



Tricks of the Trade: Section 301 Investigation of Chinese Intellectual Property Practices Concludes (Part I)

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In the latest in a series of international trade-related investigations conducted by the Trump Administration, the Office of the U.S. Trade Representative (“USTR”) recently [concluded its investigation](#) under [Section 301 of the Trade Act of 1974](#) (the “Section 301 Investigation”) “to determine whether acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce.” Thereafter, on March 22, 2018, President Trump issued a [memorandum](#) (the “Memorandum”) in response to the investigation’s findings, directing the USTR (1) to determine whether to increase tariffs on certain goods from China and (2) to pursue dispute settlement before the World Trade Organization (“WTO”) to address China’s allegedly discriminatory intellectual property licensing practices. The [Memorandum](#) also directed the Secretary of the Treasury to propose possible investment restrictions in response to China’s alleged systematic investment in and acquisition of U.S. companies in order to obtain technologies and intellectual property.

There are several notable legal distinctions between this Section 301 Investigation and other recent trade-related investigations that led to increased tariffs on imports of [certain solar energy related products](#), [washing machines](#), and [steel and aluminum](#). First, unlike the prior trade investigations, which were not country-specific under the relevant statutes, the Section 301 Investigation involved China in particular, and any resulting trade measures will apply only to China. Second, investigations under Section 301, unlike other recently used trade statutes, require consultation and negotiation with the country under investigation. Here, such negotiations are [reportedly ongoing](#) with China. Third, Section 301 investigations are governed by a complex set of statutory provisions that interplay with [dispute settlement mechanisms](#) at the international level. As [one commentator](#) notes, Section 301 “marks a point of intersection between the international trade agreements regimes and the domestic trade laws.”

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Consequently, investigations under Section 301 can result in multiyear negotiations (much of which occur [away from the public eye](#)), proceedings before the U.S. courts, and proceedings before dispute settlement tribunals, such as the WTO's [Dispute Settlement Body](#).

Part I of this two-part Sidebar describes the legal framework governing Section 301 investigations generally, including the domestic statutory framework, its relationship to international dispute settlement before the WTO, and domestic court challenges to trade measures resulting from Section 301 investigations. [Part II](#) applies this legal framework to the recently concluded Section 301 Investigation specifically, by first describing the USTR's findings and the President's directives and then discussing the legal issues that lie ahead. (For a discussion of the policy considerations in Section 301 investigations and the history of their use with regard to China specifically, see this [CRS post](#).)

Legal Framework

The complex statutory framework governing Section 301 investigations is based in Section 301 through 310 of the Trade Act of 1974. [Section 301](#) defines two types of executive action—mandatory or discretionary—that can result from Section 301 investigations. Under [Section 301\(a\)](#)—the “mandatory action” provision—the USTR *must* take action as specified by the statute, subject to certain exceptions, if he determines that:

- “the rights of the United States under any *trade agreement* are being denied,” *or*
- “an act, policy, or practice of a foreign country . . . violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any *trade agreement*,” *or*
- “an act, policy, or practice of a foreign country . . . is unjustifiable” (defined to mean conduct that “is in violation of, or inconsistent with, the *international legal rights* of the United States”) “*and burdens or restricts United States commerce.*”

Thus, the mandatory action provision generally applies in the context of a trade agreement provision, or when a foreign country's conduct violates or is inconsistent with international legal rights (which likely are the product of a trade agreement).

By contrast, under [Section 301\(b\)](#)—the “discretionary action” provision—the USTR *may* take certain actions enumerated in the statute if he determines that:

- “an act, policy, or practice of a foreign country is *unreasonable or discriminatory and burdens or restricts United States commerce, and . . . action by the United States is appropriate.*”

The [statute](#) further specifies that conduct “is *unreasonable* if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.” Thus, the discretionary action provision can operate outside of the context of a trade agreement or established “international legal rights.” Conduct is *discriminatory* under the [statute](#) when “any act, policy, and practice . . . denies national or most-favored-nation treatment to United States goods, services, or investment.” (“Most-favored-nation treatment” is a commitment on the part of trading partners to treat another country's goods no less favorably than domestic goods or the goods of other trade agreement countries).

