

## Background

On June 2, 2020, the United States Trade Representative (**USTR**) announced that they are beginning investigations under Section 301 of the 1974 Trade Act to look into digital services taxes that have been adopted or are being considered by a number of countries.<sup>[1]</sup>

In view of this recent development, this note seeks to shed some light on what is meant by a Section 301 investigation by the United States (**US**), past investigations pursued by the US under Section 301 and briefly discusses the implications.

## What are Section 301 investigations?

Title III of the Trade Act of 1974 (Sections 301 through 310, 19 U.S.C. §§2411-2420), titled “Relief from Unfair Trade Practices,” is often collectively referred to as “Section 301”.<sup>[2]</sup> Section 301 grants the USTR a range of responsibilities and authorities to investigate and take mandatory or discretionary action to enforce US rights under trade agreements and respond to certain foreign trade practices.<sup>[3]</sup>

Although the provision does not limit the scope of such investigations, it identifies the following three types of foreign government conduct that may be subject to actions under Section 301<sup>[4]</sup>:

- (1) a violation that denies U.S. rights under a trade agreement,
- (2) an “unjustifiable” action that burdens or restricts US commerce, and
- (3) “unreasonable” or “discriminatory” action that burdens or restricts US commerce.

In other words, Section 301 provides a statutory means by which the US can impose unilateral trade sanctions on foreign countries that violate U.S. trade agreements or engage in acts that are “unjustifiable” or “unreasonable” and burden U.S. commerce.

A foreign act, policy, or practice is considered **unjustifiable** if it is inconsistent with any international legal rights of the United States and specifically includes denial of national or most-favored-nation treatment or the right of establishing or protecting intellectual property rights.<sup>[5]</sup> Whereas, an **unreasonable** act, policy, or practice is one that while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.<sup>[6]</sup> The term **commerce** includes goods, services, and investment.<sup>[7]</sup>

Section 301 came into place in view of US frustration with the weak dispute settlement system under the erstwhile General Agreement of Tariff and Trade (**GATT**), which required positive consensus (i.e. agreement by all Members) to file a dispute, adopt a panel report and authorize retaliation against a non-implementing respondent.<sup>[8]</sup> However, subsequent to the Uruguay Round trade negotiations and the creation of an enforceable dispute settlement mechanism through Dispute Settlement Body (**DSB**) of the World Trade Organization (**WTO**) in 1995, the US significantly reduced its use of Section 301.<sup>[9]</sup>

The recent surge in Section 301 investigations particularly by the Trump Administration is a departure from past US practice.<sup>[10]</sup>

<sup>[1]</sup>USTR Initiates Section 301 Investigations of Digital Services Taxes, accessed at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/june/ustr-initiates-section-301-investigations-digital-services-taxes>

<sup>[2]</sup> Section 301 of the Trade Act of 1974, Congressional Research Services, accessed at: <https://crsreports.congress.gov/product/pdf/IF/IF11346>

<sup>[3]</sup> Section 301 (a)-(b)

<sup>[4]</sup> Section 301 of the Trade Act of 1974, Congressional Research Services, accessed at: <https://crsreports.congress.gov/product/pdf/IF/IF11346>

<sup>[5]</sup> Section 301 (d) (3)

<sup>[6]</sup> Section 301 (d) (4)

<sup>[7]</sup> Section 301 (d) (1)

<sup>[8]</sup> Shirley A. Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why, and How*, 6 N.C. J. Int'l L. & Com. Reg. 381 (2016)

<sup>[9]</sup> Section 301 of the Trade Act of 1974, Congressional Research Services, accessed at: <https://crsreports.congress.gov/product/pdf/IF/IF11346>

<sup>[10]</sup> Enforcing U.S. Trade Laws: Section 301 and China, Congressional Research Services, accessed at: <https://fas.org/sqp/crs/row/IF10708.pdf>

## What types of actions can be undertaken under Section 301?

Under Section 301, the US can impose unilateral actions, including<sup>[11]</sup>:

- Suspension of trade agreements
- Imposition of import duties and other import restrictions, with a preference for import duties
- Imposition of restrictions on services, including access authorization
- Suspension of unilateral trade preferences
- Entering into binding agreements with foreign countries

## What kind of Section 301 investigations have been initiated in the past?

There have been 127 cases under Section 301 since the law's enactment in 1974, of which 32 have been initiated since the WTO's establishment in 1995.<sup>[12]</sup> Some of the key Section 301 investigations include the following:

- **Section 301-China:** This investigation was initiated to determine whether China's acts, policies, and practices related to technology transfer, intellectual property, and innovation are unreasonable, unjustifiable, or discriminatory and burden or restrict U.S. commerce. There was an affirmative finding in the investigation and the US applied the following of actions (i) filing a case at the WTO *China—Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542), (ii) applying 25% ad valorem duties and (iii) investment restrictions.<sup>[13]</sup>
- **Section 301-EU Beef:** This investigation was initiated to determine whether previously terminated Section 301 action in order to exercise a WTO authorization to suspend trade concessions in *EC – Hormones* should be reinstated for particular products. The US and EU successfully negotiated the U.S.-EU Beef MOU and the investigation concluded to not reinstate the action.<sup>[14]</sup>
- **Section 301-Large Civil Aircraft** This investigation was initiated to enforce US' rights under the WTO and assess whether the EU failed to comply with DSB recommendations in *EC - Large Civil Aircraft* (DS316) dispute. US determined that EU had not satisfactorily implemented DSB recommendations.<sup>[15]</sup> Accordingly, US applied duties on certain large civil aircraft and subsequently revised the duty from 10 to percent to 15 percent as well as changed composition of the list of products subject to additional duties of 25 percent.<sup>[16]</sup>
- **Section 301- France's Digital Services Tax** This investigation was initiated to determine whether the proposed French Digital Services Tax (DST) is actionable under Section 301. In particular, the investigation sought to focus on (i) whether the DST amounted to *de facto* discrimination by way of revenue thresholds; (ii) whether the DST is unjustifiable due to its retroactive application and (iii) whether it is unreasonable as it diverges from norms reflected in the US and international tax system in certain respects. The investigation led to an affirmative finding with respect to the aforementioned issues and proposed action in the form of additional duties of up to 100 percent on certain products from France. The final determination on the proposed action is yet to be issued.
- **Section 301-Digital Services Taxes** : The latest Section 301 investigation has been initiated to assess whether DSTs adopted or considered by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom are discriminatory and unreasonable. This investigation includes the equalization levy on e-commerce supply of services applied by India vide the Finance Act, 2020, which is in effect from April 1, 2020. The USTR is presently seeking comments with respect to: (i) whether one or more of the covered DSTs is unreasonable or discriminatory; (ii) whether the DSTs burdens or restricts U.S. commerce;

<sup>[11]</sup> Section 301 (c)

<sup>[12]</sup> Section 301 of the Trade Act of 1974, Congressional Research Services, accessed at: <https://crsreports.congress.gov/product/pdf/IF/IF11346>

<sup>[13]</sup> Section 301 Fact Sheet, , accessed at: <https://ustr.gov/about-us/policy-offices/press-office/factsheets/2018/march/section-301-fact-sheet>

<sup>[14]</sup>[https://ustr.gov/sites/default/files/Determination Not to Reinstate Action in Connection with the EU Hormones Measures Concerning Meat and Meat Products.pdf](https://ustr.gov/sites/default/files/Determination%20Not%20to%20Reinstate%20Action%20in%20Connection%20with%20the%20EU%20Hormones%20Measures%20Concerning%20Meat%20and%20Meat%20Products.pdf)

<sup>[15]</sup>[https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice of Determination and Action Pursuant to Section 301-Large Civil Aircraft Dispute.pdf](https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice%20of%20Determination%20and%20Action%20Pursuant%20to%20Section%20301-Large%20Civil%20Aircraft%20Dispute.pdf)

<sup>[16]</sup>[https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice of Modification of Section 301 Action Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute.pdf](https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice%20of%20Modification%20of%20Section%20301%20Action%20Enforcement%20of%20U.S.%20WTO%20Rights%20in%20Large%20Civil%20Aircraft%20Dispute.pdf)

(iii) whether one or more of the covered DSTs is inconsistent with obligations under the WTO Agreement or any other international agreement.

### What is the implications of such Section 301 investigations?

Section 301 investigations allows the US to initiate unilateral actions against foreign countries based on their assessment of another countries' conduct. This assessment may be based on international law and the WTO laws but it can also include norms that the US considers reasonable. Although, a Section 301 investigation allows for a public hearing, seeks public comments in connection and consults with the targeted foreign government, it may still lead to the application of unilateral retaliatory measures. The legality of such measures under the WTO laws is questionable.

The Trump Administration's recurring use of Section 301 investigations as well as Section 232 of the Trade Expansion Act tariffs on aluminum and steel (on grounds of national security) are all evidence of unilateral measures being initiated by the US.

With an ineffective WTO dispute settlement mechanism in place on account of the US blocking appointments of Appellate Body members and such unilateral measures being applied by the US, the global trading system seems to have gone back to the GATT days, where no binding dispute settlement mechanism was in place. Accordingly, countries may have to primarily rely on diplomatic solutions and resolve their disputes in a mutually satisfactory manner in order to avoid trade battles across the globe.

In the meantime, should you require any information or clarification, please do not hesitate to contact us at [insights@elp-in.com](mailto:insights@elp-in.com)

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