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January 4, 2018

Enforcing U.S. Trade Laws: Section 301 and China

Overview

The U.S. Trade Representative's (USTR) 2017 Trade Policy Agenda and 2016 Annual Report stated that "strictly enforcing U.S. trade laws" (including the use of Section 301) was one of the Administration's top four priorities. It said that properly used, Section 301 can be a "powerful lever to encourage foreign countries to adopt more market-friendly policies." On August 14, 2017, President Trump issued a Presidential Memorandum directing the USTR to determine whether it should launch a Section 301 investigation into China's protection of U.S. intellectual property rights (IPR) and forced technology transfer polices. On August 18, 2017, the USTR announced it had launched a Section 301 case against China.

What is Section 301 and How Does it Work?

Sections 301 through 310 of the Trade Act of 1974, as amended, are commonly referred to as "Section 301." It is one of the principal statutory means by which the United States enforces U.S. rights under trade agreements and addresses "unfair" foreign barriers to U.S. exports.

> Since 1974, the USTR has initiated 122 Section 301 cases, retaliating in 16 instances. The last 301 case was in 2010 against China's green technology policies.

Section 301 procedures apply to foreign acts, policies, and practices that the USTR determines either (1) violates, or is inconsistent with, a trade agreement; or (2) is unjustifiable and burdens or restricts U.S. commerce. The measure sets procedures and timetables for actions based on the type of trade barrier(s) addressed. Section 301 cases can be initiated as a result of a petition filed by an interested party with the USTR or self-initiated by the USTR. Once the USTR begins a Section 301 investigation, it must seek a negotiated settlement with the foreign country concerned, either through compensation or an elimination of the particular barrier or practice. For cases involving trade agreements, such as those under the Uruguay Round (UR) agreements in the World Trade Organization (WTO), the USTR is required to utilize the formal dispute proceedings specified by the agreement. For Section 301 cases (except those involving a trade agreement or IPR issue) the USTR has 12 to 18 months to seek a negotiated resolution. If one is not obtained, the USTR determines whether or not to retaliate (which usually takes the form of increased tariffs on selected imports) at a level equivalent to the loss in commerce by U.S. firms from the foreign burden or restriction that is being challenged.

After the United States implemented the UR agreements in 1995, the USTR sometimes chose to file Section 301 cases on WTO-related issues and then initiated a WTO case, but since 2010, disputes have been taken directly to the WTO.

Special 301

U.S. innovation and the intellectual property that it generates have been cited by various economists as a critical source of U.S. economic growth and global competitiveness. China has been a particular concern to U.S. IPR stakeholders for many years. Section 182 of the 1974 Trade Act (as amended), commonly referred to as "Special 301," is the primary U.S. trade statute used to protect U.S. IPR in foreign markets. The provision directs the USTR to report to Congress those countries that deny adequate protection or market access for U.S. IPR and to designate as "priority" those countries with the most onerous acts, policies, or practices and have the most significant impact on U.S. IPR stakeholders. If a country is designated by the USTR as a "priority foreign country," it will launch a Section 301 case. If an agreement is not reached within six months (extendable to nine months), the USTR must determine if the foreign practice violated U.S. rights under a trade agreement or was "unreasonable" or "discriminatory." If an affirmative determination is made, the USTR may decide to impose trade sanctions. The Special 301 statute was amended in the UR implementing legislation to exempt IPR issues covered under the WTO from the timetables required under Special 301. This allows the USTR to proceed under the WTO dispute resolution process and timetables. In 2001, the United States designated Ukraine as a priority foreign country under Special 301, and subsequently suspended its tariff preferences under the Generalized System of Preferences (GSP), which were valued at $75 million (Ukraine was not a WTO member at the time).

Section 301 and WTO Dispute Settlement

A central goal of the United States during the UR negotiations was strengthening the trade dispute mechanism that existed under the General Agreement on Tariffs and Trade (GATT), the WTO's predecessor. Under the GATT, any member could delay or block the dispute settlement panels and reports and the GATT had no real authority to enforce its decisions. At the time, the United States claimed that it was often forced to rely on unilateral Section 301 action because of the lack of an effective multilateral dispute settlement process. However, many U.S. trading partners often criticized Section 301 as unfair. The WTO dispute mechanism established in the UR agreements prevents members from blocking panel decisions and can authorize retaliation if a member fails to implement a WTO dispute settlement body's ruling.

