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2019

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Kathleen Claussen

University of Miami School of Law, kec120@miami.edu

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Recommended Citation

Kathleen Claussen, *Forgotten Statutes: Trade Law's Domestic (Re)Turn*, 113 *AJIL Unbound* 40 (2019).

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CAN INTERNATIONAL TRADE LAW RECOVER?

FORGOTTEN STATUTES: TRADE LAW'S DOMESTIC (RE)TURN

*Kathleen Claussen*¹

Since the first half of the twentieth century, the U.S. Congress has increasingly delegated its authority over tariffs to the U.S. president. Some of these statutes permit private actors to petition for tariff relief. Some also permit the president to initiate an investigation and subsequently to take trade-related or other action when certain criteria are met. Since the 1990s, however, a robust multilateral trading system has required the United States and others to resolve disputes over trade measures in Geneva, rather than through unilateral policy steps under these tariff authorities. In a stark departure from this movement away from unilateral action, the Trump Administration has returned to relying heavily on domestic statutes to impose tariffs on goods imported from U.S. trading partners and on those from one country in particular: China.

The primary statute the Trump Administration has used for this purpose is Section 301 of the Trade Act of 1974 (hereinafter “Section 301”).² Section 301 permits the president to impose tariffs or take other measures when the U.S. Trade Representative (USTR) determines that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts U.S. commerce.³ This essay first describes the history of Section 301, the widespread criticism surrounding it, and its application by the Trump Administration. The essay then analyzes three normative questions underlying the present situation that, if resolved, may help the United States, China, and their trading partners address their grievances while preserving a multilateral rules-based trade law order.

Section 301: A Complicated History

As early as 1794, Congress granted the president authority to take action against trading partners who were unfairly discriminating against U.S. goods.⁴ Predecessor statutes to Section 301 provided that the president could suspend trade benefits with trading partners whose measures substantially burdened U.S. commerce. The critical paragraph that today authorizes the USTR to take action provides:

[i]f the Trade Representative 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

¹ Associate Professor, University of Miami School of Law.

² *Trade Act of 1974*, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041–43 (codified as amended at 19 U.S.C. § 2411).

³ *Id.*

⁴ See K. Blake Thatcher, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW U. L. REV. 492 (1987) (outlining the history of like delegations).

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 substantial breadth in the measures that may be considered “unreasonable” or “discriminatory” and that burden or restrict commerce creates ample opportunity for the president to take action. Despite congressional amendments to sharpen the scope of this delegated authority and ensure that disputes regarding trade agreements would be resolved as required by those agreements,⁶ the statutory language today still permits action against “virtually any trade practice the USTR wishes to attack.”⁷

With respect to remedies, Section 301 authorizes the president to impose tariffs or to take action already within the scope of his authority. It does not otherwise create new remedial authority nor, more importantly, does it limit the president’s authority when the executive identifies such an unreasonable or discriminatory act, policy, or practice by a trading partner. In other words, the president is not restricted expressly in the statute to remedies that are consistent with international trade rules.

Private parties⁸ and the U.S. government have invoked Section 301 collectively more than 120 times since the statute’s inception.⁹ Despite these uses, debates ensued in the international community as to whether the application of Section 301 is permitted under World Trade Organization (WTO) rules requiring members to bring their trade disputes to the WTO dispute settlement system.¹⁰ Given Section 301’s broad reach, of all the U.S. trade statutes, “perhaps none elicits greater . . . condemnation than Section 301.”¹¹ Scholars have maintained mixed views as to whether the statute is plainly inconsistent with WTO rules or constitutes “justified disobedience.”¹² On the positive side, in the 1980s and early 1990s, Section 301 “arguably was more successful in opening markets . . . than any developments . . . in Geneva.”¹³ For a period, the statute was used effectively to discourage breaches or as a deterrent for nonblatant cheating.¹⁴ But a danger lingered that a president could use Section 301 opportunistically or imprudently.¹⁵

Beginning around 2000, Section 301 fell largely out of fashion in part owing to a challenge to the statute brought by the European Union at the WTO¹⁶ and in part due to the perceived success of the WTO dispute settlement

⁵ 19 U.S.C. § 2411(b).

⁶ Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT’L ECON. L. 233 (1996) (detailing the amendments from 1974 to 1996).

⁷ Alan Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL’Y INT’L BUS. 263, 281 (1992).

⁸ Any interested individual may file a petition under Section 301. 19 U.S.C. § 2412(a).

⁹ See A. Lynne Puckett & William L. Reynolds, *Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, 90 AJIL 675, 675 (1996); Judith H. Bello & Alan F. Holmer, *Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT’L LAW 211, 216–18 (1987).

¹⁰ See, e.g., Seung Wha Chang, *Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301–310 of the Trade Act of 1974*, 31 LAW & POL’Y INT’L BUS. 1151 (2000); John Gero & Kathleen Lannan, *Trade and Innovation: Unilateralism v. Multilateralism*, 21 CAN.-U.S. L.J. 81 (1995); Marjorie Minkler, *The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or A Violation of the United States’ Obligations Under International Law?*, 11 J.L. & COM. 283 (1992).

