September 22, 2026

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

Re: Docket Number MISC-053: Request for Comments Regarding Implementation of 19 U.S.C. 1338(g)

Dear Ms. Barton,

In the Request for Comments Regarding Implementation of 19 U.S.C. 1338(g), the Commission raises the following topic:

> Section 338 (19 U.S.C. 1338) addresses "unreasonable" and "discriminatory" conduct by foreign governments. What makes conduct "unreasonable" or "discriminatory" in the context of international commerce? How should the Commission understand those terms for the purposes of Section 338?

This comment focuses on the appropriate understanding of the term "discriminatory" for the purposes of Section 338.

In thinking about the meaning of "discriminatory," helpful guidance can be found in the views of the Office of the U.S. Trade Representative (USTR) on similar issues in the context of dispute settlement at the World Trade Organization. As part of its criticism of the Appellate Body, one of USTR's complaints relates to how the Appellate Body had interpreted the WTO's non-discrimination obligations. As USTR put it in its 2020 Report on the Appellate Body of the World Trade Organization,[1] while a key principle of the WTO agreements is "the requirement that Members not discriminate against trade from other Members," this "fundamental principle, reflected in the national treatment and most-favored nation obligations, was not

[1] https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

intended to prevent Members from pursuing their legitimate policy objectives." According to USTR, however, the Appellate Body "has found a measure to be discriminatory (and therefore not consistent with WTO rules) based solely on evidence that the measure may impact imports from one Member more than those of another, even though converting a nondiscrimination inquiry into a detrimental impact test renders almost any origin-neutral measure vulnerable to challenge in WTO dispute settlement." The result of this approach, USTR said, is that "[i]t is much more difficult to pursue legitimate public policy measures under the legal standard the Appellate Body has invented than under the standards to which Members actually agreed," and "the Appellate Body's approach would have WTO adjudicators second-guess Members' legislatures and serve as the ultimate arbiters of a range of important legislative questions, which is not a role that WTO Members assigned to them under the WTO agreements."

These concerns expressed by USTR are directed at WTO adjudicators, but the same logic applies when it is the U.S. government that is deciding whether a law or regulation is discriminatory. If disparate impact is sufficient to find that discrimination exists pursuant to a Section 338 investigation, with tariffs imposed in response, the pursuit of legitimate public policy objectives by governments could be undermined. An interpretation of Section 338 that leads to this outcome should be avoided, as the U.S. government should not interfere with the legitimate public policies of other countries. Doing so could harm relations with U.S. trading partners, lead to worse policies in those countries, and trigger similar complaints about U.S. laws and regulations.

It is true that governments should not use laws and regulations as a means of *disguised protectionism*, and both domestic and international trade law have long recognized this principle. However, for the reasons noted above, the legal standard for "discriminatory" should not target laws and regulations that merely have a *disparate impact* on foreign goods and services. Instead, an investigation by the Commission under Section 338 as to whether measures are "discriminatory" should consider whether these measures are designed to protect domestic industries.

The same logic applies to the Section 338 reference to an "unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country," which is a specific articulation of the non-discrimination principle.

Former U.S. Trade Representative Katherine Tai has talked about these issues in the context of tech regulation on multiple occasions. In October 2023, she offered this brief comment: "I think that as [the trade conversation about discrimination] then crosses over into regulatory efforts that impact these big technology companies, we have to really be cognizant that measures that may look like they have a discriminatory effect may or may not be advanced with a discriminatory intent."[2] Then in January 2025, she went into more detail on these issues:

> One of the challenges that we have had in recent years is the growth of some U.S.-based companies to become so powerful and so dominant, not just here in the United States, but in the global marketplace, that efforts to regulate those companies or those sectors start to run into this dynamic where if they are foreign [countries] attempting to regulate, that they could appear to be discriminatory because these companies are almost all exclusively U.S. based.
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> And so, that's been actually quite a large part of the conversation here over the course of the last couple of years, especially in light of, for example, the tech sector, where European attempts to regulate, they might have discriminatory overtones, or they might not. But attempts to regulate at all, because the affected companies tend to be only U.S. companies, we here at USTR have had to build in additional levels of examination, analysis from a governmental perspective to try to engage with our trading partners and to really try to suss out, are the governmental measures that our companies are complaining about, are they actually discriminatory and therefore something we need to really push back on from a

[2] https://ielp.worldtradelaw.net/2023/10/tai-on-industrial-policy/

> trade discipline perspective? Or are they instead legitimate attempts to regulate that we need to make room to have conversations about and we can't just assume are discriminatory because the affected companies happen to all be U.S.-based?
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> So, this has been one of the most interesting aspects of the way we've been evolving the perspective here at USTR, which has really put us in conversation with our competition authorities to create that space to say that not every foreign government regulatory measure is necessarily discriminatory when you look at the dynamic in the domestic and the international marketplace, where you have a set of dominant players that happen to be U.S. based.[3]

Applying Tai's thinking here, an important issue in Section 338 investigations that seek to identify "discriminations against the commerce of the United States" is how the Commission should analyze whether the foreign regulations are "actually discriminatory" or whether, instead, they are "legitimate attempts to regulate." USTR has weighed in on these issues in the context of WTO obligations, and it would be useful for the Commission to consider USTR's views as it thinks about how the principle of non-discrimination should be interpreted and applied in the context of Section 338.

Sincerely,

Simon Lester
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[3] https://ielp.worldtradelaw.net/2025/01/katherine-tai-on-discrimination-against-us-companies/