UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. MISC-053

Request for Comments Regarding Implementation of 19 U.S.C. 1338(g)

91 Fed. Reg. 57,387 (Sept. 9, 2026)

Discrimination in Fact: A Standard, a Procedure and a Public Record for Section 338 of the Tariff Act of 1930

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Public version. These comments contain no confidential business information.

Abstract

For the first time, a President has used Section 338 of the Tariff Act of 1930 to impose tariffs, and the United States International Trade Commission has asked the public how it should carry out its own duty under Section 338(g): to ascertain whether foreign countries discriminate against American commerce, and to report to the President with recommendations. These comments, filed in Investigation No. MISC-053, answer that question. The statute turns on two phrases it never defines: an "unreasonable" charge that is not equally enforced, and a country that "discriminates in fact." The 1922 Senate record shows what Congress meant. The Senate struck a pure equal-treatment test and kept a test of discrimination, and the words "in fact," added in conference, were read by the leading contemporary commentator to require a real effect on trade. On that reading, a preference that a third country earns through reciprocal concessions is not discrimination without more, and "unreasonable" asks an objective question of its own: whether the measure is bona fide. The comments test that reading against Canada's cheese tariff-rate quotas, using Global Affairs Canada permit data and two USMCA panel reports, and show why a finding must look past fill rates to the rules on who may hold quota. They then propose a procedure modeled on reviews the Trade Representative already runs under Sections 181 and 182 of the Trade Act of 1974: notice, a chance to respond, protection for those who supply information, a stated standard of proof, and graded, reasoned public reports. Annexes reproduce Section 338

and set the 1922 committee text beside the enacted text. The Commission's reports are advice to the President. The case made here is that the advice should show its work.

Statement of Interest and Capacity

I am Distinguished Adjunct Professor of Law, Distinguished Senior Fellow and Co-Director of the Center for International Law at New York Law School. I have practiced international trade law for more than thirty-five years and have authored two books on the North American Free Trade Agreement (NAFTA). I am admitted to the bars of New York, the District of Columbia, Ontario and the United States Court of International Trade. I am also Adjunct Professor in the School of International Policy and Governance at Wilfrid Laurier University, Interim Director of the Balsillie Legal Advisory Centre at the Balsillie School of International Affairs, and Managing Partner of Appleton & Associates International Lawyers LP.

I file these comments as an individual, in a personal capacity and at my own expense. I appear for no government and represent no party to this investigation. The views expressed are my own and do not necessarily reflect the opinions or positions of New York Law School, Wilfrid Laurier University, the Balsillie School of International Affairs, the Balsillie Legal Advisory Centre, or Appleton & Associates International Lawyers LP or any of its clients. These comments contain no confidential business information, and I consent to their posting in full.

I have addressed related questions of process and standards before the Office of the United States Trade Representative, and I cite those filings where they bear on the Commission's questions.[1]

[1]Barry Appleton, *Law, Not Leverage: A Rules-Based Path for the USMCA Review* (Dec. 12, 2025) (rebuttal comments submitted to the Office of the United States Trade Representative, Docket No. USTR-2025-0004); Barry Appleton, *Public Comments on Review of the Agreement Between the United States, Mexico, and Canada* (Oct. 27, 2025) (unpublished manuscript), https://ssrn.com/abstract=5668791; Barry Appleton, *A Standard Never Stated: Section 301 Forced Labor Rebuttal* (July 16, 2026) (rebuttal comments submitted to the Office of the United States Trade Representative, Docket No. USTR-2026-0265, Comment ID USTR-2026-0265-00133410-CAT-20385).

I prepared these comments with the assistance of research and drafting tools, as the accompanying note describes.[2]

[2]I used three generative artificial intelligence tools in preparing these comments: Claude (Anthropic), CoCounsel (Thomson Reuters Westlaw) and Harvey AI. Under my direction, the tools were used to locate and summarize sources, to draft and revise text, to test the argument against anticipated objections, to check citations and cross-references, and to format the document. I have read the authorities cited in these comments and checked each against the original source. The research questions, the argument, the recommendations and the conclusions are my own, and I take full responsibility for the accuracy and integrity of these comments. No artificial intelligence tool is an author of these comments.

I. Summary

For the first time, a President has used Section 338 of the Tariff Act of 1930 to impose tariffs.[3] The statute gives the Commission a standing duty of its own: to ascertain whether foreign countries burden or discriminate against American commerce, and to bring what it finds to the President with recommendations. The Commission has asked how it should carry out that duty. The answer will be the Commission's first published practice under Section 338(g), and trading partners, investors and courts will read that practice as the measure of how seriously the United States takes its own standard.

The statute turns on two phrases it never defines. The first limb reaches an "unreasonable" charge or limitation that is not equally enforced. The second reaches a country that "discriminates in fact." The Congress that wrote those words left a clear record. In 1922 the Senate had before it a clause that would have condemned any difference in treatment, whatever the consideration behind it. It struck that clause and kept a test of discrimination. That choice, and the words "in fact" that the conference committee then added, should guide how the Commission reads the statute today. I offer five recommendations.

1. Read "discriminates in fact" as the enacting Congress did. Require proof of an actual disadvantage to identified American goods against a named comparator, and treat a preference that a third country obtains in exchange for reciprocal concessions as outside discrimination unless the record shows more.
2. Define "unreasonable," under the first limb, as a measure that is not bona fide, judged objectively from its terms, structure and operation. Keep "not equally enforced" as the separate element the statute already requires, and publish the factors by which bona fides are tested.

[3]Cong. Rsch. Serv., R49349, *U.S. Tariffs on Canadian Imports: Section 338 of the Tariff Act of 1930* (2026) (describing the 2026 proclamations as "the first time a President has expressly cited this statute to impose tariffs").

3. Build the record measure by measure and subdivision by subdivision, and tie any recommendation to the goods that benefit from the practice and to the burden those goods already carry.
4. Restore the public procedure the Commission once used. Give notice and a chance to respond, protect those who supply information, and do not reuse submissions for other purposes without consent.
5. State a standard of proof and publish graded, reasoned reports on the model Congress built into Section 182 of the Trade Act of 1974.

Table 1. The five recommendations at a glance

Recommendation	Commission question	Where discussed
1. Read "discriminates in fact" as the enacting Congress did: an actual disadvantage, shown against a named comparator	Question 1	Part IV; Table 2; Annex B
2. Give "unreasonable" an objective content of its own, separate from unequal enforcement	Question 1	Part V
3. Build the record measure by measure and subdivision by subdivision, and tie any offset to the goods and the burden	Questions 2 and 4(c)	Parts VI and VII
4. Restore a public procedure: notice, a chance to respond, protection for those who supply information, and consent before reuse	Questions 3 and 4(b)	Part VIII; Part IX.B
5. State a standard of proof and publish graded, reasoned reports on the Section 182 model	Questions 4(c) to 4(e)	Part IX; Table 4

Part IV.D tests the reading against Canada's cheese tariff-rate quotas, because the public record there is unusually complete: annual permit data, a named comparator and two USMCA panel reports. Annex A reproduces Section 338 in full. Annex B sets the 1922 committee text beside the text Congress enacted, so that the reader can see what the Senate removed.

None of this asks the Commission to decide a question that belongs to the President, the courts or Congress. Nor do these comments take a position on questions now before the courts, including whether later statutes have displaced or narrowed Section 338, or whether ascertainment by the

Commission under Section 338(g) must precede action by the President; they address only how the Commission should carry out the duty that Section 338(g) describes. The Commission's reports are advice, and the President remains free to act on them or not. What these recommendations ask is that the advice show its work: a standard, a procedure and a public record. Advice of that kind also serves the President. A recommendation built on a stated standard and a public record is one the United States can defend at home and abroad.

II. Why the Commission's Choices Reach Beyond the Statute

Section 338 is an instrument of foreign economic policy, and three features of the present moment carry the Commission's choices well beyond this docket.

The first is credibility. The United States built much of the postwar trading system on the idea that governments should justify their trade measures against stated standards. A finding that another country's measure is "unreasonable," made without saying what the word means, asks partners to accept a standard the United States has not stated. Partners can live with a demanding standard. A hidden one is much harder to accept, and much easier to resist. A rules-based approach gives no other country a veto over American trade policy and does not ask the United States to give up credible tools; it asks only that the United States say when and how its instruments apply.[4]

The second is durability. A recommendation that rests on a published standard and a public record will survive changes in administration, litigation and diplomacy far better than one that does not. The Supreme Court observed this year that the other tariff statutes cited to it carry procedural prerequisites, required agency determinations and limits, and it declined to speculate about statutes not before it.[5] Section 338 carries fewer of those features than its neighbors. That does not mean Congress forbade them; under the predecessor provision the Commission supplied

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[4]Appleton, *Law, Not Leverage*, *supra* note 1, pt. II, at 6.

[5]*Learning Res., Inc. v. Trump*, 607 U.S. ____, No. 24-1287, slip op. at 16 n.4 (2026) (noting that the statutes cited by the principal dissent "contain various combinations of procedural prerequisites, required agency determinations, and limits on the duration, amount, and scope of the tariffs they authorize").

its own procedure, and the choice remains the Commission's. Careful work strengthens the structure Congress built.

The third is example. Other governments will study the first modern application of this provision. Some will copy the Commission's vocabulary to justify measures of their own. Vocabulary travels. The best standard to publish is one the Commission would be content to see applied to the United States.

III. What the Statute Leaves Open, and What the Commission Once Did

Section 338(a) sets out two triggers. The first limb reaches a country that:

> (1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or

The second limb reaches a country that:

> (2) Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.[6]

Two further provisions frame the Commission's task. Subsection (i) defines the unit of analysis, and subsection (g) states the duty itself:

> When used in this section the term "foreign country" means any empire, country, dominion, colony or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.[7]
>
> It shall be the duty of the commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.[8]

[6] 19 U.S.C. § 1338(a)(1)-(2); *see infra* Annex A (reproducing the full text of Section 338).

