trade laws. This Part describes what happened, explains why Congress adopted those safeguards in later statutes and identifies the opportunity the Commission now has to bring accountability to the Section 338 process.

A. The Canada actions demonstrate the consequences of Section 338's missing safeguards

Recent actions confirm why procedural safeguards and due process matter. On July 20, 2026, for the first time ever, the President used Section 338 to impose 50% duties on about $20 billion of Canadian imports.[7] The Administration then suddenly pushed back the start date by three days.[8] Canada announced counter-tariffs of 15%, 25% and 50% on C$27.6 billion of U.S. goods, effective Sept. 8.[9] In further retaliation, the President said that tariffs on Canadian vehicles and auto parts would rise to 50% on Jan. 1, 2027.[10] The Administration subsequently issued five more Section 338 proclamations on Sept. 8. Three of them barred imports of nearly $1 billion of Canadian goods, including alcohol, dairy and motorcycles, as of Sept. 29.[11] One of those proclamations rested largely on a Canadian provincial measure that was itself a response to the U.S. duties. Then, on Oct. 23, 2026, the President changed the product lists again, effective just one week later. He removed 22 tariff lines, such as plywood, some paper products and packing crates, and added 100 others, such as valves, carpets, vinyl flooring, window air conditioners and chest freezers.[12]

Each action rested on "information, opinions, and recommendations" from "senior executive branch officials." However, the Administration did not make any of this information public, nor did it seek public comments or reactions.[13] The Administration also did not ask the Commission for its views. The Oct. 23 proclamation mentions the Commission only to direct U.S. Customs and Border Protection to consult the Commission's Chairman, among other officials, on technical changes to the Harmonized Tariff Schedule.[14] There was no public, independent analysis prior to any of the U.S. actions on what it would cost Americans or how Canada was likely to respond. Nor is there any public record that anyone weighed the fact that Canada is the top export market for 34 states, and two-way trade with Canada supports about 1.4 million American jobs.[15] There is no clear effort to describe how this will achieve non-discrimination, particularly in the larger context of U.S.-Canada trade relations.

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[7]Proclamations 11046 (alcoholic beverages), 11047 (dairy) and 11048 (motor vehicles) (July 20, 2026).
[8]Proclamation 11056 (Aug. 18, 2026), 91 Fed. Reg. 54789 (Aug. 24, 2026).
[9] Department of Finance Canada, *List of Products from the United States Subject to Counter-Tariffs Effective September 8, 2026* (Aug. 25, 2026).
[10] Jacob Jensen, *'Eh?'-conomic Warfare: The U.S.-Canada Trade War*, The Shipment, American Action Forum (Aug. 27, 2026).
[11] Proclamations 11061–11065 (Sept. 8, 2026), 91 Fed. Reg. 58311–58346 (Sept. 14, 2026); Amanda Macias, *Trump's Canada Trade War Is Entering a Dangerous New Phase for These Battleground States*, Fox Business (Oct. 4, 2026).
[12] Proclamation of Oct. 23, 2026, *Further Modifying the Scope of Products of Canada Subject to the Additional Duties Imposed To Offset Canadian Discrimination Against the Commerce of the United States With Respect to Motor Vehicles*, Annex I, Parts A and B (effective Oct. 30, 2026); The White House, *Fact Sheet: President Donald J. Trump Further Modifies Canadian Products Subject to Tariffs Under Section 338* (Oct. 23, 2026).
[13]See, e.g., Proclamation 11061, 91 Fed. Reg. 58311; Proclamation 11065, 91 Fed. Reg. 58339.
[14] Proclamation of Oct. 23, 2026, *supra*, ¶ (5).
[15] Canadian Chamber of Commerce, Business Data Lab, *Let's Keep Trade Moving* (Jan. 13, 2025) (Canada is the top customer for 34 U.S. states; two-way trade supports 1.4 million U.S. jobs).

In short, the Administration created no public record explaining how it made any of these Section 338 decisions. The September product list changes, for example, rest on a single statement that the new lists "would still offset the burden or disadvantage on U.S. commerce and better serve the public interest." However, the Administration provided no data or argumentation to support either claim.[16] The Oct. 23 proclamation repeats that statement word for word, again with no supporting data.[17] The result for American businesses is the kind of uncertainty that Congress intended to avoid when it enacted later trade laws with transparency requirements and procedural safeguards, as discussed in Part II.B below.[18] Indeed, even the Administration has sought to require foreign countries to provide the same transparency and due process for its trade actions that it has itself neglected here.[19]

This action shows how detrimental tariffs can be without any investigation, public record, or economic analysis. The costs of this Section 338 action have spread to U.S. states, industries, and workers that had no relation to the underlying dispute, and no chance to be heard. Public commentary now reflects this. The *Wall Street Journal* editorial board, for example, has called it a "senseless trade war with Canada."[20]

