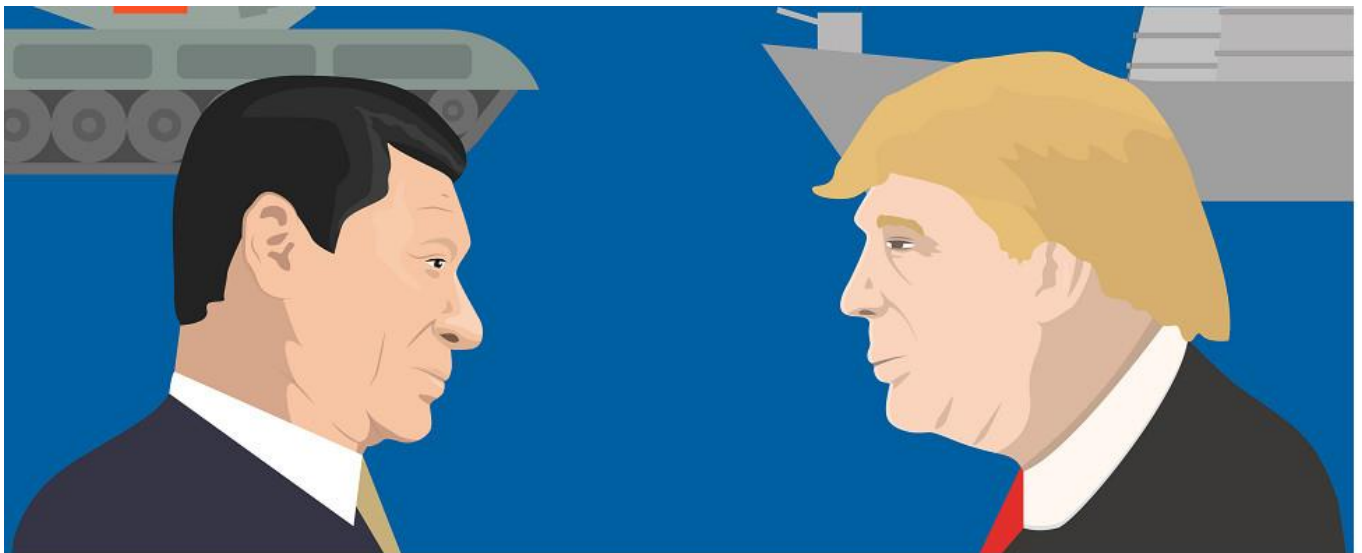


Global Trade Magazine (March 17, 2017).

Trump Unlikely To Use Section 301 Against China

Any Investigation Must be Followed by WTO Procedures



- *Section 301 has rarely been invoked since 1994.*
- *An unlawful use of Section 301 by Trump against China cannot be totally discounted.*
- *There has been only one recent instance of USTR applying Section 301.*

With the advent of Trump administration, the long standing rhetoric surrounding US-China trade disputes has not only become more ominous but also, threateningly, real. Especially the Chinese exporters to US market are petrified that as soon as the senior and middle ranks in the US trade administration are cemented, a barrage of concerted trade actions might be launched against them.

One of the available legal instruments in Trump's **tool kit that is being frequently discussed in this discourse is the dreaded Section 301 action. This article explains the investigation and enforcement mechanism contained in Sections 301-310 of US Trade Act of 1974, which should, to a large extent, help allay the fears of Chinese exporters.** The first part of the article focuses on the substantive and procedural aspects of Section 301 that the United States Trade

Representative (USTR) is required to follow while investigating allegedly unfair foreign trade laws or practices. The second part describes the solitary Chinese case investigated in recent years under Section 301.

SECTION 301

Scope

Section 301 provides for the authority and procedures to enforce US rights under international trade agreements and to respond to certain unfair foreign trade practices. It enables the United States to investigate and impose trade sanctions on foreign countries that violate bilateral or multilateral trade agreements by denying rights of US persons and interests.

Importantly, Section 301 may also be used to respond to unreasonable, unjustifiable, or discriminatory foreign government acts, policies, or practices that burden or restrict US commerce even if those acts, policies or practices do not violate the explicit terms of an international agreement. As such, Section 301 may be used to address any unfair trade practice, including issues such as restrictions on foreign market access for US goods and services.

Procedure

The USTR may initiate a Section 301 investigation upon a petition by any interested person or on its own initiative. The USTR is required to review the allegations presented and determine whether to initiate a formal investigation not later than 45 days after a petition is received. In general, upon initiation of a Section 301 investigation, the USTR is required to immediately request consultations with the foreign country concerned; however, the law does permit the USTR, after consulting with the petitioner, to delay such a request for 90 days in order to verify and/or improve the petition to ensure an adequate basis for consultation.

Remedies

Section 301 can be considered a domestic counterpart of the WTO consultation and dispute settlement procedures. If USTR initiates a Section 301 investigation, it must first seek consultations with the foreign government to negotiate a settlement in the form of compensation or elimination of the trade barrier.

If the consultations do not result in a settlement of the matter, the US can take a range of remedial enforcement actions. It can suspend concessions given under trade agreements; impose duties in excess of the rate negotiated in the WTO or the bound rate or other import

restrictions (in the same amount as damages suffered by US industry); impose fees or restrictions on services; enter into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the United States; and/or restrict service sector authorizations.