[7] *Id.* § 1338(i).

[8] *Id.* § 1338(g); *see* Trade Act of 1974, Pub. L. No. 93-618, § 171(a), 88 Stat. 1978, 2009 (1975) (codified at 19 U.S.C. § 2231(a)) (renaming the United States Tariff Commission, the

The statute defines neither "unreasonable" nor "discriminates in fact." It says against whom American commerce is to be compared, but not how the comparison is made, and it sets no standard of proof and no procedure. Each of those choices falls to the Commission.

"At all times" describes continuing work. Continuing work benefits most from criteria published in advance.

Congress knows how to supply content for a word like "unreasonable" when it wants to. In Section 301 of the Trade Act of 1974, as amended, it defined unreasonable conduct as conduct that is unfair and inequitable, gave examples, and said when certain labor practices "shall not be treated as being unreasonable."[9] In the same section it provided that a denial of most-favored-nation treatment is discriminatory only "when appropriate."[10] Section 338 carries no such text. Its terms will therefore take their working meaning from the officials who apply them and the courts that review that application. Since the Supreme Court overruled *Chevron*, a reviewing court decides for itself the best reading of a statute. It may give an executive reading weight in proportion to the thoroughness of its consideration, the validity of its reasoning and its consistency over time, and where a statute uses a term such as "reasonable" that leaves room for judgment, the court still fixes the boundaries of that room.[11] Whatever the scope of review of the President's own findings, the meaning of the statute is a question the courts decide for themselves, and the Federal Circuit has decided a question of presidential trade authority "without according any deference to the President's interpretation."[12] The Commission's reports are advice to the President. Their value in

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"commission" referred to in subsection (g), as the United States International Trade Commission).

[9] 19 U.S.C. § 2411(d)(3)(A)-(B) (defining unreasonable conduct and giving examples); *id.* § 2411(d)(3)(C)(i) (providing that certain labor practices "shall not be treated as being unreasonable" where the Trade Representative makes specified determinations).

[10] *Id.* § 2411(d)(5).

[11] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394-95, 412 (2024) (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[12] *Solar Energy Indus. Ass'n v. United States*, No. 2022-1392, slip op. at 10 (Fed. Cir. Aug. 13, 2024) (supplemental opinion on petition for rehearing).

any later review lies in the reading they set out. A Commission that states its reading first, gives its reasons and applies the reading consistently will shape that review.

The Commission's own history points the same way. Its notice records that the Commission established common rules of procedure for investigations under the predecessor provision, allowed significant public participation, and acted on its own motion, at the request of the President, or on petitions from private parties. The notice also records that the Commission does not currently have an established practice under Section 338(g).[13] The Commission would be restoring a public role, not inventing one.

IV. Question 1: What Makes Conduct "Discriminatory"

A. What the enacting Congress chose

Apart from the text itself, the clearest evidence of what the enacting Congress meant by "discriminates" is the Senate debate of August 11, 1922. Section 338 began as section 317 of the Tariff Act of 1922.[14] The committee text of section 317 carried several triggers. One paragraph reached an "unreasonable" charge that was not equally enforced, the ancestor of today's first limb. Two further paragraphs reached any charge "not equally enforced" on goods moving to or through the United States, whether or not it was unreasonable. A clause in the discrimination paragraph also reached any country that "fails to accord to the commerce of the United States treatment equal and equivalent to that accorded to the commerce of any foreign country."

Senators saw the difficulty at once. Senator Walsh of Montana observed that the equal-treatment clause would operate whatever the consideration a third country had given in a reciprocity agreement. Senator Lodge replied that a reciprocal arrangement had never been held to violate the most-favored-nation clause, and said of reciprocity treaties: "We have them ourselves." Senator Lenroot then moved to strike the two bare equal-enforcement paragraphs and the "equal and

[13]Request for Comments Regarding Implementation of 19 U.S.C. 1338(g), 91 Fed. Reg. 57,387, 57,387-88 & n.ii (Sept. 9, 2026).

[14]*Id.* at 57,387 n.i (explaining that Section 338(g) "originated at Section 317 of the Tariff Act of 1922 and was reenacted with minor changes" in 1930).

equivalent" clause, which, he said, would "leave it applying to all discriminations against the United States." The Senate agreed to the amendment and adopted section 317 as amended, 38 to 19.[15]

The Senate kept "discriminates." It deleted every clause that turned on unequal treatment alone, and it kept equal enforcement as a test only where the charge is also "unreasonable."[16] Congress then carried the same structure into the Tariff Act of 1930.

Table 2. What the Senate did to section 317 on August 11, 1922

Paragraph of the Finance Committee text	Senate action	Result in the enacted text
An unreasonable charge, exaction, regulation or limitation "not equally enforced upon the like products of any foreign country"	Kept	Kept, with "articles" for "products" and "every" for "any" (conference); today's first limb, 19 U.S.C. § 1338(a)(1)
Any charge on goods of non-U.S. origin shipped from the United States "which is not equally enforced upon importation from every foreign country"	Struck (Lenroot amendment)	Deleted
Any duty or restriction on exports to the United States "not equally enforced upon the exportation of such products to every foreign country"	Struck (Lenroot amendment)	Deleted
Discrimination "in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country"	Kept; "customs, tonnage, or port" added (McCumber amendment)	Kept; "in fact" added in conference; today's second limb, § 1338(a)(2)
"or fails to accord to the commerce of the United States treatment equal and equivalent to that accorded to the commerce of any foreign country"	Struck (Lenroot amendment)	Deleted

Table 2 summarizes the floor record. Annex B sets out the full texts and their sources.

[15] 62 Cong. Rec. 11,245-49 (1922) (committee text read by Sen. Walsh at 11,245 and 11,247; remarks of Sens. Walsh and Lodge at 11,247; Lenroot amendment agreed to at 11,248; vote of 38 to 19 on section 317 as amended at 11,248-49).

[16] Wallace McClure, *A New American Commercial Policy as Evidenced by Section 317 of the Tariff Act of 1922*, at 90 (Studies in History, Economics and Public Law vol. 114, no. 2, 1924) (explaining that the surviving paragraph applies "only if the unequal charge upon American commerce is 'unreasonable'" and that the limitation "does not appear in the paragraphs that were stricken out").

Settled principles of construction give this record its weight. Congress does not intend, without saying so, to enact language it has considered and discarded. The deletion of the equal-treatment clause is evidence of that kind, and it is stronger evidence than the remarks of any single senator, which is why these comments rest on the Senate's vote rather than on the speeches around it.[17] The text, read in its setting, supports the same conclusion. In 1922 "discriminate" was a word of commercial treaty practice, tied to the most-favored-nation clause, and the United States then followed the conditional form of that clause, under which a concession granted to one country in return for reciprocal consideration was not regarded as a denial of most-favored-nation treatment to another. That is the usage Senator Lodge invoked when he said a reciprocal arrangement had never been held to violate the clause. The United States adopted the unconditional form in its treaty practice the following year,[18] and Congress re-enacted the section in 1930. The later change in treaty practice does not alter what the 1922 Senate chose, and the 1930 Congress, as Part IV.E shows, preserved the American preference for Cuba in the same Act. The Commission should begin with the text, read in that setting, and treat the Senate's amendment as confirming it rather than as a substitute for it.

The record should be read whole, and it is not one-sided. Senator Lodge called the surviving discrimination clause "very sweeping," and before the amendment he said that, as worded, it would clash with reciprocity agreements.[19] The House and Senate conference committee then changed "discriminates" to "discriminates in fact."[20] What the debate settles is narrower than a holding and more useful than a single speech: the Senate chose a discrimination test over an

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[17] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting))); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983).

[18] Treaty of Friendship, Commerce and Consular Rights, Ger.-U.S., art. VII, Dec. 8, 1923, 44 Stat. 2132 (binding each party "unconditionally" to most-favored-nation treatment of the other's goods); *see* McClure, *supra* note 16, at 83-84 (discussing the meaning "discriminates" carried under the conditional form of the clause).

[19] 62 Cong. Rec. at 11,246, 11,248 (statement of Sen. Lodge).

[20] McClure, *supra* note 16, at 84, 90.

equal-treatment test, and the senators who managed and amended the bill treated preferences exchanged for reciprocal concessions as outside discrimination. The Senate struck the clause that would have reached them.

I recommend that the Commission adopt a reading consistent with that choice. A difference in treatment that a third country obtains in exchange for concessions of its own, under a trade agreement, should not by that fact alone count as discrimination against American commerce. The point carries more force where the United States has itself agreed, in a trade agreement Congress approved, to the terms on which its own goods enter the foreign market.[21] A finding of discrimination should explain why the advantage in question is something other than the price of a reciprocal bargain. This is a reading of a statutory word, not a safe harbor for any agreement. It asks the Commission to give reasons, and it does not ask the Commission to pass on the validity of any proclamation.

B. "In fact" requires proof of effect

The words "in fact" point to what is real. The leading early reading, set out in 1924 by Wallace McClure and reproduced this year by Simon Lester, treated the phrase as meaning material or actual, so that a practice discriminatory on its face, but without effect on trade, fell outside the section.[22] I recommend that the Commission adopt that reading. A finding should rest on evidence that the practice changed the conditions of competition for identified American goods. That evidence need not be a volume count. A rule that bars a class of buyers from holding quota, for example, can change which products move and at what price even when the quota fills. The Commission already reasons this way in other proceedings. In a recent sunset review it treated a smaller Section 232 quota on one country's goods as "a qualitative difference in the receptiveness

[21] *See* 19 U.S.C. § 4511(a) (approving the United States-Mexico-Canada Agreement and its Statement of Administrative Action).

