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Unfair Trade or Unfair Protection?

The Evolution and Abuse of Section 301

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EXECUTIVE SUMMARY

Section 301 of the Trade Act of 1974 gives the U.S. trade representative (USTR) broad authority to investigate "unfair" foreign trade policies allegedly harming American companies and to impose tariffs or other trade restrictions to achieve the removal of those policies. The statute was a common tool of U.S. trade policy from the 1980s to the 1990s, authorizing the USTR to conduct almost 100 different investigations during that period. Since the World Trade Organization (WTO) was established in 1995, however, the USTR has used Section 301 infrequently and almost exclusively to initiate or implement WTO dispute settlement actions—actions that, per WTO rules, were supposed to supplant the kinds of unilateral trade actions once applied under the law. The Trump administration departed from this long-standing U.S. practice and took advantage of Section 301's flaws to circumvent the WTO and enact unilateral tariffs against multiple U.S. trading partners, imposing significant economic and geopolitical costs along the way. This paper examines the Trump administration's actions in historical context, evaluates how the law was stretched beyond its intended purpose in direct contravention of the United States' WTO obligations, and offers practical reforms to prevent future abuse.



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INTRODUCTION

The widespread abuse of unilateral trade tools was a hallmark of Donald Trump's presidency. His actions have prompted lawmakers in both the House and Senate to consider bipartisan legislation to curtail presidential authority to impose import tariffs without significant congressional input or oversight. One law in particular, Section 301 in the Trade Act of 1974, gives the U.S. trade representative (USTR) broad authority to respond to unfair trade practices at the direction of the president. Such unfair trade practices include violations of U.S. trade agreements or "an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens US commerce."[1] Following the creation of the World Trade Organization (WTO) in 1995, Section 301 was invoked rarely because WTO rules generally prohibited members from adjudicating trade disputes unilaterally. In 2017, however, President Trump revived the little-used statute to fulfill some of his economic and geopolitical objectives, most notably to counter alleged Chinese intellectual property rights abuses. Trump imposed U.S. tariffs on billions of dollars of imports from China and *then* imposed even more tariffs in response to retaliation from the Chinese government to the first round of tariffs.[2]

> "In abusing the statute, President Trump provided a roadmap for Congress to reform Section 301 to ensure that future presidents cannot follow his lead."

The Trump administration implemented these and other Section 301 tariffs by seizing upon the broad procedural and substantive discretion that Congress granted to the president under the law, as well as the law's textual ambiguity. In so doing, the president not only inflicted significant damage upon the United States' economy and trading relationships but also ignored decades of precedent—and U.S. government promises to its foreign counterparts—limiting the use of Section 301 after the WTO agreements entered into force.

In abusing the statute, however, President Trump also provided a roadmap for Congress to reform Section 301 to ensure that future presidents cannot follow his lead. Reining in presidential authority on Section 301 would not only help Congress reclaim its powers to regulate international commerce, and therefore serve as an adequate check against executive excess, but also signal that the United States is serious about upholding the rules-based international trading system and restoring frayed economic and geopolitical relationships with U.S. allies.

BACKGROUND

Given the flurry of tariffs imposed by executive branch actions under the Trump administration, one might forget that Congress has exclusive and plenary constitutional authority to regulate commerce with other nations and once was the sole vehicle for changes in U.S. tariffs. This approach began to shift when Congress granted the president some trade policy authority under the Reciprocal Trade Agreements Act of 1934, and the trend only accelerated thereafter.

Among the most significant legislative changes was Section 301. After World War II, a developing bipartisan belief in the geopolitical benefits of trade led to the negotiation of the General Agreement on Tariffs and Trade (GATT) in 1947, under which the participating countries liberalized most tariffs on goods from each other and agreed to various other disciplines. However, the GATT lacked rules on many nontariff barriers and had a weak and nonbinding enforcement mechanism without a means to appeal unfavorable rulings. There were also concerns that U.S. trading partners were not providing reciprocity in trade. These issues, combined with a lackluster U.S. economy and weak export performance in the early 1970s, led Congress to pass the Trade Act of 1974, which primarily sought to expand the president's power to negotiate agreements "providing for the harmonization, reduction, and elimination of nontariff barriers and other distortions of international trade and to establish constitutionally appropriate procedures for the consideration and implementation of such agreements by the Congress."[3]

The act also expanded the executive branch's authority to address unfair trade practices. Title III was included to "assure a swift and certain response to foreign import restrictions, export subsidies, and price discrimination . . . and other unfair foreign trade practices."[4] Section 301 of the act authorized the president to retaliate against foreign trading partners

that maintained "unjustifiable or unreasonable" restrictions against U.S. trade. If the USTR determines that

> (1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and (2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action . . . within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.[5]

The types of action or foreign conduct subject to Section 301 include:

- trade agreement violations;
- unjustifiable actions (acts, policies, or practices that violate or are inconsistent with U.S. international legal rights, such as the denial of national treatment or normal trade relations treatment); and
- unreasonable acts (acts, policies, or practices that are not necessarily in violation of or inconsistent with U.S. international rights but are otherwise unfair and inequitable).

In other words, a president could pursue an action (e.g., impose tariffs on imports) under Section 301 to retaliate for unfair trade practices, including market access restrictions or other obstacles to U.S. exports.

Under the statute, the USTR may initiate Section 301 investigations based on a petition filed by any interested party or via self-initiation following consultations with private-sector advisory committees. Petitions for Section 301 investigations were the traditional method by which private interests could prompt the USTR to take legal action against foreign countries. However, since 1995, the USTR has self-initiated 74 percent of all Section 301 investigations, suggesting a move away from congressional and private-sector involvement in these cases.[6] This shift is likely due to the establishment of the WTO—and its binding dispute settlement system—in 1995, after which Section 301 cases were almost exclusively used to build a case that could be turned into a formal WTO dispute.

Investigations are undertaken by a Section 301 committee, which includes an official from the USTR as committee chair and individuals from other agencies that have an interest in the issue under investigation. The committee reviews complaints, holds public hearings, and makes recommendations to the Trade Policy Staff Committee, which is made up of senior civil service officers. The USTR decides whether to take action in a Section 301 case based on the recommendation of this committee.

"Section 301 authorizes the president to retaliate against foreign trading partners that maintained 'unjustifiable or unreasonable' restrictions against U.S. trade."

The USTR is authorized to take two different types of action under Section 301, as the statute provides for both mandatory and discretionary action. Section 301(a) involves "mandatory action" whereby certain actions *must be taken* if the USTR finds that unfair trade practices exist. However, there are five instances in which the USTR is *not required* to act:

1. A WTO panel report, or a dispute settlement ruling under a trade agreement, finds that the U.S. trade agreement rights have not been denied or violated.
2. The USTR finds that the foreign country is taking satisfactory measures to grant U.S. trade agreement rights or has agreed to eliminate or phase out the unfair trade practice.
3. There is an imminent solution to the burden or restriction on U.S. commerce.
4. The country has provided satisfactory compensatory trade benefits.
5. The USTR finds, in extraordinary cases, that taking action would have an adverse effect on the U.S. economy substantially disproportionate to the benefits, or the USTR finds that action would cause serious harm to national security.

Section 301(b) involves "discretionary action" by which the USTR may take action if he or she finds that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens U.S. commerce. The USTR has discretionary authority to take all appropriate and feasible action, subject to the specific direction of the president, to obtain the elimination of the act, policy, or practice. The types of action the USTR could take include imposing duties or import restrictions, withdrawing from or suspending trade agreement concessions, or entering into binding agreements that require the targeted foreign country to eliminate the burdening conduct or practice at issue or provide the United States with compensatory trade benefits (e.g., liberalization in another industry or sector). If the USTR determines that import restrictions are the appropriate form of action, he or she must give preference to tariffs over other forms of import restrictions and consider substituting on an incremental basis an equivalent duty for any other form of import restriction imposed.

"A noticeable drop in Section 301 investigations occurred shortly after the establishment of the WTO in 1995, with the immediate increase thereafter coming mostly from new WTO dispute actions."

A Section 301 action taken against a foreign country is subject to certain limitations. First, it must be equivalent in value to the burden or restriction being imposed by that country on U.S. commerce. Second, the United States must engage in international dispute resolution efforts, most notably at the WTO, in parallel with Section 301 procedures. In fact, the USTR must request consultations with the foreign country alleged to be engaging in unfair trade practices on the same day that the determination to investigate these practices is made. If the measure taken is in potential violation of a trade agreement and the issue cannot be resolved through consultations, the USTR must promptly request formal dispute settlement under the agreement. Finally, in preparing for consultations and dispute settlement proceedings, the USTR must seek information and advice from the petitioner and from appropriate private-sector advisory committees. It should be emphasized that U.S. law restricts the USTR from taking action under Section 301 in connection with any claims covered by the WTO agreements without first bringing a challenge to the WTO and receiving authorization to impose commensurate countermeasures. However, the USTR can use Section 301 for practices not covered by the WTO agreements.

Figure 1 shows the total number of Section 301 investigations from 1975 to 2020. Note that in 1984, Congress amended the Trade Act of 1974 and gave the USTR additional authority to self-initiate investigations. A noticeable drop in investigations occurred shortly after the establishment of the WTO in 1995, with the immediate increase thereafter coming mostly from new WTO dispute actions.[7] From 1975 to 2020, there have been 130 Section 301 investigations, 35 of which—just 27 percent of all cases—were initiated since the WTO's establishment.

WTO Consistency of Section 301

The consistency of Section 301 (which permits unilateral adjudication of trade disputes) with the WTO agreements (which generally require disputes to proceed through the multilateral channel only) has been the subject of debate. To resolve this potential conflict, the binding Statement of Administrative Action (SAA) for the Uruguay Round Agreements Act, which implemented the WTO agreements into U.S. law, says that the USTR "will" (not "may" or "could") invoke the WTO's dispute settlement procedures for any "alleged violation of a Uruguay Round agreement or the impairment of U.S. benefits under such an agreement." The SAA adds, however, that "neither section 301 nor the [WTO 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."[8] As a result of this understanding, several post-1995 cases begun under the Section 301 process have been brought to WTO dispute settlement. The USTR has also brought cases directly to the WTO without initiating an investigation through Section 301 at all.