The USTR may terminate a Section 301 case if the dispute is settled, but, under section 306 of the Act, the USTR must monitor foreign compliance and may take further retaliatory action if compliance measures are unsatisfactory.

The USTR administers the statutory procedures through an interagency committee made up of several senior-level officials from various executive agencies, including Agriculture, State, Treasury, Commerce, and Justice.

Limitation

When a Section 301 investigation involves an alleged violation of a trade agreement, such as agreements under the World Trade Organization (WTO) or the North American Free Trade Agreement (NAFTA), the USTR must follow the consultation and dispute settlement procedures set out in that agreement.

While US law does not require that the US government wait until it receives authorization from the WTO to take any of these types of enforcement actions, the WTO has ruled that taking any such actions against other WTO member countries without first securing approval under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes is, itself, a violation of the WTO Agreement.

Thus, the US government is legally bound to secure approval under the WTO Dispute Settlement Mechanism prior to enforcing any action against another WTO Member, like China. Such approval normally would require that a WTO panel review the matter and rule whether the measures that are the subject of the dispute violate a member country's rights or obligations under the WTO. If, after reviewing the measures in question and the proposed US enforcement actions, the WTO approves an enforcement action, the action is, of course, no longer inconsistent with US WTO obligations.

Because China is a WTO Member, any Section 301 investigation, absent a quick settlement, must be followed by procedures prescribed under established WTO protocol. As such, Section 301 can be said to simply afford an advance notice to China to adjust its acts, policies or practices without having to undergo a costly WTO dispute settlement proceeding. In other words, Section 301 facilitates the chances of a quick settlement.

RECENT INVESTIGATIONS UNDER SECTION 301

While Section 301 was a powerful, unilateral US trade policy weapon prior to the establishment of the WTO dispute settlement mechanism under GATT 1994, it has rarely been invoked since then and has not produced any US-sanctions or WTO cases.

There has been only one recent instance of USTR applying Section 301, when an investigation was instituted on October 15, 2010, in response to a petition filed by the United Steel Workers Union (“USW”) on September 9, 2010. The USW petition contended that certain policies and practices adopted by China to stimulate and protect its clean energy industry were inconsistent with its WTO obligations, and that these policies and practices had enabled China to emerge as a dominant supplier of wind and solar energy products, advanced batteries, and energy-efficient vehicles.

The USW petition asserted that China had violated its WTO commitments by restricting access to critical raw materials (i.e., “rare earth” minerals); granting subsidies to Chinese manufacturers that were WTO-inconsistent; granting other trade-distorting subsidies to Chinese manufacturers that injured foreign competitors; imposing regulations that discriminated against imported goods and foreign investors; and imposing technology transfer requirements on foreign investors.

The USW claimed that these Chinese practices had injured American workers in the green technology sector and had caused “serious prejudice to US interests.”

The USTR initiated its investigation to consider whether acts, policies, and practices of the Chinese government had denied US rights or benefits under the GATT 1994, under the Subsidies and Countervailing Measures Agreement (SCM Agreement), and/or under China’s Protocol of Accession to the WTO. Since the Section 301 investigation revealed practices allegedly inconsistent with a trade agreement, the USTR sought formal consultations with the Chinese government to address those practices. It is notable, however, that beyond the initial Section 301 investigation, all subsequent actions occurred under the aegis of the WTO.

On December 22, 2010, the United States filed a request at the WTO for consultations with China, challenging China’s Special Fund for Wind Power Equipment Manufacturing, alleging that under the Special Fund China provided monetary grants and other benefits to its domestic wind power manufacturing industry. The Special Fund program allegedly provided subsidies and other support contingent on the use of domestic Chinese components in violation of the SCM Agreement. The United States also claimed that China failed to notify the WTO of its wind power program, as required under the SCM Agreement. Thereafter, the United States and China held consultations on February 16, 2011.

Subsequently, in a June 7, 2011 announcement, USTR Ron Kirk stated that the United States had successfully challenged China’s Special Fund subsidy program and secured China’s agreement to end the program.

CONCLUSION

Because China is a Member of WTO, United States is mandated to settle any trade dispute with China solely in accordance with provisions and procedures outlined in GATT 1994, other agreements executed pursuant to GATT 1994, such as the SCM agreement, and

China's WTO Accession Protocol of 2001. As such, any Section 301 Investigation launched by USTR serves no purpose other than affording an advance warning or opportunity to settle the dispute without having to undergo the costly and time taking litigation at WTO.

That said, the USTR under the incoming Trump administration could possibly initiate a Section 301 investigation, regarding either the alleged provision of state subsidies to Chinese industry or the alleged denial of market access to various US industries, in violation of China's WTO obligations.

The key point to watch is whether following a USTR investigation, the Trump administration would decide to impose tariff or non-tariff barriers on Chinese imports without following the WTO dispute settlement mechanism. If that were to happen, it would almost certainly be held to be inconsistent with the United States' WTO obligations. Consequently, China could obtain permission from the WTO to retaliate against the United States, which would be detrimental to US trade. While an unlawful use of Section 301 against China is unlikely, it cannot be totally discounted. A lot will depend on how the chemistry between the two leaders is established during the reported upcoming visit of President Xi Jinping to USA in the first week of April 2017.



Dharmendra N. Choudhary is a Washington, DC-based international trade attorney with GDLSK LLP, the largest US law firm focused on Customs and international trade issues. He has been a longstanding counsel to several Chinese and other foreign exporters in US anti-dumping proceedings.