With respect to Section 301(b), the statute provides examples of “unreasonable” conduct, including examples relevant to the current investigation. For example, the statute defines as unreasonable any act, policy, or practice (or combination thereof) that denies “provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#).” That

WTO agreement establishes the minimum standards of protection for and enforcement of intellectual property rights for WTO members. Another example the [statute](#) defines as “unreasonable” is any act, policy, or practice (or combination thereof) that denies “nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection.”

If the USTR initiates an investigation, [Section 303](#) requires that, on the date of initiation, the USTR must “request consultations with the foreign country concerned.” Section 303 also requires the USTR to determine whether the Section 301 investigation “involves a trade agreement” and, if so, the statute directs the USTR to follow the formal dispute settlement process of that agreement if consultations with the other country fail. Thus, under this statutory framework, for purposes of determining whether the mandatory or discretionary action provisions apply, and whether formal dispute settlement processes must be followed, the USTR must determine, as a threshold matter, whether the Section 301 investigation involves a trade agreement. Neither the statute itself nor case law interpreting the statute appears to provide guidance as to how the USTR is to determine whether an investigation involves a trade agreement.

Whether falling under the mandatory or discretionary action provisions, the actions that the [statute](#) authorizes the USTR to take include, among others:

- suspending or withdrawing certain benefits of trade concessions in a trade agreement with the country under investigation;
- imposing duties or other import restrictions on goods from that country; and
- entering into binding agreements with the country that commits it to eliminate or phase out the act, policy, or practice in question.

Further, once an action has been imposed, the [statute](#) requires the USTR to “monitor the implementation of each measure undertaken” and allows the USTR to [modify or terminate](#) such actions under certain circumstances.

Legal Relationship Between WTO Dispute Settlement and Section 301

After the statute was enacted in 1974, the United States conducted [numerous Section 301 investigations](#) to enforce its trade rights. Following the establishment in 1995 of the WTO’s dispute settlement procedures under the [Understanding on Rules and Procedures Governing the Settlement of Disputes](#) (the “Dispute Settlement Understanding”), however, the United States has primarily relied on the WTO dispute settlement process to enforce its trade rights, rather than on Section 301. Accordingly, there have been [fewer uses](#) of Section 301 investigations since 1995, with the [principal use](#) being to enforce trade remedies *already authorized* by the WTO after formal dispute settlement. (See these CRS posts for more detail on [dispute settlement under trade agreements](#) generally, and on [dispute settlement before the WTO](#) specifically.)

The [Dispute Settlement Understanding](#) commits WTO members to bring trade disputes involving the WTO agreements and against other members to the WTO, instead of resorting to unilateral trade-related action. As discussed above, however, Section 301 allows the USTR to implement trade-related measures without following formal international dispute settlement processes if he determines that the conduct in question does not “involve a trade agreement.” This creates what [one legal commentator](#) calls a “tension between this domestic statute and the WTO system.” This tension was addressed in 1999 by a [WTO dispute settlement panel](#), which examined Section 301 and determined that while it seemingly appeared to violate the [Dispute Settlement Understanding](#) by allowing the United States to determine unilaterally whether a trade violation has occurred, a [1994 U.S. Statement of Administrative Action](#) (the “Statement”) that Congress approved along with the [relevant implementing legislation](#) for the WTO agreements alleviated the panel’s concerns. Specifically, the Statement indicated that the United States would refrain

from applying Section 301 in a manner that would violate its WTO obligations, indicating that if a Section 301 investigation involves a violation of a WTO agreement, the United States is committed to pursuing formal dispute settlement before the WTO. And, the [Statement's introduction](#) states “that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement.”