Actions on Section 301 must follow the letter of the SAA to remain consistent with the United States' WTO obligations. This was confirmed in a WTO dispute that the European Union (EU), then known legally at the WTO as the European

Figure 1

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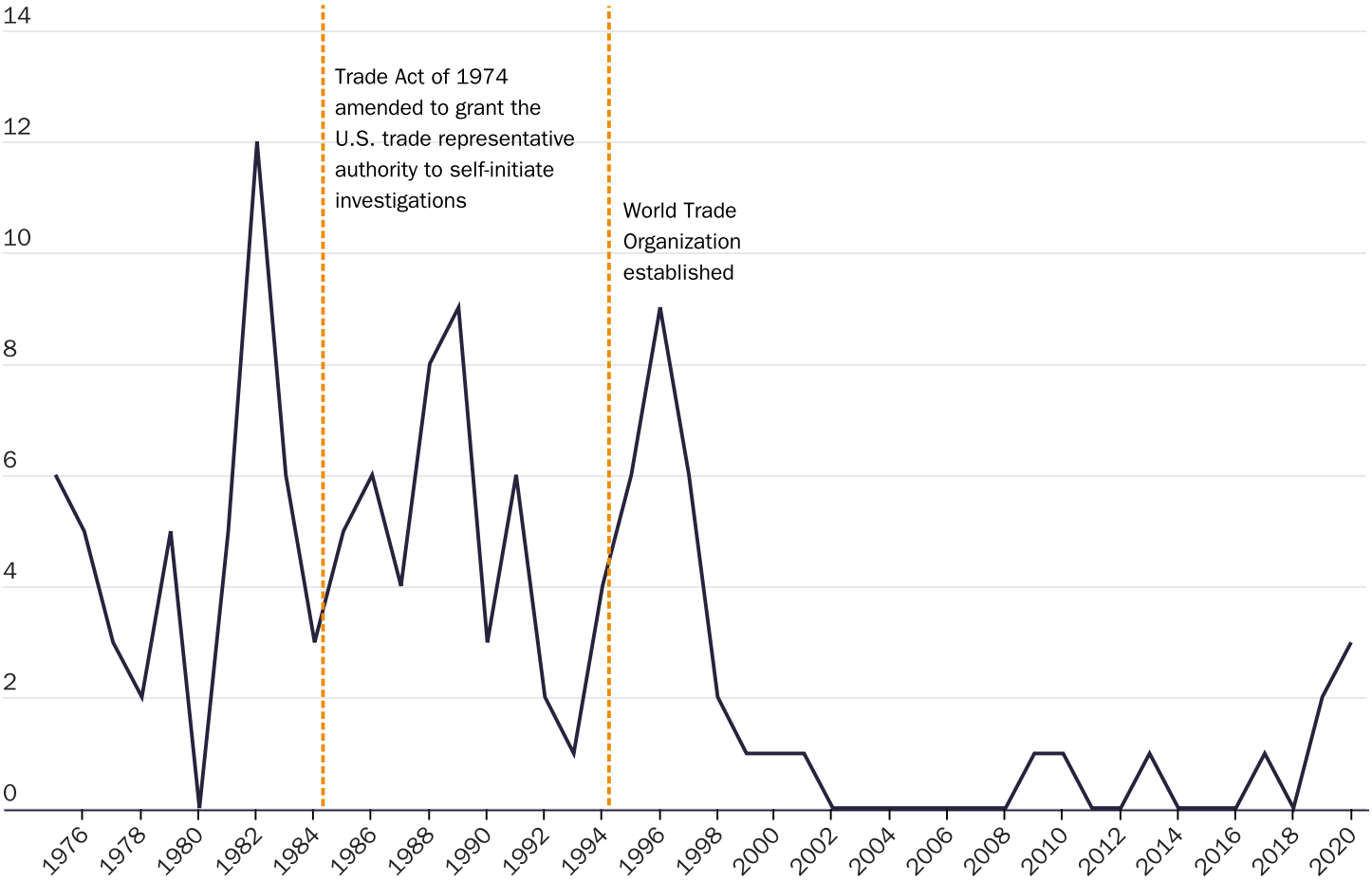

Source: Andres B. Schwarzenberg, "Section 301 of the Trade Act of 1974: Origin, Evolution, and Use," Congressional Research Service, R46604, updated December 14, 2020.

Communities, brought in January 1999 against the United States on Section 301.[9] The European Communities argued that the following aspects of Section 301 were inconsistent with WTO rules: the United States could take unilateral action under Section 301 *before* a ruling on the issue from the WTO was adopted; the United States could unilaterally determine whether a WTO ruling was implemented by the defending party in a case and take action to remedy the underlying issue *before* seeking additional dispute settlement procedures at the WTO; and Section 301 provided a shorter time frame that would allow the USTR to determine the level of suspension of concessions and mandate their implementation *before* a ruling was made by the WTO.

The WTO panel, however, found that any prima facie inconsistency with WTO law was removed by the promise that the United States made in the binding SAA. The panel stated that the SAA

> contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely.[10]

The panel essentially found that the U.S. commitment to follow WTO procedures and law in its application of Section 301 as laid out in the SAA was sufficient to overcome any inconsistency of Section 301 on its face with WTO rules. However, the panel also noted that U.S. *practice* could contradict this de jure consistency and thus run afoul of the United States' WTO obligations. The panel explained that "should the undertakings articulated in the SAA and confirmed and amplified by the US to this Panel be repudiated or in any other way removed by the US Administration or

another branch of the US Government, this finding of conformity would no longer be warranted."[11] Furthermore, as WTO trade law expert Simon Lester put it, "even if it turns out that the U.S. actions are inconsistent with a proper interpretation of the DSU, the Panel expressed its confidence that the United States would, from that point in time on, follow and await the completion of DSU procedures before making determinations."[12]

As we detail in the next section, the Trump administration broke with past U.S. practice and violated the promises laid out in the SAA. Actions taken by the Trump administration, some of which have continued under the Biden administration, thus violate WTO rules and—perhaps just as importantly—long-standing U.S. promises to its trading partners that Section 301 would never be used to implement unilateral retaliation where WTO rules are at play.

SECTION 301 UNDER TRUMP

Section 301 became a favored weapon in the Trump administration's trade war with China and was used in other high-profile cases as well. Of the 14 investigations initiated after 1997 (when the flurry of initial WTO actions died down), the Trump administration oversaw almost half (six) of them in its four years—a dramatic change compared with recent presidents. For example, George W. Bush's administration only pursued one self-initiated investigation against Ukraine, which resulted in the suspension of Ukraine's preferences under the Generalized System of Preferences (they were later restored). Barack Obama's administration self-initiated two investigations, and one was the result of a petition that led to a satisfactory resolution with China (after the United States launched a WTO complaint), which came into compliance with its WTO obligations. The Trump administration utilized Section 301 twice as often as Obama did, and all six investigations were self-initiated by USTR Robert Lighthizer. Table 1 shows the frequency with which each president used Section 301.

Self-initiated cases began under Ronald Reagan, after the change to Section 301 authorizing this process. Bill Clinton's administration self-initiated the most cases, with eight investigations in 1996 alone, but those mainly built WTO dispute settlement cases. In particular, 16 of the 25 Section 301 cases initiated during the Clinton administration after the WTO agreements entered into force related to a current or future WTO dispute. In the other cases, a resolution was reached between the United States and the foreign government prior to any WTO or unilateral action.

By contrast, only two of the six Trump administration cases related to WTO disputes: one was the U.S. implementation of duties authorized by the WTO dispute settlement body as part of the long-standing Airbus-Boeing case, while the other was suspended before a WTO panel was formed because the administration took unilateral action instead.[13] As discussed in the following section, the Trump administration's use of Section 301 largely broke with past practice in several ways.

Trump Administration Timeline of Section 301 Actions

From August 2017 to October 2020, the Trump administration self-initiated six Section 301 investigations. Of

Table 1

Section 301 investigations by U.S. presidents, 1975–2020

President	Petition	Self-initiated	Total
Gerald Ford	11	0	11
Jimmy Carter	10	0	10
Ronald Reagan	39	10	49
George H. W. Bush	7	13	20
William Clinton	10	20	30
George W. Bush	0	1	1
Barack Obama	1	2	3
Donald J. Trump	0	6	6

those investigations, the administration imposed tariffs as a remedial action in two cases, announced tariffs in two other cases, and took no action in the remaining two cases. In only one of the four cases involving tariffs—on Chinese intellectual property rights—did the Trump administration reach an agreement between governments to (partially) resolve the issues at hand in exchange for reducing some tariffs. However, most tariffs—as well as the system for U.S. companies to request a temporary exclusion from them—were maintained. Table 2 summarizes the Section 301 cases initiated by the Trump administration, each of which is detailed in this paper's Appendix.

"Actions taken by the Trump administration under Section 301 authority raise serious concerns for current and future U.S. trade policy. Chief among them are the abandonment of WTO rules to address unfair trade practices, the potential for executive overreach, and procedural abuses in the application of the law."

Beyond the Trump administration's aggressive initiation of Section 301 investigations, it also diverged from prior administrations in using *threats* of Section 301 actions to achieve goals unrelated to specific unfair foreign trade practices. Such goals included gaining leverage in ongoing trade negotiations (such as those on the U.S.-China Phase One deal); reducing the U.S. trade deficit with certain trading partners (namely with China and the EU); and pushing governments to support the United States' nontrade (e.g., foreign policy) positions (such as getting the EU to cooperate in addressing China's aircraft subsidies).

After entering office in January 2021, the Biden administration has resolved or de-escalated five of the six Trump-era cases. It reached a temporary settlement with the EU regarding the Section 301 action implementing the WTO's ruling in the Airbus-Boeing dispute on subsidies to large civil aircraft. Tariffs on EU-origin imports were suspended for five years. The Biden administration also achieved permanent solutions in two other Section 301 cases, each relating to foreign digital services taxes (DSTs). U.S. tariffs targeting France and other countries implementing DSTs were withdrawn, and the Section 301 investigations were terminated. The Biden administration also negotiated bilateral agreements in the two remaining cases, both against Vietnam. The investigations remain active, however, as the USTR monitors Vietnam's compliance with the relevant agreements.

By contrast, the Biden administration has essentially maintained the Trump administration's Section 301 action targeting Chinese imports. In particular, all the tariffs, the Phase One agreement, and the exclusion process remain in place, and the administration has shown little willingness to change course. Additional details on these positions are provided in the Appendix.

Substantive and Procedural Abuses of Section 301 by Trump

Actions taken by the Trump administration under Section 301 authority raise serious concerns for current and future U.S. trade policy. Chief among them are the abandonment of WTO rules to address unfair trade practices and the potential for executive overreach—and serious economic and geopolitical harms—as a result. In addition, the Trump administration committed several procedural abuses in the application of the law that should be avoided if Section 301 is to continue to be used as a trade tool. The tariffs put in place against Chinese imports provide a stark example of these problems.

Substantive Abuse 1: Unilateralism Run Amok

While Congress has delegated some of its constitutional authority over U.S. trade policy through Section 301, it has expressly directed the USTR to take unilateral action against only the foreign trade barriers that fall outside the WTO agreements. The SAA establishes that the USTR cannot act unilaterally against foreign trade policies falling under the WTO agreements and instead must bring a WTO dispute (and, if necessary, retaliate after receiving the WTO's agreement that a trade violation indeed exists). This is precisely what the Obama administration

Table 2

Section 301 investigations and actions by the Trump administration

Target	Issue	Finding	Action	Export value affected	WTO dispute	Status
China	Technology transfer, IP, and innovation policies/practices	Four Chinese IP rights-related practices are unreasonable (or discriminatory) and burden (or restrict) U.S. commerce.	7.5–25% tariff	$370 billion	DS542	Ongoing; Phase One deal reached in January 2020
EU (including the UK)	Subsidies on large civil aircraft	EU and certain member states have violated U.S. rights under the WTO agreement and failed to bring WTO-inconsistent subsidies into compliance with WTO obligations.	15–25% tariff	$7.5 billion	DS316, DS353	Suspended; temporary settlements reached with EU and UK in June 2021
France	Digital services tax	The digital services tax discriminates against U.S. companies and is inconsistent with international tax policy principles.	25% tariff (announced)	$1.3 billion		Terminated; compromise reached as part of OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting in October 2021
Austria, Brazil, Czech Republic, EU, India, Indonesia, Italy, Spain, Turkey, and the UK	Digital services tax	The digital services taxes of Austria, India, Italy, Spain, Turkey, and UK discriminate against U.S. companies and are inconsistent with international tax policy principles. Other investigations were terminated.	25% tariff (announced)	$2.1 billion		Terminated; compromise reached as part of OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting in October 2021
Vietnam	Policies/practices related to currency valuation	Vietnam's currency practices/policies are unreasonable and burden or restrict U.S. commerce.				Department of the Treasury reached an agreement in July 2021 with the State Bank of Vietnam to resolve the issues being investigated
Vietnam	Policies/practices related to import and use of illegally harvested timber	Nothing was found.				Negotiated U.S.-Vietnam Agreement on Illegal Logging and Timber Trade in October 2021

Source: Andres B. Schwarzenberg, "Section 301 of the Trade Act of 1974," Congressional Research Service, R46604, updated January 24, 2022. See "Section 301 under Trump" section for more details.