[22] McClure, *supra* note 16, at 32 (explaining that "in fact" carries its "familiar connotation of 'material', 'real' or 'actual'" and leaves aside practices that, "though discriminatory on paper, do not interfere with the practical flow of trade"); *see also* Simon Lester, *The Meaning of "Discrimination" in Section 338's Predecessor (Section 317 of the Tariff Act of 1922)*, Int'l Econ. L. & Pol'y Blog (July 27, 2026), https://ielp.worldtradelaw.net/2026/07/the-meaning-of-discrimination-in-section-338s-predecessor-section-317-of-the-tariff-act-of-1922/.

of the U.S. market," and the Court of International Trade sustained the reasoning while noting that the proposition was contestable.[23] The point is that the Commission should identify the effect it relies on, explain it, and show the evidence for it.

The evidence will usually be ordinary and measurable. Where the practice is the administration of a tariff-rate quota (a set quantity of imports admitted at a lower rate of duty), for example, the Commission can compare the share of each quota actually taken up, by the United States and by the named comparator, across several years. The best measure is goods actually entered. Where only permit data are public, permits issued are a reasonable proxy, and the Commission can ask both governments for entry data. A quota for American goods that fills as fully as the comparator's quota is weak evidence of a disadvantage in fact. A quota that sits unused while the comparator's fills is strong evidence. Either way, the numbers can be tested. The target government can answer them. Part IV.D shows the test applied to public data.

C. The comparator must be named

Discrimination is relative. The second limb compares American commerce with the commerce of "any foreign country," and a finding is only as sound as its comparator. Each allegation should identify the country said to be advantaged, the goods on both sides of the comparison, and the practice that produces the difference.

The dairy proclamation of July 20, 2026 names one. It identifies the eligibility rules for a cheese tariff-rate quota, which it says do not allow retailers to obtain and use quota quantities, and it names the European Union and its member States as the comparator, because retailers have access under the quota the European Union negotiated.[24] Naming a comparator makes an allegation testable; it does not establish discrimination. How the measure treats American commerce relative to the commerce of other countries generally does not change the comparison the statute requires, but it is evidence, under Part IV.B, on whether a difference measured against

[23] *Cleveland-Cliffs Inc. v. United States*, 693 F. Supp. 3d 1341, 1358 (Ct. Int'l Trade 2024).
[24] Proclamation No. 11,047, 91 Fed. Reg. 46,653 (July 23, 2026).

one partner reflects discrimination against American commerce in fact or a different bargain struck with that partner. Whether a difference between the terms two partners negotiated amounts to discrimination "compared with" any foreign country is the question a published standard should answer, and Part IV.A suggests how.

A comparator of this kind raises a second question the Commission should settle in advance. Subsection (i) defines the "foreign country" by reference to separate tariff rates or separate regulations of commerce. The European Union applies one external tariff, while its member States remain sovereign. American trade law has answered the question both ways. The Court of International Trade held that the European Community and each of its member States are countries for countervailing duty purposes, while the antidumping statute excludes customs unions from the term.[25] The Commission should say whether it treats a customs union as one comparator, as several, or case by case, and why.

D. Applying the test: Canada's cheese tariff-rate quotas

The test can be applied today with public data. The Government of Canada publishes, for each calendar year, the quantity of import permits issued under each of its cheese tariff-rate quotas. Two of those quotas are open only to cheese from the United States under the United States-Mexico-Canada Agreement (USMCA), and two are open only to cheese from the European Union under the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA). In each pair, one quota covers cheeses of all types and the other covers industrial

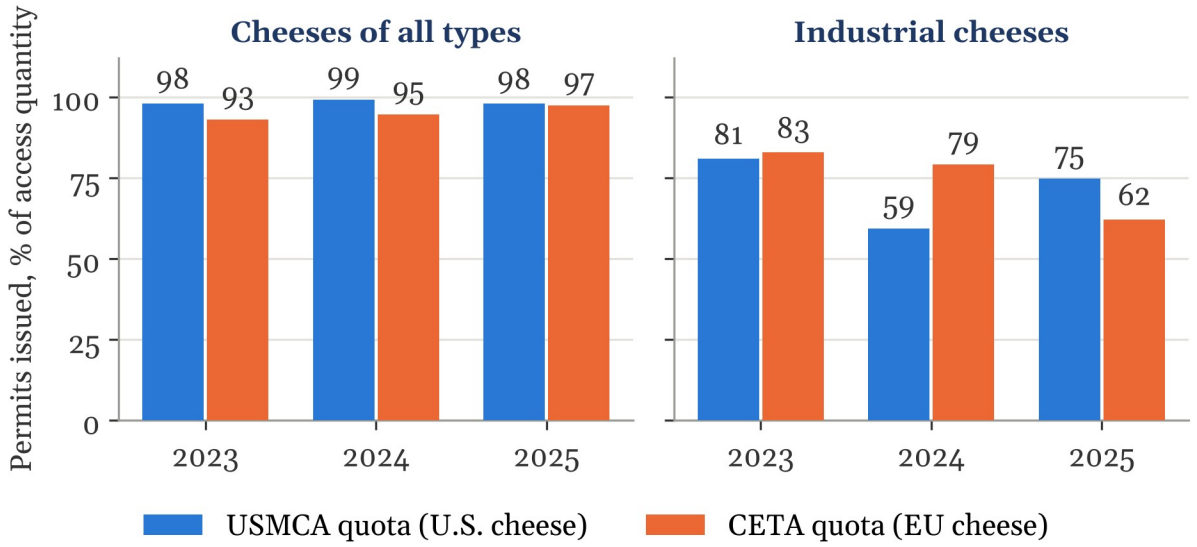
[25] 19 U.S.C. §§ 1338(i), 1677(3) (providing in the latter that a customs union may be a "country" "except for the purpose of antidumping proceedings"); *Republic Steel Corp. v. United States*, 544 F. Supp. 901, 905-06 (Ct. Int'l Trade 1982); *see also Eur. Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 144 (2d Cir. 2014) (holding that the European Community is "properly described as an organ of each nation" and so an agency or instrumentality of a foreign state under 28 U.S.C. § 1603(b)), *rev'd on other grounds*, 579 U.S. 325 (2016); *Usinor Industeel, S.A. v. United States*, 26 Ct. Int'l Trade 467 (2002) (remanding a sunset determination in which the Commission rejected the argument that the single market had made the European Community one home market, and assessed member State producers separately).

cheeses. Table 3 sets out the share of each quota's access quantity issued as import permits in the last three full years.[26]

Table 3. Share of access quantity issued as import permits, Canada's cheese tariff-rate quotas

Year	USMCA, cheeses of all types	CETA, cheeses of all types	USMCA, industrial cheeses	CETA, industrial cheeses
2023	98.0%	93.0%	80.8%	82.8%
2024	99.1%	94.6%	59.3%	79.1%
2025	97.9%	97.4%	74.7%	62.0%

Figure 1. The same shares, by quota and year (percent of access quantity issued as import permits; source: Exhibits A to C)



Two readings follow, and two limits. The American quota for cheeses of all types was used at least as fully as the European quota in each of the three years, and the permits left unissued under it

[26]Glob. Affs. Can., *Utilization Data: Cheese* (data as of Jan. 3, 2024, for 2023; as of July 17, 2025, for 2024; and as of Mar. 20, 2026, for 2025) (extracted from import permits issued through the Export and Import Controls System), https://www.international.gc.ca/trade-commerce/controls-controles/utilization-archive-utilisation.aspx?lang=eng (attached as Exhibits A, B and C). Access quantity and permits issued, in kilograms: USMCA cheeses of all types, 4,167,000 and 4,084,003 (2023), 5,208,000 and 5,163,713 (2024), 6,250,000 and 6,115,642 (2025); CETA cheeses of all types, 16,000,000 and 14,885,663 (2023), 16,000,000 and 15,132,120 (2024), 16,000,000 and 15,580,483 (2025); USMCA industrial cheeses, 4,167,000 and 3,366,676 (2023), 5,208,000 and 3,087,243 (2024), 6,250,000 and 4,666,098 (2025); CETA industrial cheeses, 1,700,000 and 1,407,489 (2023), 1,700,000 and 1,344,344 (2024), 1,700,000 and 1,053,518 (2025). Percentages are calculated from these figures.

ranged from about 44,000 to 134,000 kilograms a year. The industrial cheese quotas show no consistent pattern: the American quota was used less fully than the European one in 2023 and 2024, and more fully in 2025. The first limit is that these are permits issued, not goods entered, and a full quota does not rule out a disadvantage in the kind of cheese that moves or the price at which it moves. Nor do the figures isolate the retailer eligibility rule on which the July 2026 proclamation relies. That rule can be tested only with data on who holds quota and what they import. The second limit is that the quotas differ in size: the American quota for cheeses of all types grew under its schedule from 4.2 million to 6.25 million kilograms over the period, while the European quota stayed at 16 million. A share is read properly only beside the volume behind it, which is why the note sets out both. Comparing shares is a legitimate method, provided the comparison is explained in light of the comparator chosen.[27]

I do not offer these figures to decide whether any measure is discriminatory. I offer them to show that the question is measurable, and that a finding of disadvantage in fact can and should be tested against data of this kind before it is made.

E. Effect is necessary but not sufficient

Different outcomes do not, without more, show discrimination. Simon Lester argues in his comment in this investigation that Section 338 "should not target laws and regulations that merely have a disparate impact on foreign goods and services," and that the question is whether a measure is "designed to protect domestic industries."[28] I agree with the first point. I would not require proof of design, which a documentary record will rarely supply. Lester also accepts that

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[27] *Cf. Hyundai Steel Co. v. United States*, 838 F. Supp. 3d 1339, 1347 (Ct. Int'l Trade 2026) (explaining that Commerce "may compare relative percentages rather than absolute amounts, but it must provide a reasonable explanation" in light of the selected comparator).

