LIBERTY JUSTICE CENTER
1629 K STREET N.W., SUITE 300 • WASHINGTON, DC 20006
(512) 481-4400 • LIBERTYJUSTICECENTER.ORG

Via electronic mail

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

Re: U.S. International Trade Commission, docket number MISC-053

Dear Secretary Barton,

The Liberty Justice Center has been at the forefront of tariff litigation over the past two years, representing plaintiffs against the President's tariffs in *V.O.S. Selections, Inc., et al. v. Trump, et al.,* No. 25-00066 (IEEPA; eventually decided by the U.S. Supreme Court as *Learning Resources, et al. v. Trump, et al,* No. 24-1287); *Burlap & Barrel, Inc., et al., v. Trump, et al.,* No. 26-01606 (Section 122); *Burlap & Barrel Inc., et al. v. Greer, et al.,* No. 26-cv-03345 (Section 301); *Gellert Global Group Corp. v. Trump, et al.,* No. 26-cv-04636 (Section 338), and filing an amicus brief on behalf of the *Burlap* clients in *In re Section 301 Forced Labor Cases,* No. 26-cv-03555 (Section 301), all in the Court of International Trade. We believe that our experience litigating tariff cases over the past two years may provide valuable insight here.

Section 338 authorizes "additional duties" when the President finds that a foreign country "[d]iscriminates 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."

The question, then, is whether Canada has "discriminate[d]" against the commerce of the United States. Fortunately, we have a contemporary account to help discern the meaning of "discriminate" as it is used in Section 338. Section 338 originated as Section 317 of the Tariff Act of 1922, and Wallace McClure, a State Department veteran, wrote a book about American trade policy two years after that Act was enacted. In it, he says that "a discriminatory practice is not to be actionable unless it is 'unreasonable.' There are certain practices which, though clearly discriminatory, are commonly accepted as justifiable because of the existence of peculiar or unusual circumstances." Wallace McClure, *A New American Commercial Policy as Evidenced by Section 317 of the Tariff Act of 1922,* Studies in History, Economics and Public Law, Volume CXIV, 211, 242 (1924).

In the text of Section 338 and its predecessor, the word "discriminates" is followed by the modifier "in fact." According to McClure, the term "in fact" "doubtless possesses . . . its familiar connotation of 'material,' 'real' or 'actual,' as distinguished from 'theoretical' or 'as a matter of law.'" *Id.* at 241. The use of the term "in fact" "suggests the intention of the framers of [Section 338] to confine its application to the service of practical utility, that is, to obtain for American

exporters substantial equality of treatment, *omitting action in regard to practices that, though discriminatory on paper, do not interfere with the practical flow of trade." Id.*

By way of example, McClure observed that Canada and Great Britain in 1924 had mutual "treatment in respect to import duties that is more favorable than the corresponding treatment which either gives to the United States." *Id.* at 244. "Each of those two countries . . . imposes upon imports from the United States duties that are unequal to and heavier than the duties which it places upon similar goods imported from the other." *Id.* "[S]uch treatment constitutes a discrimination against the United States." *Id.*

Another form of discrimination exists where countries enact "double-column schedules of import duties," where one schedule "represents the rates which the tariff policy and budgetary needs of the country really require," while the higher schedule is "expected to be used for bargaining purposes." *Id.* at 244-245. McClure's example here was France, which at the time "receive[d] equality of treatment in the American market," and yet "impose[d] maximum rates upon numerous products from this country." *Id.* at 245. This form of discrimination would also exist in countries that had established statutory tariff rates, but then negotiated certain deals with certain countries under those rates. *Id.*

McClure also observed that "countries which have entered into one or more reciprocity treaties with other countries for the exchange of favors or concessions which are not generalized" discriminate against the United States, because

"American goods which compete with those of [countries with such treaties] are undoubtedly placed at a disadvantage by the existence of this arrangement, which must be assumed to constitute a discrimination against the United States." *Id.* at 246.

On the other hand, McClure noted that a scheme wherein the Canary Islands implemented a tariff scheme that was variable based on the merchandise's point of origin, with Spain being treated more favorably than the rest of Europe, and so on. Although "[t]he products of the United States must pay the highest rates," McClure believed that such a scheme would *not* discriminate against those products within the meaning of then-Section 317. *Id.* at 250.

Thus, even though at first glance the language "directly or indirectly" implies a very broad an inclusive definition of "discrimination," the remaining language tempers that implication significantly.

From this perspective, we propose that the Commission adopt a test incorporating the following factors to determine whether a foreign country has adopted trade practices that discriminate against the United States:

1. Does the foreign country in question have a more favorable trade agreement or reciprocity treaty, resulting in more favorable tariff rates, with a third country, than it does with the United States?
2. If the country has a double-column schedule of import duties, does it impose the higher duties on the United States?

3. If the country offers third countries a workaround for its tariff rates, does it offer such a workaround to the United States?
4. Finally, if the country does impose higher rates on the United States, is there a uniform rubric for doing so, as in the case of the Canary Islands noted above?

Thank you for your attention to this matter.

Very truly yours,



Jeffrey M. Schwab
Senior Attorney and Director of Litigation