Note: EU = European Union; IP = intellectual property; UK = United Kingdom; WTO = World Trade Organization.

did in a 2010 Section 301 investigation of China's green energy subsidies, which resulted in a WTO dispute (subsequently joined by the EU and Japan) and China's voluntary elimination of the subsidies at issue.[14] In short, if a trade concern can be addressed under WTO rules, the USTR must bring a complaint to the WTO and adhere to its dispute settlement process, only resorting to tariffs or other discriminatory trade countermeasures upon receiving official WTO authorization to do so.

By contrast, the USTR may take unilateral action under Section 301 where WTO rules clearly do not address the unfair foreign trade practice at issue. The SAA lists certain policies, such as anti-competitive practices, that "fall outside the disciplines of [the applicable WTO] agreements" and for which unilateral Section 301 retaliation would remain viable. However, the USTR has interpreted Section 301(a) to require it to take *any* potential violations to the WTO, and the agency has been reluctant to challenge *any* "unreasonable" or discriminatory practices that are not covered by the WTO rules. This was, in fact, how the Clinton administration and Congress, when first incorporating the WTO agreements into U.S. law, thought future administrations would interpret Section 301 authority.[15]

The Trump administration violated both the law's letter and spirit. Law professor Jean Galbraith has observed that USTR Lighthizer, "perhaps in an attempt to sidestep the legal concerns that would arise from an explicit attempt to disregard the 1994 statement of administrative action[,] . . . has described its Section 301 investigation as focused not on violations of international trade law per se, but rather more generally on 'acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce.'"[16] The ambiguous language the USTR employed obscured the trade rules China supposedly violated, which allowed the USTR to opt for unilateral action (tariffs) in that case *and* provided a roadmap for acting unilaterally in future Section 301 investigations.

The USTR under Trump thus unilaterally pursued foreign policies it deemed were not covered by WTO rules. In the process, the agency exposed a major substantive flaw in the statute: *the USTR and the USTR alone decides whether a certain foreign trade practice is covered by trade agreement rules, and there is no express requirement that Section 301 cases all proceed through the agreement's dispute settlement system.*

In some Section 301 cases, such as those on DSTs, it could be argued that unilateralism is justified by open questions as to whether DSTs are covered by ambiguous and complex WTO services disciplines.[17] Nevertheless, the aforementioned U.S. precedent and practice should have pushed the USTR to utilize the WTO dispute settlement system and resort to unilateralism only after exhausting that avenue (i.e., after receiving a formal Appellate Body ruling that DSTs are not subject to various WTO disciplines). That promise was obviously ignored.

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On China, however, almost all the Chinese practices that the USTR has targeted are quite plainly covered by WTO rules, as former WTO Appellate Body chair James Bacchus and his Cato Institute colleagues Simon Lester and Huan Zhu established in their 2018 paper on the subject.[18] In particular, they show that opportunities to rein in almost all of China's actions exist in four different areas of WTO law: intellectual property protection and enforcement; trade secrets protection; forced technology transfer; and subsidies. This includes the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (which the U.S. successfully invoked in a 2007 WTO dispute that led to China's voluntary elimination of the offending intellectual property rights measures) and the WTO-plus commitments (which include obligations that exceed those required by the WTO agreements) that China made as part of its accession to the WTO.[19] Indeed, Article 7.3 of China's WTO Protocol of Accession contains a broad and unambiguous requirement that the Chinese government refrain from technology transfer and similar requirements

(i.e., that "the distribution of import licences, quotas, tariff-rate quotas, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on . . . performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China").[20] The USTR's Section 301 case, which, by the agency's own characterization, was focused on technology transfer, thus should have gone through the WTO—a view widely held by other legal experts, such as former WTO Appellate Body member Jennifer Hillman.[21]

As Bacchus, Lester, and Zhu detail, however, the Trump administration made no serious effort to use the WTO in disciplining China's unfair trade practices—despite the aforementioned legal provisions and China's adequate history of complying with WTO dispute settlement cases brought by other members (the only way to check members' compliance under WTO rules). As they note, "there are no cases where China has simply ignored rulings against it" (as opposed to, for example, the United States).[22] Yet the Section 301 case resulted in only one new WTO dispute filed by the United States, which narrowly targeted Chinese government interventions in licensing and other technology-related contracts rather than the four broad policy areas that USTR Lighthizer identified as warranting action in the Section 301 investigation.[23] Ironically, both parties agreed to suspend the proceeding in June 2019 because China revoked or amended some of the problematic regulations at issue in the dispute.[24] In other words, the system was working even as the USTR was avoiding and denigrating it.

Substantive Abuse 2: Unlimited Power?

The actions of the USTR in the China case exposed another flaw in the statute: the law does not clearly define or limit the president and the USTR's authority to impose unilateral measures (e.g., tariffs) to achieve the elimination of the foreign government policy at issue or to modify the unilateral action after it has been implemented. As discussed, the Trump administration from July 2018 to September 2019 imposed tariffs on imports from China through five separate tariff actions—list 1 ($34 billion), list 2 ($16 billion), list 3 ($200 billion), list 4A ($120 billion), and list 4B ($180 billion, which was never implemented)—gradually escalating the value of covered goods to roughly $370 billion.[25] (See the Appendix for additional details.) The effects of these tariffs on the U.S. economy, summarized in the next section, were significant.

"The USTR's actions in the China case exposed another flaw in the statute: the law does not clearly define or limit the president and the USTR's authority to impose unilateral measures (e.g., tariffs) to achieve the elimination of the foreign government policy at issue or to modify the unilateral action after it has been implemented."

An ambiguous and incomplete statute allowed this to happen. In particular, mandatory action taken under Section 301(a) must be roughly equivalent to the injury found to have been inflicted on U.S. entities by the foreign-government practice at issue: it "shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce." However, discretionary action under Section 301(b) is subject to no such requirement: the USTR may take "all appropriate and feasible action" listed in Section 301(c)—including tariffs as well as "all other appropriate and feasible action within the power of the President," a catch-all category covering not only presidential trade powers but those with "respect to any other area of pertinent relations with the foreign country."[26] Furthermore, Section 307 of the Trade Act of 1974 contains ambiguous language about the circumstances under which the USTR may modify a mandatory or discretionary action taken under Sections 301(a) or (b), respectively.

The USTR under Trump took advantage of these two substantive flaws in the China case when it implemented the list 3 and list 4A tariffs, both of which exceeded the Section 301 report's initial $50 billion estimate of annual harm that Chinese policies related to intellectual property

inflicted on U.S. entities and represented a modification of the original tariff action—implemented through the list 1 and list 2 tariffs—unrelated to the Chinese conduct that formed the basis of that action. (The modification was an express response to *Chinese retaliation*, not intellectual property policy.) Ambiguities in current law therefore permitted the president (via the USTR) to impose whatever tariffs he wanted, whenever he wanted, and to continuously modify those tariffs (and threaten to modify them) throughout 2018 and 2019.

"The Trump administration's erratic modifications to the China tariffs also revealed procedural flaws in the statute: the lack of safeguards for interested parties affected by U.S. actions or modifications thereof or for the U.S. economy more broadly."

Thousands of parties affected by these tariff modifications challenged them at the Court of International Trade (CIT), but the court ruled that the USTR had not exceeded its statutory authority under Section 307 to implement the list 3 and list 4A tariffs. In particular, the court found that the agency acted lawfully because China's retaliation was directly connected to the original U.S. tariff action and thus to the Chinese "acts, policies, and practices that the U.S. action was designed to eliminate." The court justified its conclusion by noting that the agency had broadly defined the original Section 301 investigation as "addressing 'China's Acts, Policies, and Practices *Related* to Technology Transfer, Intellectual Property, and Innovation'" and that the investigation therefore "covered China's conduct *related* to the identified matters and not simply . . . the acts *constituting* the identified matters [italics in original]."[27] The Section 301 investigation's ambiguous language thus provided, in the CIT's view, the agency with legal cover to expand the original tariff action far beyond the level of economic harm that the action was intended to remedy.

As discussed in the following section, the CIT remanded the tariff expansion decisions back to the USTR so it could more fully explain them, in accordance with the Administrative Procedures Act (APA). The case remains pending at the time of this paper's publication and may be appealed, but the Biden administration is expected to continue to defend the Trump-era actions as lawful. None of these legal proceedings, however, prevented the Trump administration from imposing tariffs on Chinese imports worth hundreds of billions of dollars, with—as discussed later—severe economic and geopolitical consequences.

Procedural Abuse 1: Due Process Disregarded

The Trump administration's erratic modifications to the China tariffs also revealed procedural flaws in the statute: the lack of safeguards for interested parties affected by U.S. actions or modifications thereof or for the U.S. economy more broadly. First, Section 304(b)(1)(A) requires the USTR to "provide an opportunity (after giving not less than 30 days notice thereof) for the presentation of views by interested persons, including a public hearing if requested by any interested person," but does not require the USTR to consider or respond to those comments. Indeed, the USTR may even disregard this minimal due process requirement if "expeditious action is required."[28]

Unburdened by limits on its authority to act under Section 301, the USTR moved quickly in ratcheting up the trade war with its tariff modification actions: hearings for list 3 were completed on August 27, 2018, and over 6,000 written comments were received before the final September 6, 2018, deadline.[29] Not only did commenters convey the harms that these additional tariffs would inflict upon their businesses (due to increased costs, a lack of suitable vendors outside China, supply chain disruptions, and Chinese retaliation) but they also warned that the tariffs would not achieve the objectives of the original Section 301 investigation because many of the targeted items were not advanced manufactures, nor did they relate to high-tech industries (including those cited in the Made in China 2025 plan).[30] (Was there any reason to believe that tariffs on textiles and apparel, plastic packaging, and home goods, among other low-end manufactures, would bring about permanent changes to China's tech and intellectual property regime?)