[28] Letter from Simon Lester, Non-Resident Fellow, Baker Inst. for Pub. Pol'y, Rice Univ., to Lisa R. Barton, Sec'y to the Comm'n, U.S. Int'l Trade Comm'n 2 (Sept. 22, 2026) (comment in Inv. No. MISC-053), https://ielp.worldtradelaw.net/content/files/2026/09/Simon-Lester-Section-338-discrimination-comment.pdf [hereinafter Lester Letter]; *see also* Simon Lester, *What Kind of Discrimination Should Section 338 Target?*, Int'l Econ. L. & Pol'y Blog (Sept. 25, 2026), https://ielp.worldtradelaw.net/2026/09/what-kind-of-discrimination-should-section-338-target/.

governments "should not use laws and regulations as a means of disguised protectionism,"[29] and that phrase points to a more workable test: the distinction the 1924 reading draws between a bona fide regulation and "disguised favoritism,"[30] judged objectively from the measure's terms, structure and operation rather than from proof of motive. The same objective inquiry gives content to "unreasonable" under the first limb, as Part V explains. The two limbs use it differently. Under the first limb, the absence of bona fides is an element of its own. Under the second, bona fides helps decide whether a proven difference in treatment is discrimination at all.

The strongest objection to the reading in Part IV.A is textual. The second limb measures disadvantage against "the commerce of any foreign country," which reads like a most-favored-nation test. On that reading any preference given to any partner would qualify, and Simon Lester has concluded that the statute permits no justification for discrimination, including a preference allowed under the rules for free trade agreements.[31] The 1922 record answers the objection. The Senate had a pure equal-treatment clause in front of it, struck it, and kept "discriminates." The result is that preferences exchanged for reciprocal concessions are not swept in. Where Congress wanted equal treatment to matter, in the first limb, it paired it with "unreasonable." Reading the comparison phrase in the second limb to restore the deleted test would give back to the statute what Congress removed. The record does not support that reading.

Mona Paulsen, reading the same debates, notes that senators asked whether a reciprocal preference might still be discrimination in fact, and that they saw the double standard in the preference the United States itself gave Cuba.[32] She is right that the question was asked. The answer the Senate gave was the amendment. Senator Walsh had warned that the committee text

[29]Lester Letter, *supra* note 28, at 2.

[30]McClure, *supra* note 16, at 39.

[31]Simon Lester, *A Brief Section 338 Reaction*, Int'l Econ. L. & Pol'y Blog (July 21, 2026), https://ielp.worldtradelaw.net/2026/07/a-brief-section-338-reaction/ ("I don't see that a justification for discrimination is permitted").

[32]Mona Paulsen, *Why Section 338 Does Not Work in a GATT/WTO World: Lessons from Trade Law History*, Int'l Econ. L. & Pol'y Blog (July 23, 2026), https://ielp.worldtradelaw.net/2026/07/why-section-338-does-not-work-in-a-gatt-wto-world-lessons-from-trade-law-history/.

would require the President to impose duties on any country that gave a preference to another, while the United States gave Cuba "a preference over every other country."[33] The Senate then struck the clause that would have reached every preference.

A sharper version of the objection accepts that Congress meant to protect American preferences, and asks whether it also meant to leave other governments free to grant preferences to one another. The Senate debated that case too. Senator Walsh asked whether Yugoslavia, by admitting goods from Czechoslovakia at a lower rate than from the rest of the world, would make itself subject to the section. Senator Lodge answered "No," and said the section "does not interfere with reciprocity treaties." Walsh disagreed, and Lodge allowed that he was not sure.[34] The amendment settled the disagreement. It struck the "equal and equivalent" clause, the provision Walsh had said would apply whatever the reciprocity agreement.[35] The point has present force. The United States grants preferences under its own free trade agreements. A reading of Section 338 under which any preference to any partner is discrimination would make the United States a discriminator under its own statute.

The leading contemporary commentator read the section more broadly, and the Commission should weigh his view. McClure concluded that a favor granted to a third country in return for a reciprocal favor is not "any less in fact a discrimination against the commerce of the United States," and he saw the section as the foundation of an unconditional most-favored-nation policy.[36] He recorded that Senator Lodge had taken the contrary view, which McClure thought the text did not support, and he suggested that the conference committee "may possibly" have added "in fact" to strip "discriminates" of the meaning it carried under the conditional form of the clause.[37] The suggestion is McClure's own, and he offered it tentatively. A silent change made in conference is weaker evidence of meaning than the Senate's recorded vote on a deliberate

[33]62 Cong. Rec. at 11,245 (statement of Sen. Walsh).
[34]*Id.* at 11,246 (colloquy between Sens. Walsh and Lodge).
[35]*Id.* at 11,247-48.
[36]McClure, *supra* note 16, at 119.
[37]*Id.* at 83-84.

amendment, and the words "in fact" are naturally read, as McClure himself read them elsewhere, to require a real effect on trade. McClure wrote as an advocate of the unconditional clause, as his title signals, and the Congress that re-enacted the section in 1930 did not act on his reading. In the same Act it provided that "[n]othing in this Act shall be construed to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902 . . . ."[38] That clause protects the treaty against the whole Act, not against Section 338 alone, so it neither confirms nor refutes McClure's reading. It does show that the Congress that kept the section in force meant to keep a reciprocal preference of its own in place. McClure's contrary reading is a reason for the Commission to answer the question in public, with reasons, before any finding relies on it.

V. Question 1 Continued: What Makes a Charge or Limitation "Unreasonable"

A. A proposed reading

I propose that the Commission treat a charge, exaction, regulation or limitation as unreasonable when it is not a bona fide measure. The first limb then requires two findings, as its text does: that the measure is unreasonable in that sense, and, separately, that it is not equally enforced upon the like articles of every foreign country. A reading under which "unreasonable" meant no more than "not equally enforced" would make one of the two statutory requirements surplusage. It would also undo the 1922 amendment, which struck the paragraphs that reached unequal enforcement alone and left equal enforcement as a test only where the charge is also unreasonable. Bona fides, in this sense, is an objective question. It asks whether the measure, judged by its terms, its structure and its operation on the record, serves the purpose stated for it. It does not ask what officials privately intended, and so it does not require the proof of design that Part IV.E declines to require.

[38] Tariff Act of 1930, ch. 497, § 316, 46 Stat. 590, 695 (formerly codified at 19 U.S.C. § 1316) (omitted from the Code after the treaty terminated on August 21, 1963); *see Faber, Coe & Gregg, Inc. v. United States*, 97 F.2d 115, 117 (C.C.P.A. 1938) (quoting § 316).

The reading also tracks the historical reading, under which practices commonly accepted as justifiable because of peculiar or unusual circumstances, such as sanitation or public safety, were not unreasonable.[39] Because "unreasonable" leaves room for judgment, the weight given to the Commission's reading will depend on how fully it is reasoned and how consistently it is applied, as Part III explains. "Unreasonable" is an element of the first limb only. The second limb turns on "discriminates in fact" and should be read under Part IV, although the same objective inquiry into bona fides informs whether a difference in treatment is discrimination at all.

The Commission should not borrow the definition Congress wrote for Section 301. A statutory word generally carries the meaning it had when Congress enacted it, and Section 301's definitions date from the section's 1979 rewrite and later amendments, written for a different instrument administered by a different officer under procedures of its own.[40] The definition is also broader than the reading the 1922 record supports. It reaches any practice that is unfair and inequitable, even one consistent with the international legal rights of the United States, and it does not ask whether a measure serves a legitimate purpose. Congress has not carried that definition into Section 338. The Commission may find Section 301's examples useful as illustrations of conduct that is not bona fide, but it should treat them as illustrations and not as the statutory test.

B. Three factors for bona fides, and a rule of proof

A measure is more likely bona fide, and less likely unreasonable, to the extent that it states a legitimate purpose the record supports; it is reasonably related to that purpose; and the burden it places on American commerce is proportionate to the benefit it secures. Whether protecting a domestic industry can by itself be such a purpose is a question the Commission should answer expressly and explain. Where the protection takes the form of market-access terms the United

[39]McClure, *supra* note 16, at 32-33 (describing practices that, "though clearly discriminatory, are commonly accepted as justifiable because of the existence of peculiar or unusual circumstances," and inequalities permitted "for reasons such as the requirements of sanitation or public safety").

[40]19 U.S.C. § 2411(d)(3)(A) (defining a practice as unreasonable if, "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States," it "is otherwise unfair and inequitable"); *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (explaining that words generally carry their ordinary meaning at the time Congress enacted the statute).

States itself negotiated and Congress approved, the considerations in Part V.C apply. A fourth consideration governs the Commission's own finding rather than the measure: the evidence offered to show that a measure is unreasonable should match the gravity of the finding.

These are considerations for judgment, not a necessity test borrowed from trade agreements, and a measure need not satisfy each one. That is how American regulatory law of the same era read the word. Construing the Interstate Commerce Act's bar on "undue or unreasonable" preferences, the Supreme Court explained that it "does not mean that the law compels identity of treatment for like services at different places," and that whether a discrimination is unreasonable is a question of fact for the expert body Congress charged with the inquiry.[41] The proportionality factor has support in the Supreme Court's general approach to reasonableness. In *Michigan v. EPA* the Court held that the phrase "appropriate and necessary" requires "at least some attention to cost," and observed that reasonable regulation ordinarily requires attention to the advantages and the disadvantages of agency decisions.[42] I cite the case for how reasonableness is assessed, not for any view of this statute. The rule of proof reflects a familiar principle of international practice: an allegation that a government acts unreasonably is serious and must rest on solid evidence.[43]

C. Treaty status and congressional approval

Consistency with a trade agreement is relevant evidence that a measure is bona fide. It is not conclusive. A measure can conform to an agreement and still be unreasonable in the statutory sense, and a measure that departs from an agreement is not unreasonable for that reason alone.