The Clinton Administration's 1994 Statement of Administration Action (SAA) accompanying the implementation legislation of the UR agreements specified that Section 301 cases involving the UR agreements (or impairment of U.S. benefits under the UR) would, as required by U.S. law, go through the WTO dispute

settlement process. It clarified that "neither Section 301 nor the [Dispute Settlement Understanding] DSU will require the Trade Representative to invoke DSU dispute settlement procedures if the Trade Representative does not consider that a matter involves a Uruguay Round agreement." A WTO dispute settlement panel cited the SAA statements when it ruled that Section 301 did not violate U.S. WTO obligations in a case brought by the European Commission in 1998. The SAA also stated that it was expected that "as a result of the Uruguay Round agreements in general, and the Dispute Settlement Understanding [DSU] in particular, Section 301 will be even more effective than it has been in the past in addressing foreign unfair trade barriers." Since 1995, the United States has been the largest user of the WTO dispute settlement process, including 21 cases against China, and has largely prevailed on most disputes.

Past Use of Section 301/Special 301 Against China

Prior to the UR agreements, China was a major target of Section 301 actions. In April 1991, the USTR designated China as a Special 301 priority foreign country and self-initiated an investigation under Section 301 against China's alleged inadequate protection of IPR. When negotiations did not produce an agreement, the USTR released a list of products (valued at $1.5 billion) that were being considered for retaliation through increased tariffs. In January 1992, the two sides reached a memorandum of understanding (MOU) where China committed to take a number of specified steps to strengthen its IPR enforcement regime. However, in April 1994, the USTR said that China's implementation of the MOU was inadequate. In June 1994, the USTR again designated China as a priority foreign country and threated to impose sanctions, which prompted China to agree to a new IPR enforcement plan.

In October 1991, the USTR self-initiated a broad-based Section 301 investigation with respect to certain import barriers imposed by China on U.S. products. In August 1992, the USTR determined that negotiations had failed to resolve the trade dispute, and later threatened to impose $3.9 billion in U.S. trade sanctions against China—the highest amount ever issued by the USTR under a Section 301 case. China threatened counter retaliation, but an agreement was reached in October 1992, which committed China to a wide range of market-opening measures. Some Section 301 petitions have been filed by various groups against China but not pursued by the USTR, including a 2004 petition on China's worker rights policies and a 2007 petition on China's currency policy.

In October 2010, the USTR launched a Section 301 investigation into Chinese policies affecting trade and investment in green technologies. In December 2010, the USTR brought a WTO dispute settlement case against China's wind power subsidies. The USTR noted in a press release that it was continuing to investigate other Chinese green energy policies raised in the Section 301 case. In March 2012, the USTR initiated a WTO dispute case against China's exports restrictions on rare earth elements (used in a number of green technology products). The United States later largely prevailed in these two cases.

President Trump's Action on China's IPR Policies

The Section 301 investigation of China's IPR violations and forced technology requirements is likely one of the most significant cases ever launched by the USTR. U.S. business groups have long cited Chinese IPR infringement as one of the most difficult challenges they face doing business in China and cite China as the largest source of IPR infringement and theft globally. A 2013 study by the Commission on the Theft of American Intellectual Property estimated that China accounted for 70% of global IPR theft and estimated annual U.S. economic losses at $240 billion.

China's 2001 WTO Protocol of Accession committed China to eliminate and cease the enforcement of "technology transfer requirements made effective through laws, regulations or other measures." The USTR's 2016 report on China's WTO compliance listed numerous U.S. concerns over Chinese IPR policies, including matters related to trade secrets, secure and controllable Information and Communication Technology (ICT) policies, technology localization, indigenous innovation, investment restrictions, strategic emerging industries, state-owned enterprises, pharmaceuticals and medical devices, Internet-related services, among others. The report also stated that in addition to technology transfer requirements, foreign firms are often "required to conduct research and development in China, satisfy performance requirements relating to exportation or the use of local content, or make valuable, deal-specific commercial concessions."

> "We will safeguard the copyrights, patents trademarks, trade secrets and other intellectual property that is so vital to our security and our prosperity"—President Donald Trump.

To some, a Section 301 case against China on IPR and forced technology issues is appropriate, given the importance of IPR to the U.S. economy and the magnitude of financial losses incurred by U.S. firms from distortive Chinese IPR policies. On October 10, 2017, the USTR Interagency Section 301 Committee held a public hearing on China's IPR policies. It heard from a number of U.S. industry representatives, business and labor groups, and think tanks on China's IPR practices, as well as from Chinese business representatives.

It is not clear how the USTR intends to proceed. Will it use the WTO's dispute settlement process or proceed unilaterally (or a combination of both)? USTR Robert Lighthizer noted in September 2017 that "if we turn up WTO violations, we'll bring them to the WTO. We're not precluded from doing that, by any means, by using 301. And if there are things that are not covered by trade agreements that we think are unreasonable and restrain U.S. trade, then we'll try to devise other remedies that we think will get us to the point where we end up with market forces and market efficiency." Some analysts have raised concerns that if the United States decides to impose unilateral trade sanctions against China under the Section 301 case, China might bring a WTO case against the United States or impose counter-sanctions against U.S. firms.

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