While the U.S. duties primarily targeted Canadian dairy, alcohol and motor vehicles, they also covered a swath of other symbolic products. Matching the Administration's move outside the scope of the sectors in dispute, Canada's response targeted U.S. goods that have no connection to those sectors of concern, thus spreading the cost of the dispute to unrelated U.S. states and industries

- *Technology.* Canada imposed 50% counter-duties on U.S. smartphones, monitors and video game consoles. It also imposed 25% duties on U.S. washing machines and dryers and 15% duties on air conditioners.[21] In 2025, U.S. exports to Canada of the smartphones, monitors and video game consoles totaled $522 million.[22] Exports of the covered washers, dryers and air conditioners totaled $184 million.[23]

  U.S. tech manufacturers and exporters are facing these duties because of a dispute over dairy, alcohol and vehicles. Canada chose them solely for political effect. When Canada announced its counter-tariffs, Minister of Industry Mélanie Joly said Canada chose the products to "target states in the U.S."[24] Canadian officials added that the main goal was to

[16]Proclamation 11065, 91 Fed. Reg. 58339.
[17] Proclamation of Oct. 23, 2026, *supra*, recital 6.
[18] See, e.g., 19 U.S.C. 2413, 2414(b)–(c) (Section 301 requirements for consultation, notice, public hearing and published determinations).
[19] The United States has long asked its trading partners to provide notice and comment for trade measures. See, e.g., United States-Mexico-Canada Agreement, ch. 28 (Good Regulatory Practices) and ch. 29 (Publication and Administration).
[20] Editorial Board, *Tariffs Are Hurting the GOP in Michigan*, Wall St. J. (Oct. 8, 2026), https://www.wsj.com/opinion/mike-rogers-michigan-tariffs-canada-donald-trump-6b3d2bd8.
[21] Blake, Cassels & Graydon LLP, *Canada Imposes Counter-Tariffs on* C$27.6-Billion *of U.S. Imports Effective September 8, 2026* (Aug. 27, 2026); see also Osler, Hoskin & Harcourt LLP, *Elbows Back Up: U.S. Section 338 Tariffs, Canada's Retaliatory Surtaxes and the Current Tariff Landscape* (Aug. 26, 2026).
[22] U.S. Census Bureau, USA Trade Online, 2025 domestic exports to Canada: HS 8517.13 ($457.9 million), 8528.59 ($39.5 million), and 9504.50 ($24.5 million). Canada's counter-tariffs apply only to goods of U.S. origin, so these figures exclude re-exports of foreign-made goods.
[23] *Id.*, 2025 domestic exports to Canada: HS 8415.10 ($42.7 million), 8450.11 ($41.3 million), 8450.20 ($85.9 million), and 8451.21 ($14.2 million). Canada's counter-tariffs apply only to goods of U.S. origin, so these figures exclude re-exports of foreign-made goods.
[24] Megan Cerullo & Aimee Picchi, *Canada's tariffs target certain U.S. states. See which regions are most vulnerable*, CBS News, (Aug. 27, 2026).

protect "domestic market share for Canadian companies."[25] U.S. tech exporters also face new uncertainty over which products Canada will treat as U.S. goods.[26]

- *Manufacturing.* Michigan's auto industry is closely tied to Ontario. Canada ships about $40 billion of goods to Michigan each year, with about half of those being vehicles and parts.[27] Parts can cross the border several times before a vehicle is finished, so each new duty adds cost at every crossing.[28] The Section 338 duties also stack on earlier tariffs. The *Wall Street Journal* noted that earlier auto tariffs already added about $1600 to the cost of each vehicle assembled in the United States. It also noted that General Motors projected a tariff cost of $2.5 billion to $3.5 billion this year, which could reduce each worker's profit-sharing payment by about $3500.[29] The threatened January 1, 2027, tariff increase would add to these costs. Beyond Michigan, Ohio and Pennsylvania have about $2.3 billion and $1.8 billion, respectively, of exports to Canada exposed to its counter-tariffs, including machinery and equipment.[30] Kentucky, home to a major U.S. appliance maker, is exposed through the duties on washers and dryers.[31]

- *Agriculture and food.* Canada's counter-tariffs cover U.S. dairy. Wisconsin cheese is among the products affected.[32]

- *Consumers and small businesses.* One estimate puts the yearly cost of the Section 338 duties to U.S. consumers and businesses at about $3.3 billion.[33] The *Wall Street Journal* noted that small businesses bear the heaviest burden because they have less room to absorb costs.[34] The Oct. 23 changes extend the U.S. duties to more consumer goods from Canada, such as window air conditioners, chest freezers and hand-held power tools.[35]

- *Jobs.* We are not aware of any published federal estimate of how the Section 338 duties, Canada's response, and the threatened auto duties will affect U.S. employment. That information gap is itself the point. The Administration did not ask any federal agency to produce such an analysis before the duties took effect.