¹¹ Alan O. Sykes, *“Mandatory” Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT’L L.J. 301 (1990).

¹² For one view, see Thomas J. Trendl, *Self-Help in International Trade Disputes*, 84 AM. SOC’Y INT’L L. PROC. 32, 33–34 (1990) (citing Robert Hudec as arguing that actions under Section 301 while illegal, nevertheless may be justified).

¹³ Judith H. Bello & Alan F. Holmer, *The Post-Uruguay Round Future of Section 301*, 25 LAW & POL’Y INT’L BUS. 1297, 1301 (1994).

¹⁴ Sykes, *supra* note 7, at 274.

¹⁵ *Id.* at 264.

¹⁶ See An Chen, *The Three Big Rounds of U.S. Unilateralism Versus WTO Multilateralism During the Last Decade*, 17 TEMP. INT’L & COM. L.J. 409 (2003) (summarizing arguments made in the case).

system. However, when he arrived at USTR in 2017, U.S. Trade Representative Robert Lighthizer, well versed in Section 301 from his past professional experience, readily shifted away from the Obama Administration's WTO-focused approach, especially for dealing with China, to instead consider quick, high impact moves that Section 301 facilitates.

In its Section 301 investigation report issued in March 2018, USTR concluded that China is engaged in acts, policies, or practices related to technology transfer, intellectual property, and innovation that are unreasonable or discriminatory and that burden or restrict U.S. commerce.¹⁷ Acting on this conclusion, the Trump Administration took both domestic and international trade policy steps. On the domestic side, the president issued proclamations implementing tariffs on a wide range of products imported into the United States from China. On the international side, the United States filed a case at the WTO against China concerning China's patent law practice, which the United States claims is a violation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

At a meeting of the G20 in late November 2018, the U.S. government announced that it would delay by ninety days a threatened additional increase in tariffs on products from China under Section 301. Up until it made that announcement, the administration had continued to turn up the heat. The USTR issued an updated Section 301 report on November 20 illustrating that the two countries remained far apart in resolving their differences. Rumors circulated about the possibility of further investigations into Chinese labor practices and Chinese autos.¹⁸ But in the face of many complaints from businesses that the duties on Chinese products were hurting their bottom line and possibly costing them jobs, the administration's decision to delay still higher duties did not come as a surprise. As of December 2018, tariffs remain in place on a long list of Chinese products, China continues to impose retaliatory tariffs on U.S. goods, and any hope for an end to the trade war seems dismal. The predominant view among other governments and observers is that this return to tariffs poses a renewed risk to the central viability of the international trade system.¹⁹

Accommodating Trade Law's Domestic (Re)Turn

Despite their criticisms, many U.S. trading partners and commentators acknowledge that China has engaged in some of the acts, policies, and practices identified by USTR and that those behaviors are detrimental not just to U.S. business but also to businesses around the world that either compete with Chinese businesses or work in China. In other words, trading partners have taken issue with the method by which the United States has chosen to respond, not with the underlying basis for action. In particular, critics claim that the use of Section 301 by the Trump Administration is inappropriate if not illegal under WTO rules because, first, those rules largely occupy the field and are intended to avoid unilateral trade actions that impose tariffs on members, and second, those rules require the United States to use the WTO for any dispute arising under the WTO rules. With respect to the former critique, it is clearly not the case that the multilateral rules cover all trade-related grievances. There are many trade-related practices, some of which are regulated through free trade agreements such as impediments to labor or lower environmental standards, that fall outside the scope of the WTO rules and may be unfairly restrictive on U.S. businesses. Indeed, other countries maintain their own Section 301-equivalent mechanisms for this reason.²⁰

¹⁷ Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13099 (Mar. 22, 2018).

¹⁸ Isabelle Hoagland, *Sources: USTR Mulling Section 301 Investigation into Chinese Labor Practices*, INSIDE U.S. TRADE (Nov. 9, 2018).

¹⁹ See Kathleen Claussen, *The Other Trade War*, 103 MINN. L. REV. HEADNOTES 1 (2018); James Bacchus, *How to Take on China Without Starting a Trade War*, WALL ST. J.: OPINION (Aug. 16, 2017).

²⁰ The European Union has a similar mechanism against unfair foreign trade practices or obstacles to trade. Council Regulation 3286/94, 1994 O.J. (L 349) 71 (EC).

With respect to the latter critique, USTR has taken the position that Section 301 remains an available tool despite WTO rules and processes—a view it has asserted since the creation of the WTO²¹—and that its use here is sound because the acts, policies, and practices under investigation in this Section 301 action fall outside the WTO rules. That is, other than the patent violation, USTR appears to assert that China has not violated any existing rules; rather, China is engaged in practices that are discriminatory and burdensome, but not illegal. In response, Jennifer Hillman and others have made the case that the grievances raised by USTR could in fact be addressed at the WTO. Hillman argues that China's WTO accession instruments and the WTO agreements provide a basis for a WTO claim for each concern USTR identifies.²² Further, some commentators have argued that the invocation of Section 301 is pretextual because if it were successful in opening China's market to greater U.S. competitiveness and investment, that outcome would be at odds with other goals of the administration, such as to increase investment and maintain production in the United States rather than overseas.