On the other hand, the [Statement](#) also provides: “Neither section 301 nor the [Dispute Settlement Understanding] will require the [USTR] to invoke . . . dispute settlement procedures if the [USTR] does not consider that a matter involves a [WTO] Agreement.” In this vein, the Statement contemplates that “Section 301 will remain fully available to address unfair practices that do not violate US rights or deny US benefits under the [WTO] Agreements.” The Statement’s caveat highlights the importance of the USTR’s threshold determination, described above, as to whether a Section 301 investigation “involves a trade agreement.” While the 1999 WTO panel determined that the [Statement](#) indicated that U.S. challenges to allegedly unfair trade practices involving WTO agreements would be brought to the WTO, it did not address the circumstance of a disagreement with a USTR determination that a given Section 301 investigation does *not* involve a trade agreement and therefore that resort to dispute settlement proceedings is, in the USTR’s view, unnecessary. In other words, a foreign country under investigation may disagree as to whether the conduct being investigated during a Section 301 investigation is, in fact, covered by a trade agreement. This unresolved issue could have international legal implications for the current Section 301 Investigation, as discussed in [Part II](#) of this Sidebar.

Court Challenges to Section 301 Investigations

Because Section 301 investigations became less frequent after the WTO was established, there are few recent cases challenging actions taken under the statute. However, two notable series of cases involving long-running disputes—the [Gilda Industries](#) cases involving a dispute between the United States and the European Community and the [Almond Brothers](#) cases involving a dispute between the United States and Canada—spawned numerous lawsuits concerning Section 301 investigations. The [Gilda Industries](#) cases involved a challenge to the United States’ enforcement of trade rights through the imposition of retaliatory tariffs that the WTO authorized after formal dispute settlement. The [Almond Brothers](#) cases, by contrast, involved a challenge to certain bilateral agreements the United States and Canada negotiated to resolve Section 301 and other trade investigations. Thus, both lines of cases involve challenges to the specific measures the USTR took in response to Section 301 investigations. Nonetheless, several general principles can still be gleaned.

First, it appears [settled](#) that “[t]he [Court of International Trade](#) ha[s] jurisdiction under [28 U.S.C. § 1581\(i\)](#) to review the [USTR] actions” resulting from a Section 301 investigation. Second, once jurisdiction is established there, the [challenge](#) would be centered on whether the USTR complied with the [Administrative Procedure Act](#) (“APA”). In one of the [Almond Brothers](#) cases, however, the court noted that the APA “precludes review of ‘agency action[s] that are] committed to agency discretion by law,’” and “[a] decision is more likely to be committed to an agency’s discretion when it requires ‘a complicated balancing of a number of factors which are peculiarly within its expertise.’” In the context of a legal challenge to an agreement with another country that resulted from a Section 301 investigation, the court emphasized that “the USTR has discretion to craft whatever relief it deems necessary to resolve the dispute.” Because “[t]he negotiation and determination of the terms of international agreements is a paradigmatic example of ‘a complicated balancing of a number of factors which are peculiarly within [the USTR’s] expertise,’” the court concluded that determining the terms of a trade agreement to resolve a Section 301 dispute was committed to the discretion of the USTR and therefore not subject to the court’s scrutiny under the APA.

Moreover, although the dispute in the [Gilda Industries](#) cases was resolved through formal WTO dispute settlement (and not through negotiation of an agreement as in the [Almond Brothers](#) cases), the court again

noted the USTR’s discretion in Section 301 investigations. Specifically, in one *Gilda Industries* case, the court stated it “affords substantial deference to decisions of the [USTR] implicating the discretionary authority of the President in matters of foreign relations,” such as the selection of a remedy in response to a Section 301 investigation. In other words, because Section 301 investigations involve consultations with other countries and other foreign relations-related issues, a degree of discretion is afforded to the actions the USTR takes. The court emphasized that, “[i]n international trade controversies of this highly discretionary kind—involving the President and foreign affairs—this court and its predecessors have often reiterated the very limited role of reviewing courts.” For a court to intervene, “there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.”

Thus, the case law suggests that the actions the USTR takes in response to a Section 301 investigation will be afforded substantial deference by the courts, perhaps to the degree, as in the *Almond Brothers* case, of being unreviewable under the APA. What remains open to challenge before the courts, however, are allegations of statutory misinterpretations on the part of the USTR, violations of the statute’s procedures, actions that exceed the authority delegated to the USTR by statute, and similar claims. For an examination of how these and other complex legal issues apply to the recently concluded Section 301 Investigation, proceed to [Part II](#) of this post.