The best available estimate comes from a non-governmental source: and models a broader scenario. A study by Oxford Economics for the Canadian American Business Council found that a breakdown of trade under the USMCA would cost about 214,000 U.S. jobs in 2027, and about $1.0 trillion in U.S. GDP from 2026 through 2035. It would also cost each U.S. household about $4,809 over that same period, with Indiana, Michigan, Kentucky, Alabama, Kansas and Texas being

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[25] Spencer Van Dyk & Stephanie Ha, *Canada Outlines U.S. Counter-Tariffs on Products Like Makeup, Smartphones, Changes to EI*, CTV News/CP24 (Aug. 25, 2026).
[26] Jonathan Lamont, *Canada's c*ounter *tariffs hit phones, game consoles – but don't worry*, MobileSyrup (Aug. 28, 2026).
[27] Editorial Board, *supra*.
[28] Macias, *supra* (noting that a single component may cross the border "upwards of eight times" before a vehicle is finished).
[29] Editorial Board, *supra* (citing Anderson Economic Group and General Motors).
[30] Macias, *supra* (citing David Clement, Consumer Choice Center).
[31] Kent Jones, *Wisconsin Cheese, Maine Seafood, Kentucky Appliances: Trump's Canada Tariffs Punch Swing States Just Before the Midterms*, Fortune (Sept. 7, 2026) (originally published in The Conversation).
[32] Cerullo & Picchi, *supra*; Jones, *supra*.
[33] Jensen, *supra*.
[34] Editorial Board, *supra*.
[35] Proclamation of Oct. 23, 2026, *supra*, Annex I, Part B (HTSUS 8415.10.30, 8418.30.00, 8467.29.00).

among the hardest-hit states. By contrast, a successful USMCA renegotiation would add about 137,000 U.S. jobs, worth about $516 a year to each U.S. household compared with a breakdown.[36]

These results are not the product of any one decision. They follow from how Section 338 works.

First, on its face, Section 338 requires no economic analysis. Under Section 301, USTR may ask for the Commission's views on the probable impact of a proposed remedy on the U.S. economy.[37] Section 338 has no such allowance. Had there been such an analysis that would comprise a public record, the affected states and industries could have expressed concerns about their exposure before the duties took effect. The Commission's Section 338(g) role is the natural place for that analysis.

Second, the Section 338 actions did not account for retaliation. Instead, the statute allows further actions, including import bans, if a country has "maintained or increased" its discrimination after a proclamation.[38] However, it does not differentiate between continued or increased discrimination and retaliatory action, which is not the same as "maintained or increased" discrimination. Canada's retaliation, and the U.S.'s own cross-retaliation, show what happens when tariff authorities are not carefully calibrated and considered. As we explain in Part III, the Commission's analysis can draw that line.

Third, the costs fall on "bystander" states and industries. The firms and workers paying for these tariffs, from tech exporters to appliance makers, cheesemakers and auto workers, had no part in the original disputed sectors, and subsequently had no forum to be heard and no say about the actions taken.

Fourth, the current process only creates uncertainty. Start dates were moved, product lists were changed, and new duties were threatened, all within weeks. Businesses simply cannot plan investment, hiring or supply chains around such instability and unpredictability. The product lists have now changed twice since the duties took effect in August. The latest changes, announced on Oct. 23, take effect on Oct. 30, with no exception for goods already in transit.[39]

Commentators and public officials widely recognize these consequences. The *Wall Street Journal* editorial board has written about the costs to Michigan families, workers and small businesses.[40] Public officials in the most affected states, from both parties, have called for an end to this "trade war".[41]

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[36] Oxford Economics, *Economic Impacts of US-Canada Tariff Escalation Under the USMCA* 5, 22–23, 27 (prepared for the Canadian American Business Council, Aug. 2026). Note: The study's sector results show U.S. electronics doing relatively better in the breakdown case, because the study assumed limited Canadian counter-tariffs on electronics. It predates the Sept. 8 counter-tariffs on smartphones, monitors and game consoles and does not model them.
[37] 19 U.S.C. 2414(b)(1)(C).
[38] 19 U.S.C. 1338(b).
[39] Nithya Nagarajan, Cortney Morgan & Emily Mikes, *President Trump Issues Order Further Modifying Section 338 Duties on Goods From Canada*, Husch Blackwell LLP (Oct. 26, 2026).
[40] Editorial Board, *supra*.
[41] See, e.g., Editorial Board, *supra*; Katherine Dailey, *New Tariffs on Canada Heighten Michigan Democrats' Affordability Attacks on Trump, GOP*, Michigan Advance (Aug. 26, 2026); *Michigan Republican Senate Candidate Mike Rogers Breaks with Trump on Tariffs*, CNN (Oct. 7, 2026).