Yet list 3 tariffs were announced only a few weeks later on September 21, 2018 (with a subsequent correction issued shortly thereafter—an indication of the agency's lack of

thoroughness), and took effect *three* days later, leaving businesses with virtually no time to prepare and adjust their supply chains. The 10 percent tariffs were then increased to 25 percent on May 9, 2019—without any additional hearings or comments.[31] Timelines were just as truncated for list 4.[32] In both cases, it was highly unlikely that the agency's staff were considering—or perhaps even reading—most of the comments provided.

In remanding the Section 301 tariff expansion actions to the USTR, the CIT found that the agency violated the APA because it failed to respond to the issues raised by commenters on lists 3 and 4. (In general, the APA requires that agencies notify potentially affected parties about an intended action, provide these parties an opportunity to comment on that action, and explain the action in light of the comments received.) In originally expanding the tariffs to cover list 3 and list 4, the agency simply stated that the new tariffs were being implemented "at the president's direction." The court ruled that the agency thus violated the APA because "the final determinations do not explain whether or why the President's direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President's direction."[33] The CIT required the USTR, on remand, to reconsider or explain the new tariffs in light of the comments received by June 30, 2022, but did not compel the agency to change the tariffs.[34]

"USTR Lighthizer established the tariff exclusion system—even though the law did not provide for such a process nor had any previous USTR implemented one."

Second, the statute does not require an economic analysis of proposed actions taken thereunder. Under 304(b)(1)(C), the USTR simply may request that the International Trade Commission determine a proposed action's "probable impact on the economy of the United States."[35] Thus, the law allows the USTR to impose an economy-crippling trade action without any impartial government analysis or subsequent public consideration of such harms. One need not have a vivid imagination to understand how this provision allowed President Trump to take certain liberties regarding the future effects of his tariffs, despite the thousands of comments from U.S. businesses detailing the significant and long-lasting costs that the tariffs would (and eventually did) impose on a wide array of American industries and workers, and despite empirical studies confirming those harms.[36]

Procedural Abuse 2: Exclusions in Name Only

The Trump administration's tariff exclusion process revealed another procedural problem with Section 301. As the tariffs escalated, various stakeholders raised concerns about the potential harm to their businesses and industries at large. In response, USTR Lighthizer established the tariff exclusion system—even though the law did not provide for such a process nor had any previous USTR implemented one. According to a Congressional Research Service report, "Title III of the Trade Act of 1974 does not outline a formal process for exclusions or require the USTR to establish one. The determination to do so appears to be solely at the USTR's discretion."[37] Lighthizer again took advantage of ambiguity in the law.

A July 11, 2018, *Federal Register* notice issued by the USTR first outlined the exclusion process and substantive requirements, assigning to the agency sole authority to evaluate exclusion requests "on a case-by-case basis, taking into account whether the exclusion would undermine the objective of the Section 301 investigation." Exclusion requests were required to identify the product in need of exclusion and "the annual quantity and value of the Chinese-origin product that the requestor purchased in each of the last three years," as well as the rationale for the exclusion (i.e., whether the product is available only from China, whether the imposition of duties on the product would cause "severe economic harm to the requestor or other U.S. interests," and whether the product is "strategically important" or related to Chinese industrial policies).[38] Any exclusions granted by the USTR would apply to the product regardless of the importer at issue.

From the very start, the exclusion process was riddled with problems. As Senate Finance Committee chair Sen. Chuck Grassley (R-IA) stated to Lighthizer at a 2019 hearing:

> Americans working in businesses of all sizes have expressed concerns to me about the exclusion process for Section 301 duties. In particular, they note they

have to wait months to get a decision, and struggle to understand how USTR is applying the discretionary exclusion criteria. In fact, there are exclusion requests still pending from the first tranche of duties.[39]

Lighthizer responded by suggesting that the lack of resources to administer the exclusion process was contributing to these delays, but the exclusion process was plagued by more than just delays. These problems were documented in a July 2021 Government Accountability Office (GAO) report, which examined data on exclusion requests and public comments on extensions to previously granted exclusions, spanning the exclusion process period of July 2018 to August 2020. In total, the "USTR received about 53,000 exclusion requests, covering 4,485 different product categories across the four lists," with each request covering a single product. The agency denied 87 percent of the exclusion requests and refused to extend 75 percent of the tariff exclusions that it had granted, most of which expired on December 31, 2020.

"The law is problematic when used by the executive branch to make unilateral decisions about countries' trade agreement compliance and to enforce those decisions with unilateral sanctions. This approach to international trade disputes is more law of the jungle than rule of law."

More troubling than these figures, however, is how the agency arrived at them. The GAO examined 16 case files selected randomly from a pool of 31,664 exclusion requests and public comments on extensions to previously granted exclusions submitted between June 2019 and August 2020, and it found that the USTR had not sufficiently documented its internal procedures for reviewing exclusion requests and that its officials had therefore performed reviews inconsistently. Some case files lacked documentation explaining the agency's final decision, and the agency "did not publish a reason for its decisions on extensions."[40]

The exclusion process exposed two fundamental flaws in the statute. First, the USTR has broad, unchecked discretion when taking action under the law. Second, the agency need not justify or document its implementation of any such action beyond a single semiannual report to Congress on petitions, investigations, and actions taken under Section 301 as well as the "commercial effects" of any such actions.[41] This is hardly a check on future abuse of the law the agency may commit.

Indeed, the Biden administration has taken few steps, if any, to alter the Trump administration's approach in this case. Biden USTR Katherine Tai in October 2021 requested comments on the reinstatement of exclusions that had lapsed, signaling the start of another exclusion process.[42] Some members of Congress have "strongly urge[d] the USTR to expand its exclusion process as quickly as possible to give American workers, businesses, and families badly needed economic relief."[43] Acknowledging the findings of the GAO report, they emphasized the issues of delays and lack of transparency. On March 23, 2022, Tai reinstated tariff exclusions for 352 products through December 31, 2022, once again demonstrating that the authority to decide on this matter rests solely with the USTR because the law is ambiguous and affords excessive discretion to the executive branch.[44]

Section 301 as an Enforcement Tool

The Trump administration elevated Section 301 as a tool to enforce trade policy in novel ways. When used as a normal mechanism to investigate foreign trade practices, the law is a minor concern. However, the law is problematic when used by the executive branch to make unilateral decisions about countries' trade agreement compliance and to enforce those decisions with unilateral sanctions.[45] This approach to international trade disputes is more law of the jungle than rule of law, especially when politics is involved (as it inevitably is in trade cases). International trade law scholar Robert Hudec describes Section 301 as a mechanism where "the United States plays both prosecutor and judge, [and] in which the defendants are tried in absentia."[46] Trade experts Thomas Bayard and Kimberly Elliott have likewise referred to it as "frontier justice."[47] The Trump administration suggested on several occasions that instead of relying on the neutral adjudication process embedded in trade agreements, Section 301 could be used to enforce these agreements.[48]

A window into the administration's thinking is best outlined in the SAA for the U.S.-Mexico-Canada Agreement (USMCA), submitted to Congress on May 30, 2019, by USTR Lighthizer.[49] It is well known that under the North American Free Trade Agreement (NAFTA), the dispute settlement mechanism ground to a halt in 2001 when the United States failed to appoint panelists to the roster of individuals that could be called upon to adjudicate a dispute.[50] In the draft SAA submitted in May 2019, Lighthizer was apparently content to leave dispute settlement nonfunctional, suggesting that Section 301 could unilaterally enforce the agreement instead. As trade experts Simon Lester and Inu Manak argued at the time, the "USTR seems to be emphasizing and prioritizing the use of unilateral enforcement tools, as it tries to make the case that enforcement authority exists even without a functioning state-to-state dispute settlement mechanism."[51] Lighthizer's approach would have embedded the administration's Section 301 practice into the new NAFTA, giving the USTR ever more authority to enforce what it *considers* to be violations of a trade agreement.

Codification of this unilateralism never occurred, because House Democrats demanded that the USMCA contain a working state-to-state dispute settlement mechanism. However, this experience led Lighthizer to pursue a different approach to the China Phase One deal, which would not require congressional oversight. There, the Trump administration succeeded in enshrining the idea of unilateral enforcement into an international trade agreement.[52] The final text provides for unilateral enforcement ("the Complaining Party may resort to taking action") through suspension of obligations or a proportionate remedial measure if one party believes the other is in violation. The action can be taken "based on facts provided during the consultations," putting further power in the hands of the complainant to decide what facts are relevant. In congressional testimony, Lighthizer justified this unilateral approach by saying, "The only arbitrator I trust is myself."[53] The sentence speaks volumes.

Rule of law aside, Lighthizer's affinity for Section 301 as a unilateral enforcement mechanism is perplexing given its historical inefficacy. For example, Bayard and Elliott analyzed every Section 301 investigation between 1975 and 1994—91 cases targeting foreign actions against U.S. goods, farm products, services, and intellectual property—and found that Section 301 produced, at best, mixed results in terms of achieving its ultimate objective of removing the targeted foreign trade barrier. Of the 72 cases that permitted analysis, the authors found that U.S. negotiating objectives were successful less than half the time (35 cases, or a 48.6 percent success ratio). Even more damning, Bayard and Elliot found that U.S. retaliatory action (e.g., tariffs) produced only two successes out of 12 cases examined—a 17 percent success rate. They also showed that American "unilateralism" was not very unilateral at all and instead was employed in parallel with multilateral trade rules under the GATT. In fact, "in every case where a GATT panel found a violation or evidence of nullification and impairment, changes in the offending policy were made."[54]

An assessment by political scientist Krzysztof J. Pelc examining 189 U.S. trade actions from 1975 to 2000 came to similar conclusions about the inefficacy of American unilateralism: when the U.S. chose to act unilaterally, it was 34 percent *less likely* to secure concessions from the countries it was targeting.[55] "Targeted countries, particularly Japan, saw resisting unilateralism as an investment in the future" and thus "reasoned that conceding to a unilateral threat would bring on similar threats—much like how negotiating with hostage-takers can precipitate further hostage takings." By contrast, U.S. trading partners were more amenable to changing their policies via multilateral negotiation and dispute settlement because "conceding to legitimate multilateral challenges showed countries to be good global citizens."[56]

"USTR Lighthizer's affinity for Section 301 as a unilateral enforcement mechanism is perplexing given its historical inefficacy."

Such factors help to explain why the United States has won more than 85 percent of the disputes it has litigated at the WTO since 1995, achieving compliance in almost all of them, and has favorably settled many other WTO complaints before litigation began. These dynamics are also evident in the Trump administration's Section 301 action targeting China: the unilateral tariffs have failed to change Chinese behavior, while the narrow WTO dispute quickly achieved the elimination of the targeted policy.

The implications of expanding the use and abuse of Section 301 in U.S. trade policy are significant, not least because it vests so much power in the hands of very few officials to determine what is a threat and how to address alleged unfair trade practices. The attempt to embed unilateral enforcement in the USMCA and the weak enforcement that still exists in the China Phase One deal serve as reminders that Section 301 is not only an enforcement tool but also a means of undermining the stability and predictability of binding international trade agreements and multilateral dispute settlement.

