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Section 301 of the Trade Act of 1974

Section 301 of the Trade Act of 1974 (19 U.S.C. §2411) grants the U.S. Trade Representative (USTR) a range of responsibilities and authorities to investigate and take action to enforce U.S. rights under trade agreements and respond to certain foreign trade practices. Prior to the Trump Administration and since the conclusion of the Uruguay Round of multilateral trade negotiations in 1995, which established the World Trade Organization (WTO), the United States has used Section 301 authorities primarily to build cases and pursue dispute settlement at the WTO. However, President Trump has been more willing to act unilaterally under these authorities to promote what the Administration considers to be "free," "fair," and "reciprocal" trade. The Trump Administration's use of Section 301 has been the subject of congressional and broader international debate.

The Administration has attributed this shift in policy to a large and persistent gap between U.S. and foreign government practices that may disadvantage or discriminate against U.S. firms. In addition, the Administration has justified many of its recent tariff actions—particularly those against China—by pointing to alleged weaknesses in WTO dispute settlement procedures and the inadequacy or nonexistence of WTO rules to address certain Chinese trade practices. It has also cited the failure of past trade negotiations and agreements to enhance reciprocal market access for U.S. firms and workers.

Overview of Section 301

Title III of the Trade Act of 1974 (Sections 301 through 310, 19 U.S.C. §§2411-2420), titled "Relief from Unfair Trade Practices," is often collectively referred to as "Section 301." Section 301 provides a statutory means by which the United States imposes trade sanctions on foreign countries that violate U.S. trade agreements or engage in acts that are "unjustifiable" or "unreasonable" and burden U.S. commerce. Prior to 1995, the United States used Section 301 extensively to pressure other countries to eliminate trade barriers and open their markets to U.S. exports. The creation of an enforceable dispute settlement mechanism in the WTO, strongly advocated by the United States, significantly reduced U.S. use of Section 301.

The United States retains the flexibility to determine whether to seek recourse for foreign unfair trade practices in the WTO and/or act unilaterally. The Statement of Administrative Action (SAA)—which explained how U.S. agencies would implement the Uruguay Round Agreements Act (URAA or "WTO Agreements")—states that the USTR will invoke the dispute settlement procedures of the WTO Dispute Settlement Understanding (DSU) for investigations that involve an alleged violation of (or the impairment of U.S. benefits under) WTO Agreements. At the same time, the SAA makes clear that "[n]either section 301, nor the DSU will require the" USTR to do so if it "does not consider that a matter involves" WTO Agreements. Such a determination appears to be solely at the USTR's discretion. However, the USTR's decision to bypass WTO dispute settlement and impose retaliatory measures (if any), may be challenged at the WTO.

Section 301 Investigations

While the law does not limit the scope of investigations, it cites three types of foreign government conduct subject to Section 301 action: (1) a violation that denies U.S. rights under a trade agreement, (2) an "unjustifiable" action that "burdens or restricts" U.S. commerce, and (3) an "unreasonable" or "discriminatory" action that "burdens or restricts" U.S. commerce. The statute defines "commerce" to include goods, services, and investment.

Procedures for Section 301 Action

Sections 302 through 309 describe the procedural requirements and limitations for Section 301 actions.

Administration. Section 301 investigations are conducted by a "Section 301 Committee"—a subordinate, staff-level body of the USTR-led, interagency Trade Policy Staff Committee (TPSC). The Section 301 Committee reviews Section 301 petitions, conducts public hearings, and makes recommendations to the TPSC regarding potential actions under Section 301. The USTR then bases its final decision on the recommendations provided by the TPSC.

Initiation. The USTR may initiate a Section 301 case as a result of a petition or can "self-initiate" a case. Any interested person may file a petition with the USTR requesting that the agency take action under Section 301. Within 45 days of the receipt, the USTR must review the allegations and determine whether to initiate an investigation. Section 301 also provides two means by which the USTR may initiate an investigation in the absence of a petition. It can investigate any matter, but only after consulting with appropriate stakeholders. In addition, the USTR is generally required to initiate a Section 301 investigation of any country—within 30 days—after identifying it as a "Special 301" "Priority Foreign Country." In its annual Special 301 report, the USTR identifies countries that do not provide adequate intellectual property rights (IPR) protection and enforcement. (Rules for IPR cases initiated through Special 301 differ somewhat from those that govern standard Section 301 investigations.)

Consultations. Upon initiating an investigation, the USTR must request consultations with the targeted foreign government regarding the issues raised. If the investigation involves a trade agreement and a mutually acceptable resolution is not reached, the USTR must request formal dispute settlement proceedings under the governing trade agreement (WTO or potential U.S. free trade agreement). In the past, with regard to investigations that do not involve an agreement, the USTR has initiated investigations while simultaneously requesting consultations with the foreign government and seeking information and advice from appropriate trade advisory committees. If an investigation includes "mixed" issues, some of which are covered by an

agreement and some of which are not, the URAA SAA states that the USTR will pursue consultations within the agreement framework and through bilateral negotiations.