B. Congress established safeguards in subsequent trade laws for precisely these reasons

The problems in the Canada actions are not new. Congress recognized them decades ago and built safeguards into later trade laws. Congress wrote Section 338 in 1930, well before the General Agreement on Tariffs and Trade (GATT), to secure equal treatment for U.S. goods. Section 338 and its predecessor were developed following a recommendation by the Tariff Commission that the United States adopt a commercial policy of equal treatment among trading partners.[42] Section 338 lets the President, on his own finding, impose duties of up to 50% or bar a country's goods outright. It requires no investigation, no public notice, no comment and no published findings. However, it was so devoid of due process and so susceptible to misuse that its only use was as a threat to change discriminatory behavior. By 1979, the Commission itself called Section 338 "[a]n obscure and never-used provision of the law" that "has been overshadowed by more recent enactments."[43]

Section 301, enacted in 1974 within the context of GATT negotiations, lets USTR act when a foreign "act, policy, or practice . . . is unreasonable or discriminatory and burdens or restricts United States commerce."[44] It defines discrimination to include "any act, policy, and practice which denies national or most-favored-nation treatment to United States goods, services, or investment."[45] That is the very essence of Section 338.

The only differences between Section 301 and Section 338 are Congress' addition of transparency requirements and procedural safeguards. Under Section 301, USTR must consult with the foreign government. It must give "not less than 30 days notice" and a chance for "the presentation of views by interested persons, including a public hearing if requested." And it must publish each decision in the *Federal Register* "together with a description of the facts on which such determination is based."[46] Section 301 also gives the Commission an important role: USTR may ask for the Commission's views on "the probable impact on the economy of the United States" of a proposed action.[47]

Congress also already requires yearly monitoring of foreign barriers. Section 181 of the Trade Act of 1974 directs USTR to "identify and analyze" significant foreign barriers to U.S. exports, investment and e-commerce, estimate their trade effects and report by March 31.[48] For many decades, USTR has used the NTE process to request public comment. Its asks about "discriminatory practices affecting trade in digital products" and "discriminatory or burdensome barriers to cross-border data flows," among other trade discriminatory measures.[49] And where imports also raise national security concerns, Section 232 of the Trade Expansion Act of 1962 already provides for a Commerce Department investigation, with findings and reports due to

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[42] Section 317 of the Tariff Act of 1922, ch. 356, § 317, 42 Stat. 858, 944–46; see also John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 Am. J. Int'l L. 957, 960 (2017).
[43] U.S. International Trade Commission, MTN Studies: Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva, Inv. No. 332-101, S. Comm. Print CP 96-27, at 48 (Aug. 1979), quoted in John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 Am. J. Int'l L. 957, 968 (2017).
[44] 19 U.S.C. 2411(b)(1).
[45] 19 U.S.C. 2411(d)(5).
[46] 19 U.S.C. 2413, 2414(b)(1)(A), 2414(c).
[47] 19 U.S.C. 2414(b)(1)(C).
[48] 19 U.S.C. 2241(a)(1), (b)(1).
[49] USTR, Request for Comments on Significant Foreign Trade Barriers for the 2027 National Trade Estimate Report, 91 Fed. Reg. 58247 (Sept. 14, 2026).

Congress.[50] Together, these existing laws already give the United States a full and transparent set of effective tools to address foreign discriminatory trade actions.

C. The Commission has an opportunity to bring accountability to the Section 338 process

The Commission does not need to wait for Congress. Section 338(g) gives it a standing duty to stay informed of foreign discrimination and to advise the President. Used well, that role can supply what has been missing from the Canada actions: a public record, an assessment of the costs to Americans and recommendations grounded in evidence.

CTA supports the full repeal of Section 338 for the reasons described above. Absent repeal, at a minimum, CTA believes that Congress should at least provide express legislative approval before any Section 338 duty or import ban can stay in place. CTA has endorsed the bipartisan Trade Review Act of 2025 (S. 1272), which would require the President to notify Congress within 48 hours of a new or higher duty, and explain to Congress its reasons and expected economic effects. The duty would end after 60 days unless Congress approves it.[51] The bill applies to any new or increased duties. These steps would restore Congress's role over tariffs.

In the absence of such amendments to Section 338, CTA urges the Commission to engage in an open and transparent oversight process to implement Section 338(g). Section 338(g) directs the Commission to "ascertain and at all times be informed" of foreign discrimination and to report it to the President "together with recommendations." The rest of our comments explain how the Commission can do this in a way that maintains the Commission's independence, allows for full transparency and due process, and stays true to the statute and the intent of Congress.