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[41] *Bd. of Trade of Kan. City v. United States*, 314 U.S. 534, 546 (1942) (quoting *Mfrs. Ry. Co. v. United States*, 246 U.S. 457, 481 (1918)).

[42] *Michigan v. EPA*, 576 U.S. 743, 752 (2015) ("at least some attention to cost"); *id.* at 753 ("advantages and the disadvantages of agency decisions").

[43] Panel Report, *Thailand: Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, ¶¶ 7.873-7.874 (adopted July 15, 2011) (explaining that allegations of biased or unreasonable conduct are serious and must be supported by solid evidence); Panel Report, *United States: Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, ¶¶ 6.50-6.51 (adopted Feb. 1, 2001) (finding that different conclusions reached on different facts do not breach the reasonableness requirement); *see* World Trade Org., *WTO Analytical Index: GATT 1994*, art. X, ¶¶ 58, 63.

Two circumstances deserve particular weight, and the Commission should say in advance how it will treat them. The first is a measure whose terms the United States accepted in an agreement that Congress approved and implemented by statute. The second is a measure that has been examined under the agreement's own dispute settlement procedure. A finding that such a measure is unreasonable should explain why the statutory judgment differs from the one Congress made, or from the one the agreement's procedure produced. An assertion of unreasonableness is not a finding of it.[44] Giving that weight is not a limit on any authority; it bears on whether the facts that Section 338 requires are present.

The cheese quota rules discussed in Part IV.D illustrate the second circumstance. Canada's allocation of its USMCA dairy tariff-rate quotas has been the subject of two panel proceedings under Chapter 31 of the USMCA, the Agreement's state-to-state dispute settlement chapter. The first panel, in 2021, found that Canada's practice of reserving shares of each quota for processors was inconsistent with the Agreement. The second panel, in 2023, examined Canada's revised measures, including the conditions that the United States said prevented retailers, food service operators and other importers from using quota allocations. The majority found none of the measures inconsistent with the provisions the United States cited, including those on the treatment of retailers and other types of applicants. One panelist, in a separate opinion, would have found a breach in the exclusion of retailers and food service operators.[45] The Trade Representative's own 2026 National Trade Estimate records the same outcome: the second panel "found that Canada's measures are not inconsistent with the USMCA provisions cited by the

[44] *Cf.* Appleton, *A Standard Never Stated*, *supra* note 1, pt. VI.B, at 19-22.

[45] Final Report of the Panel, *Canada: Dairy TRQ Allocation Measures*, USMCA Secretariat File No. CDA-USA-2021-31-01 (Dec. 20, 2021); Final Report of the Panel, *Canada: Dairy Tariff-Rate Quota Allocation Measures 2023*, USMCA Secretariat File No. CDA-USA-2023-31-01, ¶¶ 309-12 (Nov. 10, 2023); *id.* ¶¶ 313-14 (separate opinion); Press Release, Off. of the U.S. Trade Representative, *USMCA Panel Releases Canada Dairy Report; Biden-Harris Administration Will Continue Seeking Full USMCA Benefits for U.S. Dairy* (Nov. 24, 2023), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/november/usmca-panel-releases-canada-dairy-report-biden-harris-administration-will-continue-seeking-full (reporting that two of the three panelists found no breach and that the third agreed with the United States on the exclusion of retailers).

United States," and the United States "continues to press Canada" on the exclusion of retailers, among other concerns.[46] The July 2026 proclamation relies on that retailer rule. A finding about it under Section 338 should engage with the 2023 report and explain any different conclusion. Doing so would not make the Commission a reviewer of the panel. It is the reasoned explanation this Part asks for.

VI. Question 2: Mechanisms of Burden

A. Charges on disposition, transit or re-exportation (Question 2(a))

The first limb is confined by its terms to burdens on the disposition of American articles, their transit, or their re-exportation. A finding under this limb should identify the measure that operates on one of those activities. A general restriction on importation does not satisfy it by being described in other words.

B. Customs, port and similar measures (Question 2(b))

The second limb lists customs, tonnage and port duties, fees, charges, exactions, classifications, regulations, conditions, restrictions and prohibitions. Each allegation should identify which listed measure is said to discriminate, who imposed it, and what it does. Two distinctions follow.

The first is the source of the measure. Where an allegation concerns a subdivision, Section 338(i) treats the subdivision as the foreign country only if it enforces separate tariff rates or separate regulations of commerce. Where the measure is a subdivision's, the record should be built subdivision by subdivision; where it is national, a national analysis is the right one. Practices differ among subdivisions and change over time, and a national characterization of a practice that varies by subdivision will not support a recommendation about the nation.

The second is the kind of measure. A government's decision about what to buy for resale, and from whom, is a commercial choice and is not obviously a customs, port or similar measure. Peter

[46]Off. of the U.S. Trade Representative, *2026 National Trade Estimate Report on Foreign Trade Barriers* 61 (2026) [hereinafter 2026 National Trade Estimate].

Harrell and Jennifer Hillman have made this argument about provincial liquor purchasing.[47] I do not ask the Commission to resolve it. I ask it to say whether it regards purchasing decisions as within the second limb and, if so, on what textual ground. A purchasing decision and a prohibition on sale are different things, and the record should keep them apart. Whether a refusal to list goods of one origin differs in kind from an ordinary buying choice is a further question the Commission should answer on the text of the statute, and it should say where it draws that line. Where a listing decision responds to an American measure, the question in Part X.A also arises.

C. Benefit to the industry of a third country (Question 2(c))

Where the allegation is that a practice benefits the industry of a third country, the Commission should require evidence of the benefit, identify the third country and the goods, and show that the benefit comes from the practice and not from other causes. Where the benefit arises from concessions the third country obtained under a reciprocal trade agreement, the Commission should say so and apply the reading in Part IV.A.

VII. Measuring the Burden and Any Offset (Questions 2 and 4(c))

A recommendation is only as precise as the burden it answers. The offset should follow the goods. Any response the Commission recommends should be tied to the goods that benefit from the practice complained of, and not to a general measure of trade between the two countries, a point Harrell and Hillman also make.[48] A recommendation detached from the practice invites the objection that it is retaliation by another name. That objection is easy for a partner to make in public and hard for the United States to answer.

The rate should follow the burden. Section 338(d) directs the President, when he finds that the public interest will be served, to declare

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[47]Peter E. Harrell & Jennifer Hillman, *Prospective Legal Challenges to Trump's Section 338 Tariffs Against Canada*, Volokh Conspiracy (Aug. 3, 2026), https://reason.com/volokh/2026/08/03/prospective-legal-challenges-to-trumps-section-338-tariffs-against-canada/ (arguing that provincial liquor decisions were made "as purchasers of liquor, not as customs authorities").

[48]Harrell & Hillman, *supra* note 47 (arguing that an offsetting tariff should "apply to the goods that benefit from the practice being offset").

> such new or additional rate or rates of duty as he shall determine will offset such burden or disadvantage, not to exceed 50 per centum ad valorem or its equivalent . . . .[49]

Fifty percent is a ceiling. A recommendation should state the burden in dollars, by product, and show how the recommended rate approximates it.[50] The determination is the President's. The Commission's part is to supply the arithmetic on which it can rest, and to say plainly where a burden cannot be measured. A rate at the ceiling calls for a measured burden that reaches the ceiling.

The point is practical. The lists of goods covered by the current Section 338 measures were revised in September and again on October 23, 2026.[51] A record that ties each covered good to the practice it answers lets the Commission, the President and the public see what each revision does.

Cumulative burden counts. Goods that already bear duties under Section 232 of the Trade Expansion Act of 1962 or other authorities, and that would bear more under Section 338, carry a combined burden the Commission should measure and report. The statute caps Section 338 duties at fifty percent and says nothing about stacking. The Commission cannot resolve that question, but it can show the combined effect so that decision-makers see it. Overlapping instruments impose their own costs on firms that try to comply, and smaller firms bear them most.[52]

Recommendations should say when they end. Each should identify the facts whose change would resolve the finding. Section 338(b) itself turns on whether a country has maintained or increased its discriminations.[53] A recommendation with a stated way out is easier to defend and easier to review.

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[49] 19 U.S.C. § 1338(d).

[50] *See* Harrell & Hillman, *supra* note 47 (arguing that an offsetting tariff's amount should "match or approximate the value of that harm").

[51] Proclamation No. 11,064, 91 Fed. Reg. 58,331 (Sept. 14, 2026); Proclamation No. 11,065, 91 Fed. Reg. 58,339 (Sept. 14, 2026); Proclamation No. 11,076, 91 Fed. Reg. 68,861 (Oct. 30, 2026).

[52] Appleton, *Law, Not Leverage*, *supra* note 1, pt. II.C, at 7.

[53] 19 U.S.C. § 1338(b).

VIII. Question 3: Obtaining Information, Confidentiality and Reprisal

A. Restore a public procedure (Question 3(a))

The Commission should adopt written rules of procedure before it acts on any specific allegation, as it did under the predecessor provision. Those rules should provide for a published notice of each investigation, written submissions, and a public hearing where the allegation concerns a specific measure of a specific country. A hearing lets the Commission test evidence in public and gives the government concerned, American exporters and American importers the same opportunity to be heard. I would welcome the opportunity to appear at any hearing the Commission holds on these questions.

