Significant Changes Likely for US Trade Policy and Enforcement

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01 / 30 / 17

This article is from Skadden's *2017 Insights*.

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U.S. international trade policy and enforcement were centerpieces of President Donald Trump's campaign and are likely to feature prominently in the new administration's agenda in the months ahead. The Trump administration has promised potentially seismic shifts in U.S. trade policy, with the likelihood of more aggressive enforcement of U.S. trade laws, significant action at the World Trade Organization (WTO), negotiation and renegotiation of important U.S. trade agreements, and measures to address the issue of border tax adjustability.

Trade Law Enforcement

Vigorous enforcement of U.S. trade laws was a key plank in President Trump's "Seven Point Plan to Rebuild the American Economy by Fighting for Free Trade" announced in June 2016. Since that time, President Trump has clearly expressed his intent to use every tool under U.S. law to address unfair trade practices affecting U.S. companies, workers and national security. Among the existing statutory mechanisms that could be utilized in these efforts are the following:

- **Section 232(b) of the Trade Expansion Act of 1962.** Section 232(b) provides for the imposition of tariffs or quotas on imports that threaten to impair U.S. national security. Investigations may be self-initiated by the Department of Commerce (Commerce). They may also be initiated based on an application from an interested party or at the request of the head of another U.S. government agency. If Commerce finds that imports of a particular product or products threaten to impair U.S. national security, the president decides whether to impose tariffs or quotas on such imports.
- **Section 122 of the Trade Act of 1974.** This statute authorizes the president to impose quotas and tariffs of as much as 15 percent for up to 150 days against one or more countries that have "large and serious" balance-of-payment surpluses with the United States. Imports from countries with significant current account surpluses (such as China) would be possible targets for any such measures.
- **Section 201 of the Trade Act of 1974.** Section 201 permits the president to impose tariffs or quotas on imports of a particular product where there has been a surge of imports of that product. To have tariffs or quotas imposed under Section 201, the import surge must constitute a substantial cause of serious injury to the U.S. industry producing the product in question.
- **Section 301 of the Trade Act of 1974.** Under Section 301, upon a finding that another country has denied the United States its rights under a trade agreement or has engaged in practices that are unjustifiable, unreasonable or discriminatory and burden or restrict U.S. commerce, the United States may impose tariffs and quotas against the foreign country's imports. Section 301 investigations are conducted by the U.S. Trade Representative's Office, which has the authority to impose duties and quotas and to suspend benefits granted to the United States' trading partners under trade agreements.
- **The Trading With the Enemy Act (TWEA) and the International Emergency Economic Powers Act of 1977 (IEEPA).** TWEA and IEEPA authorize the president to regulate all forms of international commerce and freeze assets in time of war (TWEA) or in response to "unusual or extraordinary" international threats to the national security, foreign policy or economy of the United States (IEEPA). Past measures imposed pursuant to these statutes have predominantly taken the form of embargoes, economic sanctions and asset freezes, but precedent exists for the imposition of tariffs under the presidential power to regulate imports.

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- **Anti-Dumping and Countervailing Duty Laws.** Upon a finding that a U.S. industry is being "materially injured" or threatened with material injury by dumped or subsidized imports, the United States can impose anti-dumping (AD) or countervailing (CVD) duties to offset the level of dumping or subsidization that is occurring. Investigations may be initiated in response to a petition from a domestic industry or union, or may be self-initiated by Commerce. A number of industries have successfully brought investigations under these laws in recent years to address injury being caused by unfairly traded imports, and the brisk pace of cases and investigations is expected to continue as numerous industries continue to face overcapacity and other structural issues arising from subsidization and government intervention in markets.
- **Enforcement of Existing AD/CVD Orders and U.S. Customs Laws.** Companies importing into the United States also should expect increased enforcement of existing AD and CVD orders as well as other requirements of the U.S. customs laws. Among other areas, U.S. Customs and Border Protection can be expected to increase enforcement actions against imports suspected of evading AD and CVD duties under the recently enacted Enforce and Protect Act of 2015 and other grants of enforcement authority.

Initiatives at the WTO

President Trump's trade agenda calls for strong action at the WTO. Among other measures, the new administration is expected to increase the number and range of cases challenging the unfair trade practices of other WTO members, especially China.

Trump administration officials also have called for more effective use of U.S. leverage at the WTO to better enforce the terms of existing WTO agreements or potentially renegotiate such terms. This could include a withdrawal of some or all of the U.S. commitments under the WTO agreements if U.S. negotiating objectives are not achieved.

Renegotiating the North American Free Trade Agreement

President Trump has called the North American Free Trade Agreement (NAFTA) "the worst trade deal ever signed" and stated his administration's intent to renegotiate and potentially withdraw from the agreement. Priorities in any such renegotiation may include the NAFTA rules defining whether a good "originates" in a NAFTA member country, the rules governing investor-state disputes and appeals of AD and CVD cases, and the provisions on labor and environmental regulation.

Under the terms of Chapter 22 of NAFTA, the U.S. may withdraw from the agreement upon six months' written notice. If NAFTA is terminated, the U.S. may seek to reinstate the Canada-U.S. Free Trade Agreement or negotiate new trade deals with Canada and Mexico.

Action on Other Trade Agreements

NAFTA will not be the only trade agreement under reconsideration by the Trump administration. The administration has already taken action to withdraw from the Trans-Pacific Partnership Agreement (TPP). In addition, administration officials have heavily criticized the U.S.-Korea Free Trade Agreement, signaling a possible move to renegotiate or terminate that agreement.

At the same time, however, the new administration's policies should not be taken to mean the end of new trade initiatives. In place of broad multilateral agreements such as TPP, the Trump administration seems likely to pursue a series of bilateral trade agreements with key trading partners such as the United Kingdom and Japan.

Border Tax Adjustability

Trump administration officials have identified the value-added tax (VAT) systems of U.S. trading partners such as China, Mexico and the EU as one cause of the U.S. trade deficit and the offshoring of U.S. jobs. (See "Business Tax Reform All but Certain in US, Europe.") Under most countries' VAT systems, VAT is charged on imports (such as imports from the United States) but is rebated on exports. Such VAT systems generally are permitted under the WTO agreements (such as the Agreement on Subsidies and Countervailing Measures) but are viewed as creating an export incentive and deterring imports, unfairly prejudicing U.S. companies.

Efforts to address this issue are likely to proceed on multiple fronts and may take various forms. For example, the Trump administration may seek to end preferential treatment of VAT systems under WTO subsidy rules or may address Mexico's VAT system in the context of a renegotiation of NAFTA. Legislation also has been proposed that would create a border tax adjustment in the United States that would mirror the VAT systems of other countries in many respects. Under a proposal floated by the Republican leadership in the House of Representatives, the United States would implement a destination-based tax system that would eliminate the U.S. corporate tax deduction for the cost of imports and exempt income earned by U.S. companies on export sales. This and other measures are likely to continue to be considered and vigorously debated in the coming months.

Conclusion

The next few years could be some of the most momentous in the history of U.S. trade policy. Investors, companies engaged in international trade and U.S. companies affected by imports should pay close attention to the potentially dramatic changes on the horizon and be prepared for how they may impact their businesses and investments.