III. The Commission's Role Under Section 338(g)

The Commission should ensure that policymakers fully know, calibrate, and consider the possible effects of any contemplated Section 338 action ***before*** taking such action. To adequately discharge its duty under Section 338(g), the Commission should publish an analysis of the following factors in relation to any potential Section 338 action:

1. effects by state, including each state's exports exposed to likely retaliation;
2. effects by industry, including U.S. manufacturers that use the affected imports and U.S. exporters in unrelated sectors exposed to retaliation;
3. effects on U.S. employment; and
4. the likely foreign response, based on the target country's announced and past retaliatory actions.

[50] 19 U.S.C. 1862.
[51] Trade Review Act of 2025, S. 1272, 119th Cong. (2025).

The Commission already has the tools to do this. Its 2023 study of the Section 232 and 301 tariffs estimated the effects of those tariffs on U.S. industries, including downstream users.[52] The Commission should also monitor the actual effects of any Section 338 action, by state and industry, and report them publicly in its yearly report (see Part VI). That would give the President and Congress the information they need to decide whether any duties or ban should continue.

A. Core Guiding Principles

Four principles should guide the Commission's work. First, the Commission should act as an independent fact-finder. Its value lies in its independence and economic expertise, and its findings should rest on evidence, apart from any policy outcome.

Second, the Commission's findings should come before any action by the President. From the 1920s through the 1940s, the Commission's predecessor, the Tariff Commission, studied claims of discrimination pursuant to Section 317 and 338 and reported to the President. In doing so, its staff warned the President that "[t]he task of showing that a discrimination in fact exists distinctly rests upon the United States."[53] Although the statute does not require a Commission report before the President acts, it is clear that the Commission's findings are most useful when they come first.

Third, each finding should be true to the statute. It should name the statutory category, the foreign measure, and the comparison with other countries on which its claim of “discrimination” rests.

Fourth, the Commission's work should respect U.S. trade commitments, including the United States-Mexico-Canada Agreement, and Congress's power over tariffs.

B. The Commission Should Meet APA Due Process and Transparency Standards and Allow No Less Than 30 Days for Comment

The Commission should follow the due process and transparency standards of the APA. This matters because of how Section 338 works. The President is technically not an "agency" under the APA.[54] As such, this Administration has taken the view that Section 338 proclamations need no notice, no comment, and no reasoned explanation. The Canada proclamations show the result of this position: tariffs, product list changes, and import bans with no public record.

At this time, only the Commission can bring openness and a public record to the current Section 338 process. If the President’s action will lead to additional taxes on American businesses and consumers, or bans on goods, those affected should be able to see and respond to the evidence underlying the President’s decision.

We understand that in the 1930s, the Commission ran its Section 338 work "under cover of secrecy," and "[h]earings [were] neither required nor contemplated."[55] However, that practice grew out of when Section 338 was being used purely as a bargaining tool, and not to actually impose duties. The Administration is now actually using Section 338 to impose tariffs, while using its

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[52] U.S. International Trade Commission, *Economic Impact of Section 232 and 301 Tariffs on U.S. Industries*, Inv. No. 332-591, USITC Pub. 5405 (Mar. 2023).
[53] Veroneau & Gibson, *supra* at 962 (quoting a 1923 Tariff Commission staff memorandum).
[54] *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).
[55] Veroneau & Gibson, *supra* at 965 (quoting the Commission and former 19 C.F.R. provisions).

successor trade laws to impose tariffs. It should then require the same due process and transparency obligations from these successor laws to its use of Section 338.

The Commission's own early practice offers a better model. Under Section 317, it established common rules of procedure and allowed significant public participation.[56] The sensitivity concerns that later led to less public engagement can be met through the confidentiality protections described in Part V.

The Commission should therefore start by adopting any Section 338(g) procedures through notice-and-comment rulemaking under 5 U.S.C. 553, as it has for other similar trade laws. Once procedures are in place, the Commission should publish a *Federal Register* notice whenever it opens an inquiry into a foreign measure or prepares a report to the President under Section 338. Each notice should name the country, the measure and the statutory provision at issue.

The Commission should then allow no less than 30 days for written public comments on each inquiry, and preferably 45 to 60 days. That is in line with Section 301, which requires "not less than 30 days notice" before USTR hears public views.[57] USTR allowed 45 days for comment on this year's NTE.[58] The Administrative Conference of the United States recommends at least 30 days, and at least 60 days for significant actions.[59] And the Commission itself allows about 60 days for similar processes that it runs.

The Commission should also post all public comments on its website, allow reply comments and hold a public hearing. It should seek views from importers, manufacturers, retailers and consumers who would be paying for any tariff action, not only from those claiming discrimination. And it should publish its findings and recommendations with an explanation about how it is responding to major comments (see Part VI).

