

Within Bounds of Trade Law, Trump Has Wide Leeway

Ben Hancock, The National Law Journal

Throughout the course of his pugnacious campaign, now President-Elect Donald Trump has devoted no small amount of time to making threats and promises in the arena of trade. He's said he will tear up NAFTA, hit China with high tariffs and punish companies that outsource.

So how much of that could he actually deliver on? The answer, according to attorneys specializing in international trade law, is quite a bit. And that's just assuming he sticks within the bounds of current rules — not exactly something Trump is known for.

True, presidential hopefuls have often bashed trade and pledged to get "tough on China" — a frequent theme in the race between President Barack Obama and Mitt Romney in 2012 — only to soften their tone in office. But given the outsize role trade has played in the Trump campaign, lawyers expect his administration will feel obligated to act on at least some of the rhetoric.

"I think it will be something that he [acts on] before he does something else," said Julie Mendoza, a partner at Morris, Manning, & Martin who has represented the Chinese government in U.S. trade remedy cases. "You just have to hope and pray that it's something legal."

Here's an overview of the policy levers Trump can pull, and how he might use them during his first months in office.

China's Currency

Among the things Trump has [pledged](#) to do on day one of his presidency is direct his Treasury secretary to label China a currency manipulator. But he hasn't really said what happens next.

That's because the relevant law, the Omnibus Trade and Competitiveness Act of 1988, only requires the Treasury Department to "initiate negotiations" with the accused manipulators, with the aim of bringing a halt to the intervention. The Treasury has historically been reluctant to even do that, wary of straining diplomatic ties and inviting scrutiny of its own monetary policies.

That doesn't mean Trump won't follow through, but the result is unclear at best. "I think it will put him on a road that goes to a bog," said John Magnus, a lawyer at TradeWins in Washington.

What Trump could also do, though, is **direct the U.S. Department of Commerce to treat currency manipulation as an illegal subsidy in investigations of unfair trade.** The department has the authority to slap tariffs on goods to offset the effect of such subsidies. Under Obama, it has taken the position that currency manipulation can't be factored in under trade rules.

That might change under Trump. One of his trade advisers is Dan DiMicco, former head of steel manufacturer Nucor and an open advocate for a more forceful response to currency manipulation in Commerce Department proceedings. DiMicco is also rumored to be in the **running for Commerce secretary or U.S. Trade Representative.**

Higher Tariffs

There are a variety of other tools Trump has to raise tariffs on imports from China and elsewhere. For one, his administration **could self-initiate unfair trade cases at Commerce,** streamlining a process that usually requires the filing of lengthy petitions by trade attorneys for U.S. workers or firms.

Some lawyers say that is likely to be something Trump's administration pursues, with potential targets being sectors in which China has amassed huge overcapacity, like steel and aluminum. Those are big industries in rust-belt states like Ohio that flipped for Trump on Tuesday.

"I think a Trump administration should be very favorable to new trade remedy cases, particularly against China, and would potentially even self-initiate cases," said Timothy Brightbill of Wiley Rein. (Nucor is a client of the firm.)

Other mechanisms include so-called **"Section 201" proceedings** that allow for the special imposition of higher tariffs on products when imports are surging. President George W. Bush did that in 2002 against steel imports, although adjudicators at the World Trade Organization later ruled that the U.S. hadn't followed trade rules in imposing the duties, noted Terence Stewart, managing partner of Stewart and Stewart.

The WTO, however, has increasingly been seen as toothless by the U.S. because of long delays in the dispute settlement process. That means that parties can break the rules for years without suffering any repercussions. It also means the WTO may not be Trump's favored method of acting on his pledge to stop unfair trade, although lawyers said they wouldn't rule it out.

What Trump probably can't do — at least, not under the current law — is slap punitive duties on select companies like HVAC manufacturer Carrier Corp. or Ford Motor Co., which he has singled out for moving operations abroad. That would raise due process and equal protection questions, not only trade policy ones, attorneys say. But Trump could seek

other ways in the realm of tax policy to disadvantage companies that offshore manufacturing more generally.

Mega-Regional Trade Deals

Trump has also pledged that starting on his first day in office, he will seek **to renegotiate** the more than two-decade old **North American Free Trade Agreement** with Canada and Mexico. If they balk, he says, the U.S. will withdraw from the deal. He hasn't said what he wants to renegotiate.

The president does have the authority to **withdraw from NAFTA under Article 2205**, which just requires six months' notice to the other parties. But trade lawyers disagree on whether that would automatically kick tariff rates back up to higher levels, or whether that would require an act of Congress. GOP-aligned business groups like the U.S. Chamber of Commerce would almost surely resist legislation.

Trump has also said he will **"withdraw"** from the 12-nation **Trans-Pacific Partnership**. **That's not actually necessary. The TPP, negotiations for which concluded in October 2015, still hasn't been ratified** by the U.S. Congress. And with Trump opposing it, it's likely not going anywhere for a while.

Ditto for a yet-to-be-completed deal between the U.S. and the EU, called the Transatlantic Trade and Investment Partnership, that has been opposed stiffly in Europe and gotten an unenthusiastic reception even among pro-free trade constituents in Washington. It remains to be seen what Trump will do with other agreements, like the U.S.-Korea Free Trade Agreement, the second largest deal implemented after NAFTA.

"I think TPP and TTIP are probably dead, and I think existing free trade agreements are potentially at risk as well," said Matthew Nicely, a partner at Hughes Hubbard & Reed.

This isn't the first time a candidate has pledged to renegotiate NAFTA, by the way. That was a pledge back in 2008 made by then-candidate Obama. His administration has said he would have accomplished that with TPP, which includes Canada and Mexico and has updated rules in areas like labor rights.