The notice explains that the Commission moved to a less public practice after 1930 because of the sensitive nature of the work.[54] Sensitivity is a reason to protect particular information. The confidentiality rules the Commission already applies, and a non-public annex where needed, can do that work without closing the process to the parties whose conduct and commerce it concerns.

B. Notice and response

The Commission should give notice of any specific allegation to the government whose measure is in issue and to affected parties, and allow a reasonable time to respond. A finding that rests on evidence the target has never seen is one the target cannot answer. Where the Commission relies on information it did not share, it should say so, and it should not draw an adverse inference from silence about material that was never put to the party.

C. Confidential business information (Questions 3(b) and 3(c))

Firms that supply information about foreign practices may fear reprisal in the market they describe, and smaller firms most of all. The Commission should offer protective procedures that do not depend on the submitter's market power, require non-confidential summaries good enough for others to answer, and state at the outset how it will treat information supplied by a

[54]Request for Comments, 91 Fed. Reg. at 57,387 n.iii.

foreign government. A foreign government is more likely to cooperate with a process whose terms it can read in advance.[55]

D. Mitigating the risk of reprisal (Question 3(d))

The Commission should assume reprisal against a submitter is possible and design for it. It can accept anonymous or aggregated submissions where the evidence permits, limit who within the Commission sees identifying detail, and publish the rules for doing both.

IX. Question 4: Analysis, Reuse, Proof and Publication

A. Specific allegations and aggregates (Question 4(a))

The Commission can usefully receive both. An allegation about a specific measure can be tested. An aggregate picture of a country's practices cannot be tested until it is broken into the measures that compose it. I recommend that the Commission accept aggregates as context and require that any finding rest on identified measures.

B. Reuse of information (Question 4(b))

Information submitted under Section 338(g) should not be used in other Commission proceedings, including its general fact-finding studies under Section 332 of the Tariff Act of 1930, without the submitter's consent. A submitter who offers material for one purpose, on the understanding that it is protected, should not find it reused for another. Nothing in the statute requires this rule, and nothing forbids it; it is a choice within the Commission's discretion. Aggregated or anonymized use could remain open. A consent rule will improve the candor and quality of what the Commission receives.

C. Factors for recommendations, and a stated standard of proof (Question 4(c))

The Commission should state the standard of proof it will apply and set it in proportion to the gravity of the finding. A finding that a practice is unreasonable or discriminatory, with consequences for trade in other goods, should require more than an assertion or a single secondary source. The Commission should also say which kinds of evidence it treats as probative

[55] *Cf.* Appleton, *Law, Not Leverage*, *supra* note 1, pt. II, at 6 (proposing shared rules on access, privacy and due process).

and which as merely suggestive. When it recommends a response, it should weigh the factors set out in Part VII, the availability of consultation under any applicable trade agreement, and the effect of the response on American importers and consumers. Congress has written factors of this kind before. Before naming a priority foreign country under Section 182, the Trade Representative must find that its practices are the "most onerous or egregious," that they have the "greatest adverse impact (actual or potential)" on the relevant American products, and that the country is not "entering into good faith negotiations" or "making significant progress" in negotiations.[56] Severity, measured impact and the state of engagement are the right factors here as well.

D. Public reports (Questions 4(d) and 4(e))

The notice records that the Commission did not historically publish its reports to the President, and asks whether it should continue that practice. It should not. The factual findings and the reasoning behind them should be public, with a non-public annex confined to confidential business information and similar material. The historical record shows the cost of the alternative. In 1941 the Tariff Commission reported that it did "not, however, make public the correspondence and complaints" it received under Section 338, and that no action under the law had "been carried as far as the imposition of penalty duties."[57] Authors who surveyed the record in 2016 reported that petitions under the section were not public, that hearings were not held, and that they found no public record relating to the section after 1949.[58] Work that leaves no public record cannot be reviewed, and work that cannot be reviewed builds none of the predictability on which trade depends.

Congress has already designed a model. Section 182 of the Trade Act of 1974 requires the Trade Representative to identify, each year and against criteria the statute states, the countries whose

[56]19 U.S.C. § 2242(b)(1)(A)-(C).

[57]U.S. Tariff Comm'n, *Twenty-Fifth Annual Report* 43-44 (1941).

[58]John Veroneau & Catherine Gibson, *The President's Long-Forgotten Power to Raise Tariffs*, Law360 (Dec. 14, 2016), https://www.cov.com/-/media/files/corporate/publications/2016/12/law360_the_presidents_long_forgotten_power_to_raise_tariffs.pdf; *see also* U.S. Tariff Comm'n, *Eighteenth Annual Report* 16 (1934) (listing "its customary work on discriminations" under section 338 among its "confidential projects").

practices deny adequate intellectual property protection or fair market access, and to publish the list in the Federal Register. The Trade Representative may revise the list at any time when the information warrants.[59] The Trade Representative runs that review in public. A Federal Register notice invites written comments from interested persons and, on a separate schedule, from foreign governments; a public hearing follows; the comments sit in a public docket; and the annual report places countries on a Priority Watch List or a Watch List.[60] Criteria stated in advance, grades, a narrative and a calendar make those reports readable, comparable and reviewable. Section 338(g) neither requires nor forbids publication. The Commission can adopt the same architecture without waiting for legislation.

[59]19 U.S.C. § 2242(a), (c)(1), (e); *see also* Appleton, *A Standard Never Stated*, *supra* note 1, pt. VI.E, at 28-29.

[60]Request for Comments and Notice of a Public Hearing Regarding the 2026 Special 301 Review, 90 Fed. Reg. 57,519 (Dec. 11, 2025) (Docket No. USTR-2025-0243).

E. Two existing processes that point the way

Table 4. The Special 301 review and the practice proposed here

Feature	Special 301 review (Section 182)	Section 338(g) practice proposed here	Where
Criteria stated in advance	Statutory: "most onerous or egregious," "greatest adverse impact," and the state of negotiations (19 U.S.C. § 2242(b)(1))	Published readings of "discriminates in fact" and "unreasonable"; three factors and a rule of proof	Parts IV, V and IX.C
Notice and comment	Annual Federal Register notice; comments in a public docket	Published notice of each investigation; written submissions	Part VIII.A
Foreign government voice	Separate comment deadline for foreign governments	Notice to the government concerned and time to respond	Part VIII.B
Hearing	Annual public hearing	Public hearing where a specific measure of a specific country is alleged	Part VIII.A
Confidential information	Business confidential information protected; public version required	Existing confidentiality rules; a non-public annex where needed	Parts VIII.C and IX.D
Publication	Annual report; list published in the Federal Register (§ 2242(e))	Graded, reasoned public reports	Part IX.D
Revision	List may be revised "at any time" (§ 2242(c)(1))	Each recommendation states the facts that would end it	Part VII

Sources for the Special 301 column appear in the notes to Part IX.D.[61]

Section 181 offers a second model and a ready source of information. It requires the Trade Representative to identify and analyze, every year, the foreign practices that are significant barriers to American exports, to estimate their trade-distorting impact on American commerce, and to take into account "the extent to which such act, policy, or practice is subject to international agreements."[62] The resulting National Trade Estimate draws on comments received in response to a Federal Register notice and on the advice of the trade advisory committees.[63] The comment

[61] *See supra* notes 59-60.

[62] 19 U.S.C. § 2241(a)(1)(A)-(B), (a)(2)(C), (a)(4), (b)(1).

[63] 2026 National Trade Estimate, *supra* note 46, at 1.

period for the 2027 report ran until October 29, 2026, and the Trade Representative posts the submissions, other than confidential business information, in a public docket.[64]

Two consequences follow. The first is a caution. The National Trade Estimate identifies barriers "the U.S. Government seeks to remove," a category far wider than discrimination.[65] A listing in that report is a starting point for inquiry. It is not a finding under Section 338, and the Commission should say so. The second is economy. Where the Commission examines a practice that also appears in that public record, it can begin with what American firms have already placed there, rather than ask the same firms, and expose them to the same risk of reprisal, a second time.

X. Question 5: Other Matters

A. Measures taken in response to American measures

The Commission will be asked to consider measures that a foreign government describes as a response to American measures. The statute does not say how such a measure is to be treated, and the question should not be decided by silence. I recommend that the Commission state in advance whether, and how, a measure taken in response to an American measure can be discrimination under the statute. The statute is aimed at discrimination against American commerce, and a measure that answers an American measure may not fit that description; a reading that counted every response would permit a cycle of measure and countermeasure with no limit the statute supplies. Whatever its answer, the Commission should apply to such a measure the same evidentiary standard, the same comparator requirement and the same notice procedure it applies to any other. A standard applied evenly is the one most likely to persuade the governments whose conduct it describes.

[64]Request for Comments on Significant Foreign Trade Barriers for the 2027 National Trade Estimate Report, 91 Fed. Reg. 58,247 (Sept. 14, 2026) (Docket No. USTR-2026-0498).
[65]2026 National Trade Estimate, *supra* note 46, at 1.

B. Predictability as an American interest

Investors and supply chain planners price stability. A Commission that publishes its reading of these terms gives firms and governments the means to plan, and gives the President a record on which to act. It does so without limiting any authority the statute confers.

XI. Conclusion

Congress chose the Commission for this work. As first proposed in the Senate, the provision would have left the task to whatever department or independent establishment the President directed. The text the Senate adopted gave it to the Tariff Commission, the body Congress had built to find facts about trade.[66] The Commission now has the chance to say, in public and before any particular finding is made, how it will do that work.

I respectfully ask the Commission to read "discriminates in fact" as the Congress that wrote it did, and to require proof of a real disadvantage against a named comparator. I ask it to give "unreasonable" an objective content of its own, separate from unequal enforcement. I ask it to build its record measure by measure and subdivision by subdivision, to tie any recommendation to the goods that benefit and to the burden those goods already carry, to protect those who supply information, and to report in a form that is graded, reasoned and public.