Determinations and Implementation. Following consultations, the USTR begins its investigation to determine if the alleged conduct is unfair or violates U.S. rights under trade agreements. If the USTR's determination is affirmative, it then decides what action, if any, to take (subject to the direction of the President, if any). Section 301 divides such actions into mandatory and discretionary categories. Mandatory action is required if the USTR concludes that there is a trade agreement violation or that an act, policy, or practice of a foreign government is "unjustifiable" and "burdens or restricts" U.S. commerce. If an investigation involves an alleged violation of a trade agreement, the USTR must make its final determinations 30 days after the date on which the dispute settlement procedure concludes. Generally, in cases not involving trade agreements, the USTR must make its determinations within 12 months after an investigation begins.

Upon making an affirmative determination to take retaliatory action, the USTR must implement that action within 30 days. Waivers are allowed for mandatory actions and implementing timelines.

Retaliatory Action. To remedy a foreign trade practice, Section 301 authorizes the USTR to (1) impose duties or other import restrictions, (2) withdraw or suspend trade agreement concessions, or (3) enter into a binding agreement with the foreign government to either eliminate the conduct in question (or the burden to U.S. commerce) or compensate the United States with satisfactory trade benefits. The USTR must give preference to duties (i.e., tariffs) if action is taken in the form of import restrictions. The level of mandatory action under Section 301 should "affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on" U.S. commerce.

Subsequent Actions. Sections 306 and 307 specify the requirements for monitoring, modifying, and terminating any action taken under Section 301. Notably, foreign noncompliance with a measure or agreement undertaken as a result of a Section 301 investigation is considered a violation of an agreement under Section 301 and subject to mandatory retaliatory action. Section 301 actions terminate automatically after four years unless the USTR receives a request for continuation and conducts a review of the case. In addition, in some cases the USTR may reinstate a previously terminated Section 301 action.

Section 301 Cases

There have been 127 cases under Section 301 since the law's enactment in 1974, of which 32 have been initiated since the WTO's establishment in 1995. These cases have primarily targeted the European Union (EU), concerning mostly agricultural trade. The EU is followed by Canada, Japan, and South Korea. Prior to 2017, the last Section 301 investigation took place in 2013 and involved Ukraine's practices regarding IPR. Given the political situation in Ukraine, the USTR determined that no action was appropriate at the time. The last investigation prior to the Trump Administration resulting in retaliation (i.e., tariffs) took place in 2009 and involved Canada's compliance with the 2006 U.S.-Canada Softwood Lumber Agreement. Per a U.S.-Canadian understanding, the USTR suspended the tariffs in 2010. Under President Trump, the USTR has initiated three new investigations.

Recent Section 301 Investigations

China

Date of Initiation. August 2017.
Issue. Technology transfer, IP, and innovation policies/practices.
Finding. Four Chinese IPR-related practices are unreasonable (or discriminatory) and burden (or restrict) U.S. commerce and justified U.S. action: (1) forced technology transfer requirements, (2) cyber-enabled theft of U.S. IP and trade secrets, (3) discriminatory licensing practices, and (4) state-funded strategic acquisition of U.S. assets.
Action Taken. Five major tariff actions since May 2018. Approximately two-thirds of U.S. imports from China are subject to increased Section 301 tariffs, ranging from 7.5% to 25%. (As part of the U.S.-China Phase One Trade Agreement, the USTR announced reductions for certain tariff rates effective February 14, 2020.)
WTO Procedures. Panel established to review China's technology licensing requirements (November 2018); proceedings suspended at the request of the United States (June 2019). (Since April 2018, China has filed three WTO cases challenging Section 301 tariffs.)

European Union

Date of Initiation. April 2019.
Issue. EU subsidies on large civil aircraft; violation of U.S. rights under the WTO Agreement; EU's failure to implement WTO Dispute Settlement Body recommendations.
Finding. EU and certain member states have denied U.S. rights under the WTO Agreement and have failed to implement WTO Dispute Settlement Body recommendations concerning certain subsidies to the EU large civil aircraft industry.
Action Taken. Additional tariffs of 15% or 25% on $7.5 billion worth of EU imports—consistent with the WTO arbitrator's finding on the appropriate level of countermeasures (October 2019). The USTR revised the action by increasing the tariff rate on certain large civil aircraft and modifying the list of imports subject to additional tariffs, effective March 2020 (February 2020).
WTO Procedures. For an overview, see WTO Case "DS316."

France

Date of Initiation. July 2019.
Issue. France's new digital services tax (DST).
Finding. DST discriminates against major U.S. digital companies and is inconsistent with prevailing tax policy principles.
Action Taken. None (as of April 2020). In December 2019, USTR issued a preliminary list of products from France, with an estimated 2018 import value of $2.4 billion on which to impose additional tariffs of up to 100%. The USTR is also considering whether to impose fees or restrictions on services from France. The agency sought comments on the proposed action and convened a hearing in January 2020. (The United States is also participating in ongoing OECD negotiations to reach a compromise on international digital taxation.)
WTO Procedures. None (as of April 2020).

Issues for Congress

Since 1995, the United States has addressed most trade disputes bilaterally and multilaterally, including through the WTO. While some Members applaud the Administration's Section 301 actions or call for more active use of trade authorities, others have decried such unilateral actions as an undesirable shift in U.S. trade policy. Congress could consider amending Section 301 to require greater consultation or approval before a president takes new trade actions, establish a formal product exclusion process, or request an economic impact study of how such actions may affect the U.S. economy, global supply chains, and the multilateral trade system.

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