Economic and Geopolitical Harms

By most accounts, the Trump administration's Section 301 actions were an economic and geopolitical failure. The tariffs and subsequent foreign retaliation imposed high economic costs on U.S. consumers, firms, and workers, generated much uncertainty, and undermined some of the United States' most important alliances and commercial partnerships. And while defendants of the administration's aggressive use of Section 301 might uphold the Phase One deal with China as an example of the law's success, the reality is far more complicated and suggests that U.S. unilateralism emboldened, rather than discouraged, the Chinese regime's pursuit of industrial policy, technological supremacy, and commercial prominence abroad. At the same time, by fueling a shortsighted trade conflict with the EU, the Trump administration wasted an opportunity to foster more-intensive cooperation with one of the United States' closest and most powerful allies to address the concerns of both sides about a rising China. In short, proper stocktaking of the high costs and minimal benefits of the Trump administration's Section 301 actions shows the futility of using this statute to advance the United States' economic and geopolitical interests.

Economic Impact

More than three years after the Trump administration first imposed Section 301 tariffs on Chinese products, there is sufficient evidence to conclude that the Trump-era Section 301 actions hurt U.S. consumers, businesses, and workers—as much as or more than they hurt the foreign firms and governments that these actions targeted.

These harms are most evident with respect to the tariffs imposed in response to China's policies on intellectual property rights; these tariffs have been the subject of numerous studies since 2018. First, economists have uniformly found that American importers and consumers, not Chinese companies or the Chinese government, have borne the brunt of the tariffs. A pair of studies documents that, while quantities of some tariffed items did decline slightly,[57] there was almost complete pass-through of the tariffs to the tariff-inclusive prices of the goods that continued to be imported. In other words, Chinese firms did not lower their prices; instead, U.S. importers paid the duties.[58] Trade Partnership Worldwide calculates that the cumulative cost of Section 301 duties for U.S. importing companies stood at $37.3 billion by November 2019.[59] A separate study found that these tariffs and other costs were mostly absorbed by U.S. companies and not passed on to consumers (though they paid slightly more in the end).[60]

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The tariffs especially harmed import-consuming American manufacturers, who imported $135.2 billion in intermediate inputs and $173.5 billion in capital equipment from China in 2017. By the time the Phase One deal entered into force in February 2020, however, 93 percent of intermediate inputs and 47 percent of capital equipment imported from China were subject to Section 301 tariffs.[61] According to a 2021 Federal Reserve study, higher manufacturing input costs resulting from the Section 301 tariffs increased production costs and decreased both industrial production

Table 3

China's retaliation against the United States for tariffs imposed under Section 301

Action	Date	Tariff (ad valorem)	U.S. exports affected
1st retaliation	July 6, 2018	25%	$34 billion
2nd retaliation	August 23, 2018	25%	$16 billion
3rd retaliation	September 24, 2018	5–10%	$60 billion
3rd retaliation (modification)	June 1, 2019	5–25%	$60 billion
4th retaliation	September 1, 2019	5–10%	Subset of $75 billion*
4th retaliation (modification)	February 14, 2020	2.5–5%	Subset of $75 billion*

Sources: Chad P. Bown and Melina Kolb, "Trump's Trade War Timeline: An Up-to-Date Guide," *Trade and Investment Policy Watch* (blog), Peterson Institute for International Economics, updated February 8, 2022; and "Current Foreign Retaliatory Actions," U.S. International Trade Administration, updated January 6, 2020.

Notes: Does not include tariffs suspended by the Chinese government throughout 2019, see "Current Foreign Retaliatory Actions," U.S. International Trade Administration for more information. The $75 billion worth of U.S. exports affected by China's fourth set of retaliatory tariffs represents the total estimated value of U.S. exports included in two separate lists. Tariffs were only imposed on the first list on September 1, 2019. Tariffs on goods included in the second list were set to take effect on December 15, 2019, but were withdrawn after the United States and China reached an agreement on the Phase One deal.

and employment.[62] A similar study found that tariff-boosted import costs stunted exports of U.S. manufactures.[63]

Second, retaliation by foreign governments against the Section 301 actions has also harmed the U.S. economy. China, for example, imposed duties ranging from 5 to 25 percent on U.S. exports worth $155 billion in 2017. Table 3 shows retaliation imposed by China, which makes up the lion's share of Section 301 retaliatory action.

The Chinese duties, together with the retaliatory tariffs imposed in response to Trump's steel and aluminum tariffs, covered about 98 percent of 2017 U.S. agricultural exports to China. The actions resulted in a $25.7 billion loss for American farmers from both trade destruction and trade diversion.[64] The Trump administration responded by sending U.S. farmers tens of billions of taxpayer dollars as emergency relief funding—using methodologies that the GAO recently found to be significantly flawed.[65] China's retaliatory tariffs on U.S. manufactured goods, meanwhile, were found to reduce U.S. manufacturing employment in targeted industries and communities, causing a $1,600 decline in aggregate consumption per worker and, as a result, job losses in the retail companies that serve them.[66] These communities and workers, however, received no emergency funding from the Trump administration.

Finally, the Trump administration's trade policies created significant uncertainty among investors, contributing to lower stock returns (by up to $1.7 trillion on aggregate, according to one estimate), higher risks of default, and lower investment among firms most exposed to the tariffs, in addition to retaliation observed by several scholars during 2018–2019.[67]

At the same time, the Section 301 tariffs did not cripple the Chinese economy (and thus didn't push the Chinese government to change course). Though Chinese firms exposed to U.S. tariffs did experience reduced investments, research and development expenditures, and profits, the trade war—which included not only Section 301 tariffs but also the safeguard and Section 232 tariffs that had been imposed before—has been estimated to have cost China a meager 0.29 percent of gross domestic product.[68] Though Chinese exports to the United States predictably declined somewhat, China remained the United States' top source of imports in 2021, and its exports to the rest of the world expanded. Furthermore, U.S. investments in China grew in 2019, and China saw record levels of foreign direct investment inflows in 2021.[69] To the extent companies did shift manufacturing capacity away from China, they did not return to the United States or stop serving the Chinese market entirely. The Chinese regime also adopted various policies to mitigate the damage caused by U.S. tariffs.[70]

Geopolitical Impact

The Trump administration's use of Section 301 also undermined U.S. geopolitical aims while often failing to

achieve the action's stated objectives. Most notably, the actions against China did not result in significant or durable changes to Chinese trade or intellectual property policy—especially as compared with the initial offer the Chinese government reportedly made to Commerce Secretary Wilbur Ross before the tariffs were ever imposed.[71] Furthermore, U.S. hawkishness likely encouraged the Chinese government to accelerate its nationalistic goals of economic self-sufficiency and technological supremacy, while empowering more hawkish voices in the Chinese Communist Party and pushing once-reluctant Chinese companies to embrace President Xi Jinping's aggressive version of state capitalism.[72] The Phase One deal, moreover, encouraged greater economic intervention by the Chinese government to meet agreed U.S. import targets, empowering Chinese state-owned enterprises in the process.[73] Finally, the deal's weak, unilateral enforcement mechanisms and lopsided structure (i.e., it only contained Chinese obligations) helped to ensure that China would not meet most of its commitments because it had little incentive to do so.

Rising tensions with the United States likely also encouraged Chinese policymakers, who have historically been reluctant to sign large-scale trade agreements, to partake in the Regional Comprehensive Economic Partnership agreement, a framework among Asian-Pacific countries that has contributed to motivating the Biden administration to devise a corresponding Indo-Pacific strategy.[74] There are also some reports that U.S.-China tensions and the Phase One deal played a role in bringing about the conclusion of negotiations between China and the EU on their Comprehensive Agreement on Investment.[75] Finally, Trump's attempts to secure a deal from the conflict with China reportedly led to his refusal to denounce China's increasingly hardline stances on issues such as the Hong Kong demonstrations and the Uyghur forced labor camps.[76]

The United States' strategic alliances also deteriorated because of the actions against China and because of other Section 301 cases. Most notably, the Section 301 actions fueled conflict with the EU, which was targeted in two cases. The EU views Section 301 as inconsistent with the rules of the WTO (and challenged it as such at the WTO in the mid-1990s).[77] The EU also retaliated against U.S. subsidies to Boeing and against the Section 301 Airbus-Boeing tariffs with tariffs of its own.[78] These conflicts, as well as the Trump administration's stated view that the tariffs were intended to reduce the U.S. bilateral trade deficit with the EU, also undermined diplomatic efforts to address issues of mutual interest, namely shared concerns over China's trade practices.[79] Bilateral tensions only died down when the Biden administration negotiated a mutual cease-fire—but not termination of the offending subsidy programs—in the Airbus-Boeing case and completed *multilateral* (that is, through the Organisation for Economic Co-operation and Development and G20) tax negotiations, which included U.S. concessions on global tax policy issues, to end the DST cases.[80] Neither outcome is a ringing endorsement for Section 301 unilateralism.

> "The Trump administration's use of Section 301 undermined U.S. geopolitical aims while often failing to achieve the action's stated objectives."

Only the Section 301 cases targeting Vietnam—on currency and timber—were arguably successful, but even those cases warrant caution and are consistent with historical trends discussed in the previous section. Most notably, tariffs were never imposed in either case, and Vietnam is a small country, both reliant on the U.S. market and enjoying close diplomatic relations. Both factors are consistent with past Section 301 analyses showing that success is more likely when tariffs are not imposed and the bilateral relationship is highly imbalanced in the United States' favor. Just as importantly, the Section 301 cases—to the extent they reduced Vietnamese exports to the United States or made Vietnam a less attractive investment destination—actually *undermined* the more important U.S. objective of encouraging multinational manufacturers to divest from China, as Vietnam was a top destination for that very production.[81]

SECTION 301 FLAWS

While the Trump administration's actions under Section 301 were harmful and inconsistent with recent U.S. precedent, the bigger concern is the law that permitted such actions with little congressional oversight. The Biden administration has shown little interest in returning to a pre-Trump

status quo on Section 301, not only leveraging and defending the Trump administration's actions but also reportedly considering a new Section 301 case against China.[82] This section details how the law let Trump get away with his Section 301 actions—with loopholes that presidents can continue to exploit unless Congress reforms the law or installs new legal checks on presidential action thereunder.

Broad Discretion in Defining Unfair Trade Practice

Section 301 grants the executive branch far too much discretion in defining an actionable foreign trade practice. For example, the law permits the president (through the USTR) to take action to remedy any "act, policy, or practice of a foreign country [that] is unreasonable or discriminatory and burdens or restricts United States commerce." But it subsequently defines "unreasonable" as simply "otherwise unfair and inequitable" and then provides a descriptive (not mandatory) list of policies that this might include.[83] As law professor Alan Sykes explained in 1992, the inclusion of this and other subjective text means that "Section 301 can encompass virtually any foreign government practice unilaterally deemed objectionable by the United States."[84] Sykes acknowledged that this aspect of Section 301 could facilitate political opportunism and harmful outcomes—a prediction that proved prescient 26 years later. The Section 301 investigation against China did not explicitly focus on specific violations of international trade rules but made more general claims of what the USTR alone considered to be unreasonable or discriminatory behavior. This permitted the USTR to sidestep the WTO dispute settlement system and leave the door open for future claims ungrounded in trade law or economics.