[66]McClure, *supra* note 16, at 339 (reprinting the Smoot amendment, which assigned the duty to "such department or independent establishment of the Government, as the President may direct"); *id.* at 343 (reprinting the text adopted by the Senate, which assigned it to "the United States Tariff Commission").

A standard stated in advance costs the United States nothing it needs. It gives the President a record on which to act, and it gives trading partners a test they can meet. I would be glad to assist the Commission further.

Respectfully submitted,



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Dated: October 30, 2026

Annex A. Section 338 of the Tariff Act of 1930 (19 U.S.C. § 1338)

Reproduced from the United States Code. Tariff Act of 1930, ch. 497, tit. III, § 338, 46 Stat. 590, 704 (codified at 19 U.S.C. § 1338). Section 338 has not been amended since its enactment. The Trade Act of 1974 renamed the United States Tariff Commission, to which subsection (g) refers as "the commission," as the United States International Trade Commission.

(a) Additional duties

The President when he finds that the public interest will be served shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—

(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or

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

(b) Exclusion from importation

If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such products of said country or such articles imported in its vessels as he shall deem consistent with the public interests shall be excluded from importation into the United States.

(c) Application of proclamation

Any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(d) Duties to offset commercial disadvantages

Whenever the President shall find as a fact that any foreign country places any burden or disadvantage upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burden or disadvantage, not to exceed 50 per centum ad valorem or its equivalent, on any products of, or on articles imported in a vessel of, such foreign country; and thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Duties to offset benefits to third country

Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located, and whenever the President shall determine that any new or additional rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty upon the articles wholly or in part the growth or product of any such industry as he shall determine will offset such benefits, not to exceed 50 per centum ad valorem or its equivalent, upon importation from any foreign country into the United States of such articles; and on and after thirty days after the date of any such proclamation such new or additional rate or rates of duty so specified and declared in such proclamation shall be levied, collected, and paid upon such articles.

(f) Forfeiture of articles

All articles imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this chapter shall be applicable to importations into the United States of articles wholly or in part the growth or product of any foreign country, they shall be applicable thereto whether such articles are imported directly or indirectly.

(g) Ascertainment by Commission of discriminations

It shall be the duty of the commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

(h) Rules and regulations of Secretary of the Treasury

The Secretary of the Treasury with the approval of the President shall make such rules and regulations as are necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this section.

(i) "Foreign country" defined

When used in this section the term "foreign country" means any empire, country, dominion, colony or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.

Annex B. Section 317 of the Tariff Act of 1922: committee text and enacted text

The left column is the Finance Committee text of section 317 as it stood when the Senate took it up on August 11, 1922. Words struck through were deleted on the Senate floor. The right column is section 317(a) as enacted on September 21, 1922. Words in bold were added on the Senate floor or in conference. Section 338 of the Tariff Act of 1930 re-enacted this text with minor changes, among them the addition of articles imported in vessels to the opening words and the numbering of the two triggers. The operative words of the two triggers are unchanged.[67]

Section 317, side by side

Finance Committee text (August 11, 1922)	**Text as enacted (September 21, 1922)**
That the President shall by proclamation specify and declare new or additional duties as hereinafter provided upon the products of any foreign country whenever he shall find as a fact that such country—	That the President **when he finds that the public interest will be served thereby** shall by proclamation specify and declare new or additional duties as hereinafter provided upon **articles wholly or in part the growth or product** of any foreign country whenever he shall find as a fact that such country—
Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like products of any foreign country;	Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any **article wholly or in part the growth or product** of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like **articles** of **every** foreign country;
~~Imposes, directly or indirectly, upon the importation from the United States of any article not the product of the United States any customs, tonnage, or port duty or any other charge, exaction, regulation, or limitation whatever which is not equally enforced upon importation from every foreign country of the like article not being the product of the country whence it is directly imported;~~	(Deleted)
~~Imposes upon any product upon its exportation to the United States any duty, charge, restriction, or prohibition whatever which is not equally enforced upon the exportation of such products to every foreign country;~~	(Deleted)

[67]Committee text: 62 Cong. Rec. 11,245, 11,247-48 (1922); McClure, *supra* note 16, at 76-77 n.1. Text as first adopted by the Senate: McClure, *supra* note 16, at 341-43 (reprinting 62 Cong. Rec. at 11,249). Enacted text: Tariff Act of 1922, ch. 356, § 317(a), 42 Stat. 858, 944, *reprinted in* McClure, *supra* note 16, at 23.

Finance Committee text (August 11, 1922)	**Text as enacted (September 21, 1922)**
Discriminates against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country~~; or fails to accord to the commerce of the United States treatment equal and equivalent to that accorded to the commerce of any foreign country~~.	Discriminates **in fact** against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any **customs, tonnage, or port** duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. MISC-053

Request for Comments Regarding Implementation of 19 U.S.C. 1338(g)

Exhibits A to C to the Comments of Professor Barry Appleton

Public version. These exhibits contain no confidential business information.

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These exhibits support Part IV.D of the comments and note 24. Each is the annual cheese tariff-rate quota utilization report published by Global Affairs Canada, compiled from import permits issued through the Export and Import Controls System (EICS), and reproduced here in full as published. The reports are posted on the Government of Canada's archived utilization data page:

https://www.international.gc.ca/trade-commerce/controls-controles/utilization-archive-utilisation.aspx?lang=eng

EXHIBIT A

Global Affairs Canada

Utilization Data: Cheese

Period: 2023/01/01-2023/12/31

As of: 2024/1/3

Data extracted from import permits issued through the Export and Import Controls System (EICS)

Source: Government of Canada, archived utilization data
https://www.international.gc.ca/trade-commerce/controls-controles/utilization-archive-utilisation.aspx?lang=eng

Utilization Data - Cheese

Period: 2023/01/01-2023/12/31
As of: 2024/1/3

HS10	Description	Access Quantity:	CETA Cheese of All Types TRQ (kg) 16,000,000	CETA Industrial Cheeses TRQ (kg) 1,700,000	CPTPP Cheese of All Types TRQ (kg) 3,625,000	CPTPP Industrial Cheeses TRQ (kg) 7,975,000	CPTPP Mozzarella and Prepared Cheeses TRQ (kg) 2,900,000	CUSMA Cheeses of All Types TRQ (kg) 4,167,000	CUSMA Industrial Cheeses TRQ (kg) 4,167,000	WTO Cheeses of All Types TRQ - EU (kg) 14,271,831	WTO Cheeses of All Types TRQ - NON-EU (kg) 6,140,035	Supplemental (kg) N/A	IREP (kg) N/A
0406101000	FRESH (UNRIPENED OR UNCURED) CHEESE, INCLUDING WHEY CHEESE AND CURD.		292,739	38,640	48,612	0	N/A	162,854	1,079,099	185,638	434,772	26	2,478,834
0406201100	CHEDDAR CHEESE AND CHEDDAR TYPES OF CHEESE, GRATED OR POWDERED,		19,200	0	0	0	0	8,292	52,323	0	52,699	0	6,691
0406209100	GRATED OR POWDERED CHEESE OF ALL KINDS, OTHER THAN CHEDDAR AND CHEDDAR TYPES,		220,165	71,710	0	0	119,780	425,195	183,869	68,350	909,362	0	954,023
0406301000	PROCESSED CHEESE, NOT GRATED OR POWDERED		413,550	0	0	0	0	97,259	7,343	1,069,363	143,645	9,997	233,986
0406401000	BLUE-VEINED CHEESE		206,769	0	0	0	N/A	29,051	40,323	901,950	32,090	20	0
0406901100	CHEDDAR CHEESE AND CHEDDAR TYPES OF CHEESE		469,993	82,823	2,274,454	1	N/A	1,461,417	55,566	2,047,921	861,220	515	374,290
0406902100	CAMEMBERT CHEESE AND CAMEMBERT TYPES OF CHEESE		99,698	0	0	0	N/A	0	0	116,828	0	27	0
0406903100	BRIE CHEESE AND BRIE TYPES OF CHEESE		985,722	0	0	0	N/A	281	0	852,245	849	33	0
0406904100	GOUDA CHEESE AND GOUDA TYPES OF CHEESE		1,213,162	187,988	4,040	0	N/A	21,099	0	1,037,445	85,057	28	975
0406905100	PROVOLONE CHEESE AND PROVOLONE TYPES OF CHEESE		152,619	0	0	0	N/A	57,544	0	83,471	54,604	0	183,163
0406906100	MOZZARELLA CHEESE AND MOZZARELLA TYPES OF CHEESE		2,311,189	424,970	220,246	42,121	1,439,160	1,658,901	1,805,398	303,506	461,373	675	820,282
0406907100	SWISS/EMMENTAL CHEESE AND SWISS/EMMENTAL TYPES OF CHEESE		1,026,930	350,159	61,806	0	N/A	1,125	94,304	1,771,249	1,299,073	42	810
0406908100	GRUYERE CHEESE AND GRUYERE TYPES OF CHEESE		52,073	0	0	0	N/A	0	0	4,145	791,843	130	0
0406909100	HAVARTI CHEESE AND HAVARTI TYPES OF CHEESE		110,742	0	0	0	N/A	23,926	0	176,120	103,080	0	881
0406909300	PARMESAN CHEESE AND PARMESAN TYPES OF CHEESE		3,551,891	102,507	130,373	1	N/A	33,148	5,284	1,919,580	61,923	363	14,237
0406909500	ROMANO CHEESE AND ROMANO TYPES OF CHEESE		405,786	9,802	0	1	N/A	738	8,867	358,495	14,923	18	14,461
0406909800	ALL OTHER CHEESES		3,353,435	138,890	18	0	N/A	103,173	34,300	2,748,440	621,899	95	0
		Total Permit Quantity:	**14,885,663**	**1,407,489**	**2,739,549**	**42,124**	**1,558,940**	**4,084,003**	**3,366,676**	**13,644,746**	**5,928,412**	**11,969**	**5,082,633**