Even if one were to accept that China's acts, policies, and practices do not arise under the WTO rules, many agree that the vast extent, breadth, and scope of the tariffs imposed by the United States are counterproductive and contrary to the object and purpose of the international rules-based system. This conclusion gives rise to three important normative institutional questions yet unresolved. First, what options should the United States or other WTO members have to respond to harmful trade practices that are not covered by the WTO rules? Second, what options should the United States or other WTO members have to respond to harmful trade practices that may be violations of WTO rules but cannot effectively be proven to breach those rules under the WTO dispute settlement system? Third, what options should the United States or other WTO members have when facing a trading partner such as China with an institutional market structure that the rules seemingly do not accommodate?

First, to the extent certain existing harmful trade practices fall outside the rules, one option may be to update and expand the WTO rules to accommodate them. At a minimum, it is clear that more specific rules to address technology-related trade practices are necessary. Recently negotiated regional and bilateral free trade agreements reflect that need with their inclusion of digital trade and e-commerce chapters, for example. In effect, countries are achieving through regional agreements what they may ultimately wish to achieve on a multilateral scale. The failure of a successful recent WTO negotiating round only exacerbates this state of play. To the extent that the Trump Administration's Section 301 action prompts needed reform, such a step would be positive.²³

Second, even where the WTO rules may address some of the grievances raised by USTR, limits on how evidence is presented and the evaluation of evidence at the WTO make it difficult for a WTO member to successfully prove that another member is engaging in certain types of breaching behavior.²⁴ For unwritten measures, a complaining member would need to provide enough information to demonstrate that the behavior occurred, that it is attributable to the offending member, and that the activity is or the effects of the activity are ongoing. Very few WTO cases have confronted such measures. Substantiating state activity regarding technology transfer and cyber activity would prove an even more challenging task. Presumably, substantiating such nontransparent behavior

²¹ URUGUAY ROUND TRADE AGREEMENT STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 1034-35 (2d Sess. 1994). See also Pub. L. No. 103-465, § 101(a)(2) & § 102(d), 108 Stat. 4809, 4814 & 4819 (1994) (describing this statement of administrative action as “an authoritative expression” of interpretation).

²² U.S. *Tools to Address Chinese Market Distortions: Hearing Before the U.S.-China Economic and Review Security Commission*, 115th Cong. (2018) (testimony of Jennifer Hillman). See also Kathleen Claussen, *Beyond Norms: Using International Economic Law Tools to Deter Malicious State-Sponsored Cyber Activities*, 32 TEMP. INT'L & COMP. L.J. 113 (2018).

²³ See similarly, Thomas O. Bayard, *Comment on Alan Sykes' "Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301"*, 8 B.U. INT'L L.J. 325 (1990).

²⁴ See Kathleen Claussen & Mark Wu, *The Evidence Challenges Confronting International Trade Law* (manuscript on file with the author).

would require businesses—some of which may fear retaliation by the offending government—to submit evidence. Accommodating these types of issues would necessitate further WTO reform and likewise reform of regional trade agreements with changes such as special accommodations for sensitive evidence or perhaps the inclusion of technical experts as arbitrators.²⁵

Third, a larger goal underlying the Section 301 action that cannot be addressed with the fixes above is to induce China to undertake structural reform to create a more competitive market and “level playing field” for U.S. business. Analyzing such an undertaking would require far more space than this short essay permits. At present, it remains to be seen whether pressuring China with tariffs will be sufficient to correct the institutional mismatch or what other options remain under the current system.

To address the uneasiness that U.S. trading partners, scholars, and Congress have about Section 301 and about the use or availability to the U.S. president of tariff measures, Congress could take steps to disable opportunistic uses. As noted above, Congress has amended the statute a number of times. It could now narrow the president’s authority further by limiting Section 301 to action only against non-WTO members, by putting more limitations on that which constitutes unreasonable or discriminatory activity, or by taking tariffs off the table and restricting remedies to nontariff barriers, which effectively would disarm Section 301 given that its greatest potency lies in its tariff authorization. Congress could require greater justification for departing from WTO dispute settlement when the president takes action against a WTO member. It could demand additional reporting or condition the president’s authority on congressional approval. At present, Congress is doing little to consider reining in the president’s authority under Section 301.²⁶

The rejuvenation of forgotten presidential tariff authorities has changed the landscape of international trade policy in the past year, but it need not be to the detriment of the multilateral system. These moves may drive trading partners back to the negotiating table to improve and expand WTO rules. At the same time, Congress should update Section 301 to take account more clearly of binding WTO obligations and to impose constraints on authorities that could otherwise fuel future trade wars.

²⁵ See Claussen, *supra* note 21.

²⁶ Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, LAWFARE (Aug. 5, 2018).