C. The Meaning of "Unreasonable" and "Discriminatory"

Section 338 targets foreign measures that treat U.S. commerce worse than that of other countries. It covers charges or rules "not equally enforced with respect to like articles of every foreign country." It also covers discrimination that puts U.S. commerce "at a disadvantage compared with the commerce of any foreign country."[60]

As such, under Section 338 the Commission should compare a country’s treatment of U.S. commerce with its treatment of other foreign countries’ commerce. The Commission should not compare the treatment of U.S. commerce under a free trade agreement with the treatment of U.S. commerce without the free trade agreement.

In fact, Secretary of State Dean Acheson confirmed this point in 1949 when he advised that Section 338 action "would have to be based on evidence [of] discrimination, unfair treatment and

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[56]91 Fed. Reg. 57387 (citing U.S. Tariff Commission, Seventh Annual Report (1923), App. III at 54–55).
[57]19 U.S.C. 2414(b)(1)(A).
[58]91 Fed. Reg. 58247 (comments due Oct. 29, 2026).
[59]Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments* 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011).
[60]See 91 Fed. Reg. 57387 (Topic 2); 19 U.S.C. 1338.

not on mere fact [of] failure to comply [with] obligations [of a] trade agreement."[61] Disputes over a trade agreement belong in that agreement's dispute settlement process, and not in unilateral retaliation. Whenever parties disagree about a treaty violation, the dispute settlement process of that treaty requires the complaining party first to prove discrimination before taking any action and to support any finding of discrimination with actual evidence.

As such, the Commission should create a process that requires parties to provide evidence establishing discrimination under Section 338, not by mere effects alone, but by analyzing the measures at issue. For example: Do the statutory thresholds or criteria cover only U.S. firms while excluding similar domestic or third-country firms? Do legislative history or official statements show an aim to target U.S. firms? Do authorities apply discretion unevenly to U.S. commerce compared with other countries' commerce? Does the measure lack a legitimate, non-protectionist goal, or does a less discriminatory option exist? All of this would be evidence that points to discrimination.

The same holds true for a review of whether actions are "unreasonable" or not. The Commission should judge "unreasonable" against a legitimate goal. A rule that is burdensome, but applied evenly to serve a legitimate goal, is not "unreasonable."

Finally, the Commission should assess any foreign response to a U.S. action on its own merits, under the same standard. Retaliatory measures, like Canada's counter-tariffs, apply only to U.S. goods by design. If every such response counted automatically as "maintained or increased" discrimination, Section 338(b) would move on its own from duties to import bans. Proclamation 11061, which barred some Canadian alcoholic beverages, shows the risk. It relied largely on a provincial tariff that the proclamation itself describes as a response to the U.S. duties.[62] The Commission's analysis should identify such responses for what they are. Its recommendations should weigh whether negotiations would remove both the original measure and the response.

IV. How Foreign Countries Discriminate Against U.S. Commerce

The Commission asked for information on "methods and mechanisms" that are used to discriminate against U.S. commerce. Below we describe the broad types of discrimination that affect the U.S. tech sector, grouped by the notice's categories. CTA also documented specific measures in its NTE comments, which we urge the Commission to review (see Part V). For each type, we urge the Commission to apply the proposed standards set out in Part III, i.e., a mere burden on U.S. firms does not alone prove discrimination, particularly if the burden is applied even-handedly, and/or is subject to a legitimate purpose.

A. Charges, fees or rules not applied equally

Some countries tax digital services or digital revenue using thresholds or scope rules that are purposely established so that the burden falls mostly on U.S. firms. Others impose levies, network fees or infrastructure charges on a small set of foreign, mostly U.S., service providers. Still others require foreign streaming and digital platforms to fund local content or meet local content quotas.

[61] Veroneau & Gibson, *supra* at 967 (quoting a 1949 telegram from Secretary of State Acheson).
[62] Proclamation 11061, 91 Fed. Reg. 58311.

B. Discrimination through customs, import licensing, technical regulations or other rules

Foreign customs authorities may apply classification or valuation practices inconsistently to U.S. tech products. Some countries raise tariffs on products already covered by tariff-elimination commitments, such as those under the WTO Information Technology Agreement, or impose customs duties on electronic transmissions. Import licensing or registration requirements for tech equipment can give officials discretion to disadvantage U.S. suppliers if they wish. Authorities can also use technical regulations and conformity assessment measures to depart from international standards and favor domestic or third-country suppliers.

C. Burdens that benefit third-country or domestic industries

Some rules use criteria that cover U.S. firms but exempt similar domestic or third-country rivals. For instance, data localization mandates and limits on cross-border data flows can favor local or third-country cloud and digital service providers to the detriment of U.S. providers. Procurement preferences and security or "trust" frameworks can also be used to exclude U.S. suppliers.

D. Ex ante rules that mainly cover U.S. tech firms

A growing type of measure cuts across all three statutory categories: ex ante competition, platform and digital market rules. These rules impose duties in advance, without any finding of anticompetitive conduct, and often target a group of firms that is mostly or entirely American.

