

A Guide to U.S. Trade Remedies Laws

Article

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Although no one can predict what U.S. trade policy will be under the next administration, one thing we know for sure is that the Trump Administration's policies were very muscular with the goal of forcing U.S. companies to bring manufacturing back home, and the Biden Administration increased import tariff and export control restrictions.

On the campaign trail, Trump has floated the idea that if he were to be re-elected, he would impose an additional 10 percent tariff on all imports and ramp up tariffs against China by imposing an additional 60 percent. Similarly, going by the past four years, Harris seems unlikely to use tariffs any more selectively. Most trade experts agree that trade policy will once again define U.S. foreign policy regardless of the next administration.

As a result, companies and their business partners need to stay abreast of actions likely to be used by the next administration and the compliance impact, if any, the enforcement actions may have on their businesses. The past eight years of trade actions provide good insights on mechanisms that the next administration may use to seek redress against a foreign competitor for alleged unfair trade practices.

The trade remedies currently in place are:

Section 301 of the Trade Act of 1974

Section 301 provides the U.S. government with the authority to enforce trade agreements, resolve trade disputes, and open foreign markets to goods and services. It is the principal statutory authority to impose sanctions on foreign countries that violate trade agreements or engage in other unfair trade practices.

When negotiations to remove the offending trade practice fail, the government may raise import duties on the foreign products as a means to rebalance lost concessions. The list of products upon which the U.S. may raise import duties is called a "retaliation list." The U.S. government carefully selects products included on the list to minimize any adverse impact on U.S. consumers, firms, and workers.

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Section 232 of the Trade Expansion Act of 1962

Section 232 gives the government the authority to conduct comprehensive investigations to determine the effects of any imported product on national security. These investigations may include:

- Domestic production needed for projected national defense requirements
- Domestic industry's capacity to meet those requirements
- Related human and material resources
- The importation of goods in terms of their quantities and use
- The close relation of national economic welfare to national security
- Loss of skills or investment, substantial unemployment, and decrease in government revenue; and
- The impact of foreign competition on specific domestic industries and the impact of displacement of any domestic products by excessive imports.

Section 201 of Trade Act of 1974

Section 201 provides U.S. companies that are seriously injured or threatened with serious injury due to increased imports to petition the U.S. International Trade Commission (USITC) for import relief. The criteria for relief are based on those prescribed in Article XIX of the General Agreement on Tariff and Trade, as further defined in the World Trade Organization's Agreement on Safeguards. Thus, section 201 provides the legal framework that the president invokes under Article XIX.

Section 337 of the Tariff Act of 1930

Section 337 investigations before the USITC and U.S. Department of Commerce provide a private right of action for U.S. companies or subsidiaries of foreign companies to challenge the importation of goods based on the alleged infringement of intellectual property rights or other unfair acts.

The essential elements of a section 337 violation are:

1. An unfair act or unfair method of competition
2. An importation, sale for importation, or sale after importation of the accused product
3. A domestic industry; and
4. In the case of investigations not involving a federally registered intellectual property right, injury resulting from the unfair act.

The benefits of this section are an import ban on infringing products and enforceable cease and desist orders barring the domestic sale and distribution of products found to have been imported in violation of it.

The reach of section 337 also extends beyond the protection of intellectual property rights, creating a private right of action to prevent the importation—or sale in the U.S. after importation—of goods that involve “unfair” methods of competition, including trade secret misrepresentation, mislabeling, false advertising, or false representation of origin.

Antidumping and Countervailing Duty Investigations Under the Tariff Act of 1930

The Antidumping and Countervailing Duties (AD/CVD) laws impose duties on imports into the U.S. of products priced below fair market value that materially injure the domestic industry producing the same or similar products. The countervailing duty laws are designed to offset foreign government subsidies that similarly cause material injury. The benefits of AD/CVD investigations and reviews are similar to section 337 cases.

China Safeguard Investigations Under Section 421 of the Trade Act of 1974

Section 421 authorizes the USITC to determine whether a product from China is being imported in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products. If the USITC makes an affirmative determination, it proposes a remedy, then sends its report to the president and the United States Trade Representative. The president makes the final remedy decision.

Conclusion

The ingrained nature of this continued, aggressive policy raises several trade compliance issues. Chief among them are to put in place procedures and controls to monitor the myriad of potential trade cases being initiated and their outcomes, and to develop a clear and detailed work plan to manage those foreseeable compliance risks.

Finally, if a company becomes aware that they may be at risk of an enforcement action, ensure that all necessary actions are taken to meet and exceed measures required by the various export and import enforcement agencies.