Broad Discretion in Defining a Section 301 Action

The law similarly provides the USTR with wide discretion to determine the scope, objective, and magnitude of a Section 301 action. On the first two factors, for example, the USTR may "enter into binding agreements" with the targeted foreign country that commit that country to "provide the United States with compensatory trade benefits that . . . are satisfactory to [the USTR]," with no real check on the contents of that agreement.[85] In this regard, the original intent of Section 301 seems to have been lost in translation during the Trump years. As law professor Kathleen Claussen explains, Section 301 "was intended . . . to help 'reach and enforce' free trade agreements." In particular, "it was a threat that could be used with the carrot of an open market to 'pry open foreign markets and thus further liberalize trade.'"[86] In the Trump years, however, Section 301 simply became a tool to punish other countries, force them to agree to U.S. demands, or impose tariffs—no free trade objective needed. Indeed, the Phase One deal was in no sense a free trade agreement: it maintained the additional tariffs, involved no market-access concessions on the U.S. side, and centered on purchase commitments that are managed trade, not free trade. The law's ambiguity permits such misbehavior.

"In the Trump years, Section 301 simply became a tool to punish other countries, force them to agree to U.S. demands, or impose tariffs—no free trade objective needed."

On the issue of magnitude, moreover, the law does not subject discretionary actions taken under Section 301(b) to the limit specified in Section 301(a), which states that such action "shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce."[87] The law thus permits massive trade restrictions in response to minor foreign trade offenses. If the CIT's recent interpretation of the statute is upheld, moreover, the USTR may continuously expand tariffs or other Section 301 actions far beyond their original magnitude as long as the agency's original investigation is ambiguously worded. This is a license for future abuse.

The USTR's Unchecked Authority

Section 301 also provides the USTR with unchecked authority to interpret what measures or actions violate trade

agreement rules and whether an issue falls under the WTO agreements (thus requiring dispute settlement proceedings under the SAA). As the China investigation demonstrated, this allows the USTR to pursue unilateral remedies even where WTO rules are clearly implicated. Past court precedent—in particular a 2006 challenge to the USTR's use of Section 301 to enter into the U.S.-Canada Softwood Lumber Agreement—indicates that private litigants could challenge discretionary action taken by the USTR pursuant to Section 301(b) but could also find it difficult to convince courts to consider such a challenge.[88]

"The law's procedural loopholes are a recipe for open-ended tariffs and other trade restrictions, regardless of their harms or efficacy, as well as litigation."

Furthermore, the law gives Congress no say as to whether the USTR should implement a proposed Section 301 action—a stark contrast to U.S. trade promotion authority ("fast track") law, which requires majority House and Senate votes before trade-agreement tariff reductions negotiated by the USTR may take effect.

Procedural Loopholes

As indicated in the sections above, the law contains numerous procedural loopholes, including:

- a lack of due process protections for interested parties affected by a proposed Section 301 action, such as an explicit requirement that the USTR respond to comments received or wait a set amount of time before implementing a proposed action, to give affected parties time to adjust their commercial practices accordingly;
- a lack of any requirement that an independent arbiter, such as the International Trade Commission, publish an estimate of a Section 301 action's likely economic effects prior to the action's entry into force (this step is currently aspirational); and
- a lack of rules or requirements regarding the process under which the USTR may exclude U.S. companies from an action taken under Section 301. (Proposed legislation would establish such a process, but only for the China action.)[89]

The law also fails to effectively limit the duration of a Section 301 unilateral action. The USTR alone determines whether a discretionary action "is no longer appropriate" and thus warrants termination. As long as "any representative of the domestic industry which benefits from such action" requests that an action continue every four years, it can arguably continue following a review by the USTR.[90] (There is some question, however, as to what would happen in self-initiated cases, such as that targeting China.) This is a recipe for open-ended tariffs and other trade restrictions, regardless of their harms or efficacy, as well as litigation.

REFORMING SECTION 301

Congress has recognized some of the problems Section 301 poses in its current form. For example, Sen. Mike Lee (R-UT) sponsored the Global Trade Accountability Act of 2019, which suggests practical reforms and requires congressional approval of any proposed unilateral trade action, including those under Section 301, that has the effect of increasing trade barriers.[91] Two identical bills introduced in the House and the Senate by Rep. Stephanie Murphy (D-FL) and Sen. Tim Kaine (D-VA), titled the Reclaiming Congressional Trade Authority Act of 2019, focus on reining in presidential discretion to modify duty rates for reasons of national security and on limiting the authority of the USTR to impose certain duties or import restrictions through a joint resolution for disapproval.[92] While this bipartisan support is encouraging, reform efforts have stalled in 2022.

Given the weaknesses in the law identified throughout this paper, we recommend the following amendments to Section 301:

Specify when the USTR can implement a unilateral action and set the default action as dispute settlement through the WTO or an applicable trade agreement. The most significant flaw in Section 301 is that it designates the USTR, a political appointee that answers to the president, as the only arbiter in deciding whether an

identified unfair trade practice falls outside international trade rules. To fix this problem, the law should require that the appropriateness of unilateral action be confirmed by an independent entity—via, for example, a joint approval resolution by Congress or a decision by a panel of independent experts (such as those who preside over NAFTA/USMCA disputes). The law should also stipulate that all foreign trade practices be *presumed* to fall under WTO rules (thus requiring WTO dispute settlement) unless specifically proven otherwise by an entity other than the USTR. This would codify the SAA.

Limit the USTR's discretion to define an actionable unfair foreign trade practice. The law should expressly list the general categories of foreign trade policies that may be subject to unilateral action under Section 301. It should also require the USTR to detail the specific foreign laws, regulations, and practices that any unilateral action is targeting, such that the elimination of these policies would immediately terminate the action.

"Ideally, Section 301 would be repealed entirely, given its anachronistic approach to trade policy, its inconsistency with WTO rules, its potential for abuse, and the wide array of alternative legal mechanisms for achieving the elimination of unfair trade practices around the world."

Tighten language on the implementation and modification of a unilateral Section 301 action. The law should expressly require that any unilateral action taken by the USTR under Section 301 be no greater than the annual harm the targeted foreign trade practice has inflicted on the U.S. economy. Importantly, in quantifying the harm and determining the action to be taken, the action must be remedial and not punitive: the action should be valued at the minimum level needed to offset or eliminate the harm. The law should also require that there be a clear connection between the trade action and the proposed remedy and that the action be intended to liberalize bilateral trade or investment (as opposed to achieving protectionist or even nontrade objectives). Rules on subsequent modification of an action should also be changed to require that the modification strictly relate to the specific unfair foreign laws, regulations, and trade practices identified in the *original* Section 301 investigation rather than to foreign government retaliation or any other issue. Ambiguous drafting of a Section 301 investigation should not, as the CIT appears to imply, be a license for the USTR to modify tariffs or other Section 301 actions in any way he or she sees fit; instead, a new Section 301 investigation (e.g., on foreign government retaliation) should be required. (As noted above, this modification authority is currently the subject of pending litigation.)

Actions must sunset. Any unilateral action taken by the USTR must also be subject to a hard sunset of two years from the date that action goes into effect *unless* extended by a majority vote of both chambers of Congress. Remedial measures cannot be open-ended or subject to the whims of the USTR. Senator Lee's bill provides for a report by the International Trade Commission "not later than 12 months after the date of a unilateral trade action" to estimate "the effects of the action on the United States economy, including a comprehensive assessment of the economic effects of the action on producers and consumers in the United States."[93] This report would help Congress decide whether further action is warranted, and it would also hold the USTR to account for taking actions that harm the U.S. economy and fail to achieve national strategic objectives.

Procedural loopholes must be closed. The law should ensure proper due process protections for interested parties affected by a proposed Section 301 action, including by requiring the USTR to respond to party comments and wait a set amount of time (e.g., six months) before implementing a proposed action to let parties adjust their orders or supply chains. Litigation under the notoriously outdated and opaque Administrative Procedures Act should *not* be interested parties' only hope for procedural due process in Section 301 cases.[94] The law should also require an International Trade Commission assessment of a Section 301 action's likely economic effects prior to the action's implementation, and it should establish a formal and transparent exclusion process once any action is implemented.

CONCLUSION

It was long the conventional wisdom in Washington, DC, that the broad and ambiguous trade powers that Section 301 delegates to the executive branch were acceptable and even appropriate because the president's national constituency and diverse cabinet made him the federal official least susceptible to insular protectionist impulses and most likely to consider the broader national interest before acting under the law. President Trump's abuse of Section 301 thoroughly disproved that assumption and in the process revealed both the law's serious flaws and potential for major economic and geopolitical harm.

Ideally, Section 301 would be repealed entirely, given its anachronistic approach to trade policy, its inconsistency with WTO rules, its potential for abuse, and the wide array of alternative legal mechanisms for achieving the elimination of unfair trade practices around the world. In the alternative, Congress should correct the law's substantive and procedural flaws to protect against future executive branch excess and reclaim some of its constitutional powers to regulate international commerce. Doing so would not only bolster global confidence in the United States' position in the liberal international order but also ensure that another president does not follow in Trump's footsteps, with equally disastrous results.

APPENDIX: TRUMP-ERA SECTION 301 CASES

China's Forced Technology-Transfer Policies and Practices (Initiated August 24, 2017)

The Trump administration launched an investigation over concerns about China's policies on intellectual property rights, forced technology transfers, subsidies, and innovation in August 2017 and concluded the investigation in March 2018. The investigation identified four Chinese policy areas that warranted action by the United States: (1) forced technology-transfer requirements; (2) discriminatory and nonmarket licensing practices; (3) state-directed and state-funded strategic acquisition of U.S. assets; and (4) cyber-enabled theft of U.S. intellectual property and trade secrets.[95]

The administration claimed that because only China's discriminatory and nonmarket technology-licensing practices were covered by existing WTO disciplines, unilateral action (i.e., "pursuing [the United States'] sovereign right to protect its fundamental economic competitiveness from China's unfair, predatory, and harmful technology-transfer policies" via tariffs) was justified.[96] After bilateral negotiations led by U.S. Secretary of Commerce Wilbur Ross failed to quickly resolve the dispute by the end of May 2018, the president announced 25 percent tariffs on Chinese imports worth approximately $50 billion (i.e., the amount of harm that, according to the USTR's Section 301 investigation, Chinese intellectual property infractions had inflicted on U.S. entities).[97] Covered products were determined after interested parties submitted to the USTR relevant evidence and testimonies and were divided into two groups based on these submissions: list 1, worth $34 billion, and list 2, worth $16 billion.[98] USTR Lighthizer also established a process by which affected U.S. companies could petition the agency for a temporary exclusion from the tariffs.