Exhibit A

* Data extracted from EICS Import Permits Issued

EXHIBIT B

Global Affairs Canada

Utilization Data: Cheese

Period: 2024/01/01-2024/12/31

As of: 2025/7/17

Data extracted from import permits issued through the Export and Import Controls System (EICS)

Source: Government of Canada, archived utilization data
https://www.international.gc.ca/trade-commerce/controls-controles/utilization-archive-utilisation.aspx?lang=eng

Utilization Data - Cheese

Period: 2024/01/01-2024/12/31
As of: 2025/7/17

HS10	Description	Access Quantity:	CETA Cheese of All Types TRQ (kg) 16,000,000	CETA Industrial Cheeses TRQ (kg) 1,700,000	CPTPP Cheese of All Types TRQ (kg) 3,661,000	CPTPP Industrial Cheeses TRQ (kg) 8,055,000	CPTPP Mozzarella and Prepared Cheeses TRQ (kg) 2,929,000	CUSMA Cheeses of All Types TRQ (kg) 5,208,000	CUSMA Industrial Cheeses TRQ (kg) 5,208,000	WTO Cheeses of All Types TRQ - EU (kg) 14,271,831	WTO Cheeses of All Types TRQ - NON-EU (kg) 6,140,035	Supplemental (kg) N/A	IREP (kg) N/A
0406101000	FRESH (UNRIPENED OR UNCURED) CHEESE, INCLUDING WHEY CHEESE AND CURD.		432,867	164,500	17,136	40	N/A	136,788	772,207	262,275	453,981	29,260	4,275,739
0406201100	CHEDDAR CHEESE AND CHEDDAR TYPES OF CHEESE, GRATED OR POWDERED,		44,160	0	0	0	0	26,163	190,947	0	13,064	0	325,110
0406209100	GRATED OR POWDERED CHEESE OF ALL KINDS, OTHER THAN CHEDDAR AND CHEDDAR TYPES,		366,884	115,730	0	0	102,420	952,497	176,180	148,463	489,871	850	843,776
0406301000	PROCESSED CHEESE, NOT GRATED OR POWDERED		429,742	0	0	0	0	85,806	37,823	1,157,437	129,025	21,517	251,762
0406401000	BLUE-VEINED CHEESE		189,367	0	0	0	N/A	44,004	35,602	820,366	57,834	16	0
0406901100	CHEDDAR CHEESE AND CHEDDAR TYPES OF CHEESE		890,232	155,565	3,275,780	42,922	N/A	1,601,133	158,581	235,078	2,063,152	19,724	450,305
0406902100	CAMEMBERT CHEESE AND CAMEMBERT TYPES OF CHEESE		125,406	0	0	0	N/A	0	0	103,237	0	0	0
0406903100	BRIE CHEESE AND BRIE TYPES OF CHEESE		685,868	0	0	0	N/A	132	0	1,154,166	891	20	0
0406904100	GOUDA CHEESE AND GOUDA TYPES OF CHEESE		1,219,315	19,048	71,460	0	N/A	39,579	0	1,497,896	55,706	2,171	1,027
0406905100	PROVOLONE CHEESE AND PROVOLONE TYPES OF CHEESE		148,926	9,000	0	0	N/A	123,766	7,518	111,012	37,246	0	239,966
0406906100	MOZZARELLA CHEESE AND MOZZARELLA TYPES OF CHEESE		2,035,251	249,488	153,945	2	1,241,180	1,444,344	1,574,797	600,231	420,474	30,313	926,469
0406907100	SWISS/EMMENTAL CHEESE AND SWISS/EMMENTAL TYPES OF CHEESE		1,591,396	386,652	16,006	0	N/A	302,833	112,511	1,318,164	776,228	612	830
0406908100	GRUYERE CHEESE AND GRUYERE TYPES OF CHEESE		85,231	0	0	0	N/A	0	0	42,961	776,638	13	0
0406909100	HAVARTI CHEESE AND HAVARTI TYPES OF CHEESE		139,700	0	0	0	N/A	69,263	0	146,312	86,131	152	1,573
0406909300	PARMESAN CHEESE AND PARMESAN TYPES OF CHEESE		3,606,665	43,989	52,177	0	N/A	69,187	7,164	2,348,811	4,353	550	7,585
0406909500	ROMANO CHEESE AND ROMANO TYPES OF CHEESE		314,837	8,232	0	0	N/A	3,444	9,366	346,000	473	0	21,207
0406909800	ALL OTHER CHEESES		2,826,273	192,140	0	0	N/A	264,774	4,547	3,124,690	590,449	8,341	0
		Total Permit Quantity:	**15,132,120**	**1,344,344**	**3,586,504**	**42,964**	**1,343,600**	**5,163,713**	**3,087,243**	**13,417,099**	**5,955,516**	**113,539**	**7,345,349**

Exhibit B

* Data extracted from EICS Import Permits Issued

EXHIBIT C

Global Affairs Canada

Utilization Data: Cheese

Period: 2025/01/01-2025/12/31

As of: 2026/3/20

Data extracted from import permits issued through the Export and Import Controls System (EICS)

Source: Government of Canada, archived utilization data
https://www.international.gc.ca/trade-commerce/controls-controles/utilization-archive-utilisation.aspx?lang=eng

Utilization Data - Cheese

Period: 2025/01/01-2025/12/31
As of: 2026/3/20

HS10	Description	Access Quantity:	CETA Cheeses of All Types TRQ (kg) 16,000,000	CETA Industrial Cheese TRQ (kg) 1,700,000	CPTPP Cheeses of All Types TRQ (kg) 3,698,000	CPTPP Industrial Cheese TRQ (kg) 8,135,000	CPTPP Mozzarella and Prepared Cheese TRQ (kg) 2,958,000	CUSMA Cheeses of All Types TRQ (kg) 6,250,000	CUSMA Industrial Cheeses TRQ (kg) 6,250,000	WTO Cheeses of All Types TRQ - EU (kg) 14,271,831	WTO Cheeses of All Types TRQ - NON-EU (kg) 6,140,035	Supplemental (kg) N/A	IREP (kg) N/A
0406101000	FRESH (UNRIPENED OR UNCURED) CHEESE, INCLUDING WHEY CHEESE AND CURD.		1,228,123	268,592	75,469	0	N/A	233,967	1,408,802	302,214	449,106	57	4,642,024
0406201100	CHEDDAR CHEESE AND CHEDDAR TYPES OF CHEESE, GRATED OR POWDERED,		5,762	0	0	0	0	37,247	127,957	0	18,869	0	364,468
0406209100	GRATED OR POWDERED CHEESE OF ALL KINDS, OTHER THAN CHEDDAR AND CHEDDAR TYPES,		421,596	113,795	0	0	0	1,390,993	254,212	170,426	244,717	0	1,143,982
0406301000	PROCESSED CHEESE, NOT GRATED OR POWDERED		220,421	0	0	0	0	98,712	130,801	1,283,500	220,591	9,722	75,293
0406401000	BLUE-VEINED CHEESE		140,628	0	0	0	N/A	50,545	39,729	840,362	112,244	0	0
0406901100	CHEDDAR CHEESE AND CHEDDAR TYPES OF CHEESE		903,871	134,821	2,852,430	140,400	N/A	1,963,433	401,950	308,257	2,733,181	181	411,636
0406902100	CAMEMBERT CHEESE AND CAMEMBERT TYPES OF CHEESE		121,196	0	2	0	N/A	0	0	119,557	0	0	0
0406903100	BRIE CHEESE AND BRIE TYPES OF CHEESE		752,732	0	2	0	N/A	290	0	986,518	665	0	0
0406904100	GOUDA CHEESE AND GOUDA TYPES OF CHEESE		1,320,099	0	0	0	N/A	37,126	561	1,593,096	57,965	23	562
0406905100	PROVOLONE CHEESE AND PROVOLONE TYPES OF CHEESE		245,590	0	0	0	N/A	229,540	7,500	48,470	184	0	226,899
0406906100	MOZZARELLA CHEESE AND MOZZARELLA TYPES OF CHEESE		1,752,629	337,496	600,117	113,400	1,329,603	1,055,552	2,111,897	205,673	343,595	0	1,541,831
0406907100	SWISS/EMMENTAL CHEESE AND SWISS/EMMENTAL TYPES OF CHEESE		1,227,233	21,600	0	0	N/A	450,532	2,996	1,567,601	630,360	13	411
0406908100	GRUYERE CHEESE AND GRUYERE TYPES OF CHEESE		48,496	0	0	0	N/A	0	0	143,087	799,090	18	0
0406909100	HAVARTI CHEESE AND HAVARTI TYPES OF CHEESE		41,994	0	0	0	N/A	137,197	0	258,327	46,461	0	795
0406909300	PARMESAN CHEESE AND PARMESAN TYPES OF CHEESE		3,936,340	6,936	19,224	0	N/A	103,703	79,062	2,639,003	637	541	72,890
0406909500	ROMANO CHEESE AND ROMANO TYPES OF CHEESE		364,195	10,801	0	0	N/A	10,741	9,184	365,953	2	0	1,986
0406909800	ALL OTHER CHEESES		2,849,578	159,477	39,760	0	N/A	316,064	91,447	3,344,251	390,689	17,718	3,760
		Total Permit Quantity:	**15,580,483**	**1,053,518**	**3,587,004**	**253,800**	**1,329,603**	**6,115,642**	**4,666,098**	**14,176,295**	**6,048,356**	**28,273**	**8,486,537**

* Data extracted from EICS Import Permits Issued

Exhibit C