In such a case, the discrimination often lies in the design of the measure. For instance, lawmakers or regulators can base the thresholds above which they may take action on revenue, users or market value. They can also adopt scope definitions and lists of specific services that mainly cover U.S. firms and no one else, such that similar domestic or third-country firms fall outside the rules or face lighter penalties.

Such rules impose a "regulation, condition, restriction" that puts U.S. commerce at a disadvantage compared with other countries' commerce. Where similar non-U.S. firms benefit, the rules also burden U.S. commerce. When mainly U.S. coverage results from design choices like these in the measures at issue, the Commission should treat it as strong evidence of discrimination.

V. How the Commission Should Gather Information

A. Build on the NTE, do not duplicate it

The Commission does not need a new process to gather information. USTR already collects public input on foreign barriers each year, including discriminatory measures. Hundreds of companies and associations, including CTA, file comments. Their public comments are online.

A separate Commission process asking the same people about the same measures would duplicate that work. It would add costs for U.S. businesses. It would expose them to more risk of foreign reprisal by creating more records of their complaints. And it could produce conflicting U.S. government records regarding the same foreign measures.

Instead, each year after the NTE comes out, the Commission could review the NTE and the public comments underlying it and analyze this data for Section 338 purposes. The Commission could then identify which barriers are *discriminatory* pursuant to Section 338. It could then establish the burden those measures place on U.S. commerce and report its findings and recommendations to the President. This approach uses the Commission's economic expertise where it adds the most value. It also revives the Commission's past practice of reporting yearly on its Section 338 work.

This approach keeps the Commission independent. To be clear, the NTE would be a source for the Commission's analysis, not a substitute for it. The Commission would need to reach its own findings, as many NTE barriers will not meet the Section 338 standard. Where the NTE record falls short, the Commission could issue a targeted *Federal Register* request for additional information, using the procedures in Part III, and draw on its own research and public data.

B. Do not set up a petition process

The Commission should not create a process for private petitions alleging discrimination. The NTE already offers a public, proven channel for identifying foreign barriers. A petition process would merely duplicate it. It would also invite claims aimed at triggering tariffs or bans that other American businesses and consumers would pay for, often without a voice in the process.

C. Protect confidential information and guard against reprisal

The risk of foreign reprisal is real. American tech companies operate in the very markets whose measures are at issue, under those markets' regulators and tax authorities. Relying on the existing NTE record limits new exposure. Where the Commission seeks more information, it should take four steps. It should protect confidential business information under 19 C.F.R. 201.6. It should accept comments filed by trade associations in combined or anonymous form. It should let filers limit access to their information provided for purposes of Section 338. And it should not tie information to individual filers in its reports. The Canada experience shows that foreign governments choose U.S. products and states for pressure. Companies also have reason to fear that information they provide could be used to justify tariffs on goods they import, or to invite retaliation against goods they export.

VI. How the Commission Should Analyze Information and Report to the President

The Commission's main product should be a yearly report built on the NTE record (see Part V). It should open inquiries into specific measures only when a measure warrants a closer look, and only with the procedures in Part III.

Each finding should calculate the burden on U.S. commerce. Section 338 requires duties at the level the President finds "will offset" that burden, so such calculations will be necessary. The Commission should also assess how potential remedies would affect other U.S. importers, manufacturers, consumers, supply chains and exporters exposed to potential retaliation. Congress already asks the Commission for this kind of analysis under Section 301.[63] The September and

[63] 19 U.S.C. 2414(b)(1)(C).

October 2026 product list changes discussed in Part II show the need. They rested on unsupported findings of "offset" and "public interest" that the Commission is well placed to inform.

The Commission's recommendations should favor removing barriers over merely applying tariffs. Negotiation, enforcement of trade agreements, and dispute settlement should come first. Tariffs and import bans should be a last resort. If used, they should target the affected goods, be limited in time, and include an exclusion process. History supports this approach. The Tariff Commission reported that under Section 338's predecessor, "[t]he President has secured the removal of important discriminations without imposing the retaliatory duties authorized by this section." Its staff also warned that penalty duties could put broader trade relationships at risk.[64]

The Commission should make its reports public. It should end its recent past practice of keeping its reports to the President private and publish full findings and recommendations (with confidential business information removed or redacted), for the reasons set forth in Part III. Public reports will make the Commission's work more accurate and credible. Useful public information would include the measures reviewed, the Commission's findings and methods, notice when it sends a report to the President, and the actual effects of any action by state and industry.

Finally, the Commission should not use information filed for Section 338 for other purposes, such as Section 332 studies, without the filer's consent, except in combined form that prevents readers from tracing the information to a filer. And the Commission should report when a foreign measure behind a Section 338 action changes or ends, so the President can quickly lift any duties or bans.