China retaliated immediately, imposing 25 percent tariffs on $50 billion worth of U.S. products, and the dispute escalated rapidly. The Trump administration quickly responded to Chinese retaliation with a 10 percent tariff on an additional $200 billion worth of Chinese products in September 2018—a list 3 group determined mere days after the USTR had received interested party comments. China again retaliated shortly thereafter, applying tariffs to an additional $60 billion worth of U.S. products.[99]

The tariffs' stated purpose was to provide leverage in negotiations with China on the policies targeted by the Section 301 report. These talks officially resumed in December 2018, but the Trump administration also raised issues that were not part of the Section 301 investigation and demanded broader concessions from China, such as purchasing additional U.S. goods to reduce the bilateral trade deficit, enacting structural changes to grant greater market access to U.S. businesses, and addressing alleged currency manipulation practices.[100] The talks made little headway to start, prompting further action under Section 301 throughout 2019, including raising the list 3

Table 4

Section 301 actions against U.S. Imports from China

Date	List	Tariff (ad valorem)	Imports affected	*Federal Register* notice
July 6, 2018	1	25%	$34 billion	83 Fed. Reg. 28710
August 23, 2018	2	25%	$16 billion	83 Fed. Reg. 40823
September 24, 2018	3	10%	$200 billion	83 Fed. Reg. 47974 83 Fed. Reg. 49153
June 15, 2019	3	25% (increased from 10%)	$200 billion	84 Fed. Reg. 20459
September 1, 2019	4A	15%	$120 billion	84 Fed. Reg. 43304 84 Fed. Reg. 45821
February 14, 2020	4A	7.5% (decreased from 15%)	$120 billion	85 Fed. Reg. 3741

Sources: Andres B. Schwarzenberg, "Section 301 of the Trade Act of 1974: Origin, Evolution, and Use," Congressional Research Service, R46604, updated December 14, 2020, p. 30; Chad P. Bown, "US-China Trade War Tariffs: An Up-to-Date Chart," Peterson Institute for International Economics, updated March 16, 2021; "$300 Billion Trade Action (List 4)," Office of the U.S. Trade Representative, https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-china/300-billion-trade-action; and Office of the U.S. Trade Representative, "United States and China Reach Phase One Trade Agreement," December 13, 2019.

tariffs from 10 to 25 percent in May, proposing tariffs that same month on a new list 4 group of remaining Chinese products worth approximately $300 billion, and imposing 15 percent tariffs on a subset of those goods (list 4A) worth $120 billion in September.[101] Table 4 provides a summary of U.S. Section 301 tariff actions on Chinese imports.

The negotiations wrapped up in October 2019, prompting the administration to halve the list 4A tariffs, from 15 to 7.5 percent.[102] The resulting Phase One deal went into effect in February 2020, but all tariffs—ranging from 7.5 to 25 percent—remain on Chinese goods worth nearly $370 billion at the time (i.e., nearly three-quarters of all pretariff Chinese imports into the United States). The administration stated that these tariffs would remain in effect until a second agreement could be completed, but no progress was made on additional negotiations while President Trump remained in office.[103] Meanwhile, China's retaliatory tariffs (noted in Table 3) also continue to remain in place, for the most part. Some 124 U.S. products are exempt from the tariffs until June 30, 2022.[104]

China also filed three WTO dispute settlement challenges to the unilateral U.S. tariff actions. In September 2020, a WTO panel ruled in one case that the U.S. tariffs were inconsistent with the United States' WTO obligations.[105] In particular, the panel found that the tariffs clearly violated the most-favored-nation principle of GATT Article I because they applied to China alone and GATT Article II because they exceeded the bound most-favored-nation tariff rates that the United States had agreed not to exceed in its WTO tariff schedule. The panel also rejected the United States' defense that the tariffs qualified for the "public morals" exception to GATT disciplines because the United States did not demonstrate "how the imposition of additional duties on the selected imported products contributes to the achievement of the public morals objective as invoked by the United States."[106] Finally, the panel rejected the U.S. claim that the Phase One deal constituted a lawful settlement ("mutually satisfactory solution") of the matter that precluded panel review because only one of the two parties saw the issue as resolved.[107]

USTR Lighthizer responded to the panel's report, saying that it "confirms what the Trump Administration has been saying for four years: The WTO is completely inadequate to stop China's harmful technology practices." He added that the United States "must be allowed to defend itself against unfair trade practices" and that the panel report had no effect on the Phase One deal.[108] Only the last claim has merit: WTO members are indeed sovereign actors who comply with adverse dispute settlement rulings voluntarily. The remaining claims are essentially hollow because the United States *never went to the WTO to adjudicate its complaints against China in the first place* (thus forming the basis for China's WTO disputes and the panel's inevitable findings). Indeed, almost all the Chinese behavior alleged by the U.S. Section 301 report *was* covered by China's WTO commitments.[109]

The Biden administration has largely continued the Trump administration's approach to this case despite openly admitting that China has not lived up to its Phase One commitments and that the tariffs have thus failed to

achieve such compliance.[110] This is likely because, as Scott Lincicome explained in 2021, "the tariffs' overall impact on the Chinese economy has been relatively muted—decreasing Chinese GDP [gross domestic product] by an estimated 0.29 percent—because China's economy is relatively large; Chinese companies, foreign investors, and the Chinese government adapted; and increased tariff costs were mostly passed on to U.S. consumers." Bilateral relations, as well as Chinese behavior on human rights, foreign policy, and other nontrade issues, have also deteriorated, and the tariffs and related uncertainty have imposed significant costs for the U.S. economy.[111] Nevertheless, the Biden administration has shown little interest in removing the tariffs. In fact, USTR Katherine Tai has reinstated tariff exclusions for 352 products through December 31, 2022 (a clear sign that the tariffs are staying put for a while).[112] The Biden administration also defended the Section 301 action in the CIT and obtained a favorable ruling concerning the USTR's statutory authority for imposing the list 3 and list 4A tariffs.[113] While the CIT did direct the USTR to file remanded results for these lists by June 30, 2022, to demonstrate consideration for the issues raised in the comments received from interested stakeholders, this decision does not compel the agency to make changes to the tariffs.[114]

EU Large Civil Aircraft Dispute (Initiated April 12, 2019)

In April 2019, the Trump administration initiated its second Section 301 investigation, this time targeting the EU's failure to comply with adverse WTO rulings on EU civil aircraft subsidies provided to Airbus.[115] However, unlike other Trump-era Section 301 cases, this action was perfectly compatible with global trade rules and past U.S. practice under Section 301, as it implemented tariffs authorized by the WTO's Dispute Settlement Body following previous dispute rulings regarding persistent EU noncompliance.

What is commonly referred to as the Airbus-Boeing saga—the longest running dispute in WTO history—involved disputes brought by both the United States and the EU against each other's subsidies.[116] Rulings by WTO panels and the Appellate Body between June 2010 and March 2012 obligated the United States and the EU to withdraw WTO-inconsistent subsidies to Boeing and Airbus, respectively.[117] Following unsuccessful consultations, the United States and the EU both requested in 2012 that WTO panels determine each other's compliance with the adverse Appellate Body decisions.[118] In 2016 and then 2018, a compliance panel and the Appellate Body, respectively, found that the EU had failed to withdraw its illegal subsidies, and subsequent arbitration proceedings limited authorized U.S. retaliatory tariffs to $7.5 billion worth of EU products.[119] Meanwhile, the Appellate Body in 2019 upheld the 2017 ruling of a separate compliance panel that the United States also remained out of compliance, and another arbitration panel authorized EU retaliation on $4 billion worth of U.S. goods.[120]

On October 9, 2019, USTR Lighthizer used a Section 301 proceeding to enforce the WTO rulings and thereby imposed 10 percent tariffs on most Airbus jets—raised to 15 percent in February 2020—and 25 percent tariffs on a wide array of European exports, including agricultural goods on October 18, 2019.[121] The European Union then imposed its WTO-authorized tariffs on November 11, 2020.[122] Lighthizer used the standoff to push for the EU's cooperation in addressing Chinese aircraft subsidies, an issue unrelated to the WTO dispute.[123]

In March 2021, the EU and the United States—now under the Biden administration—agreed to suspend tariffs for four months and negotiate a solution to the impasse.[124] An agreement to resolve the dispute was reached in June 2021, extending the tariff suspension for five years while committing both parties to cooperate on the issue of aerospace funding by nonmarket actors.[125]

France's Digital Services Tax (Initiated July 2019)

The Trump administration initiated its third Section 301 investigation to probe France's new DST, which was signed into law in July 2019.[126] The DST imposes a 3 percent levy on gross revenues derived from intermediary and user-data-driven advertising services for companies whose annual revenue from the covered services is calculated to exceed €750 million (approximately $822 million) globally and €25 million (approximately $27 million) in France.[127] At the time of proposing the DST, the French government noted that it would remain in place until discussions on taxation and the digital economy concluded at the Organisation for Economic Co-operation and Development

(OECD) with an international agreement, which upon entering into force would replace the DST.[128]

In December 2019, the U.S. Section 301 investigation found that the DST discriminated against major U.S. digital companies (who were, in fact, the only companies that qualified for the tax at the time) and was inconsistent with international tax policies.[129] The USTR published a preliminary list of U.S. imports from France valued at $2.4 billion eligible for tariffs of up to 100 percent.[130] Shortly thereafter, in January 2020, France agreed to suspend the collection of DST payments due in 2020 until December of that year to allow time for negotiations at the OECD to conclude. In return, the United States agreed to postpone the imposition of Section 301 tariffs on French products.[131]

In June 2020, however, the United States withdrew from negotiations concerning taxing rights over the residual profits of multinational corporations and existing DSTs at the OECD.[132] In July 2020, the USTR announced a 25 percent tariff on $1.3 billion worth of U.S. imports from France, clarifying that the tariffs would not enter into force until January 2021 to allow time for progress in bilateral talks with France and for multilateral negotiations at the OECD.[133] Though no agreement was reached on either end—discussions at the G20 and OECD were prolonged until mid-2021 due to persistent disagreements and challenges arising from the COVID-19 pandemic—USTR Lighthizer decided to suspend the tariffs indefinitely in January 2021, prior to their entry into force. That decision followed the initiation of additional Section 301 investigations on DSTs adopted or under consideration by 10 other jurisdictions in June 2020 (see next section).[134]

The United States reentered negotiations at the OECD in 2021 under President Biden and Treasury Secretary Janet Yellen.[135] In October 2021, 136 members of the OECD-G20 Inclusive Framework on Base Erosion and Profit Shifting, including France, the United States, and other countries whose DSTs were subject to Section 301 investigations (see below), reached agreement on a statement for a "two-pillar solution to address the tax challenges arising from the digitalisation of the economy."[136] The first of these pillars provides for a mechanism to reallocate taxation rights for profits derived from digital services provided by certain multinational corporations among member jurisdictions. It is set to be implemented through a yet-to-be-negotiated multilateral convention, which is expected to enter into force sometime in 2023. This multilateral convention will also require all parties to remove their existing DSTs.[137] On October 21, 2021, France and the U.S. Treasury Department agreed on a transitional approach for the removal of France's DST, to occur once the first pillar of the OECD-G20 framework takes effect. The United States agreed to terminate the existing Section 301 action in return.[138]

On November 18, 2021, USTR Tai officially terminated the Section 301 action targeting France, dropping the tariffs that had been suspended since January 2021.[139]

Foreign Digital Services Taxes (Initiated June 2020)

In June 2020, USTR Lighthizer initiated a separate Section 301 investigation of DSTs covering 10 other jurisdictions that had adopted or considered adopting this type of levy: Austria, Brazil, the Czech Republic, the EU, India, Indonesia, Italy, Spain, Turkey, and the UK. In January 2021, the investigation found that the DSTs adopted by Austria, India, Italy, Spain, Turkey, and the UK discriminated against U.S. digital companies, were inconsistent with international tax policies, and burdened or restricted U.S. commerce.[140] On March 26, 2021, USTR Tai—under the Biden administration—terminated the investigations on Brazil, the Czech Republic, the EU, and Indonesia, as none of those jurisdictions had implemented DSTs.[141]

On June 7, 2021, USTR Tai determined to impose 25 percent tariffs on $65 million worth of Austrian imports, $119 million worth of Indian imports, $386 million worth of Italian imports, $324 million worth of Spanish imports, $310 million worth of Turkish imports, and $887 million worth of British imports. However, she also suspended the imposition of those duties until November 29, 2021, to allow for bilateral and multilateral discussions toward a resolution, including ongoing talks at the OECD (see the previous section).

On October 8, 2021, Austria, Italy, Spain, the UK, Turkey, and India joined the OECD-G20 statement on a "two-pillar solution to address the tax challenges arising from the digitalisation of the economy," under which they will commit to removing their DSTs as part of a multilateral convention to implement the first pillar. On October 21, 2021, Austria, Italy, Spain, and the UK (along with France) reached an

agreement with the U.S. Treasury Department on a transitional approach for the removal of their DSTs, to occur once the first pillar of the OECD-G20 framework takes effect. The United States agreed to terminate the corresponding Section 301 actions in return.[142] On November 18, 2021, Tai officially terminated the Section 301 actions.[143]

On November 22, 2021, Turkey and the U.S. Treasury Department agreed on a transitional approach for the removal of Turkey's DST under the same terms as the United States' October 21 agreement with the five European countries.[144] India and the U.S. Treasury Department reached a similar agreement two days later.[145] In return, Tai terminated the Section 301 actions on Turkey and India on November 28, 2021, before the additional tariffs announced in June 2021 were scheduled to take effect.[146]

Vietnam Currency (Initiated October 2, 2020)

As the administration and some members of Congress grew wary of the United States' widening trade deficit with Vietnam, a Section 301 investigation was launched to examine whether the State Bank of Vietnam, which actively intervenes in foreign exchange markets, undervalued Vietnam's currency to gain an unfair trade advantage.[147] With that investigation underway, the U.S. Treasury Department determined that Vietnam manipulated its currency between June 2019 and June 2020 to prevent the effective balance of payment adjustments and to gain an unfair trade advantage.[148] The U.S. Treasury also announced that it would engage with Vietnam and press for policy actions to address the underlying causes behind the undervaluation of its currency and eliminate unfair trade advantages. Before leaving office, USTR Lighthizer determined that Vietnam's practices related to currency valuation, including "excessive foreign exchange market interventions," were unreasonable and burdened or restricted U.S. commerce.[149] However, he left office without issuing a determination of action, leaving the issue pending as the Biden administration came into office.

Engagement between officials from the State Bank of Vietnam and the Biden-led U.S. Treasury continued, and on July 19, 2021, both countries announced an agreement to address concerns about Vietnam's currency practices.[150] In light of this development, USTR Tai determined on July 28, 2021, not to take additional actions under Section 301 at the time. However, her agency would monitor Vietnam's implementation of its commitments under the agreement.[151]

Vietnam Timber (Initiated October 2, 2020)

Vietnam has become one of the world's largest exporters of timber products and wooden furniture, and the USTR suspected that a significant portion of the timber inputs used in these products had been illegally harvested or traded and, moreover, that some of that timber came from species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[152] The USTR's Section 301 investigation therefore examined whether Vietnamese officials undermined their country's own laws, those of their trading partners, or international rules by importing illegally harvested or traded timber. Unlike in the Vietnam currency case, however, USTR Lighthizer never made a final determination in this investigation before leaving office.

With the change of U.S. presidential administration, the USTR engaged with Vietnam to reach a negotiated settlement. On October 1, 2021, USTR Tai announced that the United States and Vietnam had reached an agreement to keep illegally harvested or traded timber out of the supply chain. The agreement entered into force at the end of the same month. Highlighting that the case showed the "strength of using [Section 301] to address concerns regarding environmental risks or the enforcement of environmental laws," she determined that no further Section 301 action was needed at the time, though the USTR would continue to monitor Vietnam's implementation of its commitments under the agreement.[153]

NOTES

1. Trade Act of 1974, 19 U.S.C. §§ 2411–20.

2. Chad P. Bown, "Rogue 301: Trump to Dust Off Another Outdated US Trade Law?," *Trade and Investment Policy Watch* (blog), Peterson Institute for International Economics, August 3, 2017.

3. Richard Nixon and Council of Economic Advisers, *Economic Report of the President, Transmitted to the Congress February 1974, Together with the Annual Report of the Council of Economic Advisers* (Washington: Government Printing Office, 1974), https://fraser.stlouisfed.org/title/economic-report-president-45/1974-8145; and Committee on Finance, "Trade Reform Act of 1974," U.S. Senate, 93rd Cong., 2nd Sess., Report no. 93-1208, 1974, https://www.finance.senate.gov/imo/media/doc/trade10.pdf.

4. Committee on Finance, "Trade Reform Act of 1974."

5. Trade Act of 1974 § 2411(b).

6. Andres B. Schwarzenberg, "Section 301 of the Trade Act of 1974: Origin, Evolution, and Use," Congressional Research Service, R46604, updated December 14, 2020.

7. See Matthew Schaefer, "Section 301 and the World Trade Organization: A Largely Peaceful Coexistence to Date," *Journal of International Economic Law* 1, no. 1 (1998): 157–59. "Between the entry into force of the WTO on 1 January 1995 and 15 November 1997, the USTR initiated 21 S. 301 investigations with respect to practices of WTO Members. The USTR requested consultations under the [Dispute Settlement Understanding] with respect to 14 of these 21 investigations."

8. William J. Clinton, *Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements: Message from the President of the United States* (Washington: U.S. Government Printing Office, 1994), p. 1035, https://www.google.com/books/edition/Uruguay_Round_Trade_Agreements_Texts_of/Mek6AQAAMAAJ?q=&gbpv=1&bsq=1035#f=false.

9. The European Communities argued that Sections 304(a)(2)(A) and 306(b) are inconsistent with Article 23.2(a) of the WTO Dispute Settlement Understanding (DSU) and that Sections 306(b) and 305(a) are inconsistent with DSU Article 23.2(c). It also claimed that Section 306(b) violates GATT Articles I, II, III, VIII, and XI. See "United States—Sections 301–310 of the Trade Act of 1974," Report of the Panel, World Trade Organization, WT/DS152/R, December 22, 1999, pp. 116–226.

10. "United States—Sections 301–310 of the Trade Act of 1974," Report of the Panel, World Trade Organization, WT/DS152/R, December 22, 1999, p. 332, par. 7.111.

11. "United States—Sections 301–310 of the Trade Act of 1974," p. 339, par. 7.136.

12. Simon Lester, "Panel Report: United States–Sections 301–310 of the Trade Act of 1974," Dispute Settlement Commentary, WorldTradeLaw.net, updated April 21, 2005, p. 9.

13. "DS316: European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft," Dispute Settlement, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm; and "DS542: China— Certain Measures concerning the Protection of Intellectual Property Rights," Dispute Settlement, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm.

14. Doug Palmer and Leonora Walet, "China Agrees to Halt Subsidies to Wind Power Firms," Reuters, June 7, 2011.

15. "DS419: China—Measures concerning Wind Power Equipment," Dispute Settlement, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds419_e.htm; Palmer and Walet, "China Agrees to Halt Subsidies to Wind Power Firms"; and Jean Galbraith, "United States Moves Forward with Tariffs and Requests WTO Consultations in Response to Certain Trade Practices by China," *American Journal of International Law* 112, no. 3 (2018): 505–10, http://www.doi.org/10.1017/ajil.2018.68.

16. Galbraith, "United States Moves Forward with Tariffs and Requests WTO Consultations."

17. See, for instance, Okanga Ogbu Okanga, "Testing for Consistency: Certain Digital Tax Measures and WTO Non-discrimination," *Journal of World Trade* 55, no. 1 (February 2021): 101; Hosuk Lee-Makiyama, "The Cost of Fiscal Unilateralism: Potential Retaliation against the EU Digital Services Tax (DST)," European Centre for International Political Economy Occasional Paper no. 05/2018, November 2018, https://ecipe.org/publications/the-cost-of-fiscal-unilateralism/; Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, "The European Union's Proposed Digital Services Tax: A De Facto Tariff," Peterson Institute for International Economics Policy Brief no. 18-15, June 2018; PricewaterhouseCoopers, "A White Paper Analyzing the EU's 2018 Proposed Digital Services Tax (Interim Measure) under WTO Law," 2019, https://www.pwc.com/us/en/services/tax/assets/dst-under-wto-law.pdf; and Anna Dias and Oliver Prost, "French Digital Services Tax and Proposed

US Retaliation Measures: Preliminary Legal Analysis," GIDE, December 5, 2019, https://www.gide.com/en/news/french-digital-services-tax-and-proposed-us-retaliation-measures-preliminary-legal-analysis.

18. James Bacchus, Simon Lester, and Huan Zhu, "Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented," Cato Institute Policy Analysis no. 856, November 15, 2018.

19. "United States Wins WTO Dispute over Deficiencies in China's Intellectual Property Rights Laws," press release, Office of the U.S. Trade Representative, January 26, 2009; and "DS362: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights," Dispute Settlement, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

20. "Accession of the People's Republic of China: Decision of 10 November 2001," World Trade Organization, WT/L/432, November 23, 2001, p. 5, para. 7.3, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/432.pdf&Open=True.

21. "Section 301 Investigations," Office of the U.S. Trade Representative, https://USTR.gov/issue-areas/enforcement/section-301-investigations; and *Hearing on U.S. Tools to Address Chinese Market Distortions, Before the U.S.–China Economic and Review Security Commission*, (2018) (testimony of Jennifer Hillman, Professor from Practice, Georgetown University Law Center), https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf.

22. Bacchus, Lester, and Zhu, "Disciplining China's Trade Practices at the WTO." The United States did not comply with a ruling on cotton subsidies, in a dispute brought by Brazil, for instance. See "DS267: United States—Subsidies on Upland Cotton," https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

23. "China—Certain Measures concerning the Protection of Intellectual Property Rights: Request for Consultations by the United States," World Trade Organization, WT/DS542/1, IP/D/38, March 26, 2018, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/542-1.pdf&Open=True; and "DS542: China—Certain Measures concerning the Protection of Intellectual Property Rights."

24. Bryce Baschuk, "U.S. Asks WTO to Temporarily Pause Its IP Dispute with China," *Bloomberg*, June 14, 2019.

25. For list 1, see: Notice of Action and Request for Public Comment concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (June 20, 2018); for list 2, see: Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40823 (August 16, 2018); for list 3, see: Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47974 (September 21, 2018); and for lists 4A and 4B, see: Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43304 (August 20, 2019) (note: products covered in list 4A are specified in Annex A of the notice of modification, and products covered in list 4B are specified in Annex C of the notice of modification).

26. 19 U.S.C. § 2411(b)(2).

27. No. 21-00052-3JP, slip op. 22-32 (Ct. Int'l Trade April 1, 2022), pp. 36–38, https://www.cit.uscourts.gov/sites/cit/files/22-32.pdf.

28. 19 U.S.C. § 2414(b).

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