VII. Other Considerations

The Commission should coordinate with USTR and the Commerce Department to ensure that its Section 338(g) work adds to, rather than repeats or detracts from, existing efforts. Section 338 should not become a substitute for Section 301 that does away with Section 301's safeguards.

Any Commission recommendation for remedial action should include a public product exclusion process. It should avoid stacking duties on goods already subject to Section 232, Section 301, or other trade remedy duties. And it should maintain trade facilitation features that are currently applied to the present Section 338 duties, such as duty drawback.

Finally, the Commission should share its yearly Section 338 report with the Senate Finance Committee and the House Ways and Means Committee. This would support Congress's oversight and help Congress decide whether it still needs Section 338.

VIII. Conclusion

Section 338 should not become a way to bypass the transparency and procedural safeguards Congress established in modern trade laws. The Canada actions show what is at stake: tariffs and import bans imposed and then changed repeatedly within weeks, with no public record and no

[64]Veroneau & Gibson, *supra* at 964, 962 (quoting the Tariff Commission's final report on Section 317 and a 1923 staff memorandum).

assessment of the costs to Americans, while the burden has spread to states, industries and workers with no connection to the original dispute.

Before imposing tariffs, the government should explain the evidence behind its decisions and assess the costs to American businesses, workers and consumers. The Commission has the independence and expertise to provide that analysis. It should use its authority under Section 338(g) to make sure those costs are understood and that its recommendations advance American interests.

Until Congress repeals Section 338 or requires its approval of any Section 338 action, the Commission can best meet its Section 338(g) duties by building on the NTE rather than duplicating it; adopting APA standards of transparency and due process, with no less than 30 days for public comment; reading "discrimination" narrowly and in line with the text and purpose of the statute; publishing its findings; and recommending responses that remove foreign barriers rather than tariffs as a first resort.

We appreciate the Commission's consideration and welcome the chance to discuss our comments.

Respectfully submitted,

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Annex A

Selected Sources on Section 338

CTA offers the following sources, which may assist the Commission as it develops its Section 338(g) procedures. The list is not exhaustive. Inclusion of a source does not mean CTA agrees with its analysis or conclusions.

A. Statutes

Section 338 of the Tariff Act of 1930, 19 U.S.C. 1338. Authorizes the President to impose additional duties of up to 50% on, or exclude, products of a country found to discriminate against U.S. commerce, and directs the Commission under subsection (g) to monitor such discrimination and report to the President with recommendations.

Section 317 of the Tariff Act of 1922, Pub. L. No. 67-318, ch. 356, § 317, 42 Stat. 858, 944–46 (Sept. 21, 1922). The predecessor to Section 338, with substantially similar terms, enacted to secure equal treatment for U.S. commerce. Subsection (g), at 42 Stat. 946, set out the Tariff Commission's duty to "ascertain and at all times to be informed" of discrimination and to report to the President "together with recommendations."

Sections 301–310 of the Trade Act of 1974, 19 U.S.C. 2411–2420. Authorize USTR to respond to foreign acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce, with requirements for consultation, public comment and published determinations.

Section 181 of the Trade Act of 1974, 19 U.S.C. 2241. Requires USTR to identify and analyze significant foreign trade barriers each year in the National Trade Estimate Report on Foreign Trade Barriers.

Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. 1862. Provides for investigations of the effects of imports on national security.

B. Historical materials

Exec. Order No. 3746 (Oct. 7, 1922). Issued by President Harding shortly after enactment of the Tariff Act of 1922. Created a private right of petition under Section 317, among other provisions of the Act.

U.S. Tariff Commission, *Annual Reports* (1923–1940s). Describe the Tariff Commission's work under Sections 317 and 338, including complaints received and investigations of foreign practices.

Wallace McClure, *A New American Commercial Policy as Evidenced by Section 317 of the Tariff Act of 1922* (Studies in History, Economics and Public Law, vol. 114, no. 2, Columbia Univ. 1924). A contemporary study of Section 317, its purposes and the forms of discrimination it was meant to address.

C. Recent analysis

John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 Am. J. Int'l L. 957 (2017). Reviews the history of Sections 317 and 338, including Tariff Commission practice and archival records of how the authority was considered and used from the 1920s to the 1940s.

Congressional Research Service, *U.S. Tariffs on Canadian Imports: Section 338 of the Tariff Act of 1930*, R49349 (Sept. 14, 2026). Describes the statute, the 2026 proclamations on Canadian imports and related legislation in Congress.

D. Recent presidential actions under Section 338

Proclamations 11046, 11047 and 11048 (July 20, 2026); Proclamation 11056 (Aug. 18, 2026); Proclamations 11061–11065 (Sept. 8, 2026), 91 Fed. Reg. 58311–58346 (Sept. 14, 2026); Proclamation of Oct. 23, 2026 (effective Oct. 30, 2026). Impose, modify and expand additional duties and import exclusions on certain products of Canada.