

The President's Long-Forgotten Power To Raise Tariffs

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Law360, New York (December 14, 2016, 1:53 PM EST) --

During the campaign and in recent weeks, Donald Trump has expressed his interest in raising tariffs in response to unfair trade practices. While the U.S. Constitution provides Congress with primary authority over tariff levels, the president has substantial albeit qualified powers in this area.

President-elect Trump's statements have sent a generation of trade lawyers scurrying to grasp the contours of presidential power to raise tariffs. In the course of our own efforts to determine the metes and bounds of such authority, we discovered a long forgotten but still intact statute that provides the President with broad tariff-setting authority. This authority — Section 338 of the Tariff Act of 1930 — is not mentioned in the "Overview and Compilation of U.S. Trade Statutes" published annually by the U.S. Congress. And although Section 338 has gone unused for decades, it remains on the statute books and is available to the president.

Section 338 permits the president to impose "new or additional duties" on countries that have discriminated against commerce of the United States. Section 338 authority is triggered when the president finds that a foreign country has either (1) imposed an "unreasonable charge, exaction, regulation, or limitation" on U.S. products which is "not equally enforced upon the like articles of every foreign country"; or (2) "[d]iscriminate[d] in fact" against U.S. commerce "in respect to customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction or prohibition" so as to "disadvantage" U.S. commerce as compared to the commerce of any foreign country.

Whenever the president finds such discrimination, Section 338 authorizes him to impose additional duties of up to 50 percent of the product's value. If a country continues to discriminate against U.S. goods, the president may then move to block imports from that country. An investigation under Section 338 could be initiated by the government or through private-party petitions to the Tariff Commission (now known as the U.S. International Trade Commission). Although petitions were not made public and hearings were not held, annual reports indicate that in the 1930s the commission undertook, pursuant to Section 338, both general monitoring of trade relations and investigation of individual complaints.

The commission's reports also indicate that action was taken at least once in connection with Section



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338. In 1935, the president found that Germany and Australia had “discriminate[d] against the commerce of the United States.” It appears, however, that the president did not use his authority under Section 338 to raise tariffs in that case but instead withdrew other unspecified “benefits” pursuant to broader powers under the Trade Agreements Act.

Separately, use of Section 338 was threatened in the course of various trade negotiations in the 1930s. For example, its use was threatened against France in 1932 in response to discriminatory taxes and quotas on U.S. goods. Around the same time, U.S. officials considered using Section 338 as leverage in negotiations with Spain regarding most-favored-nation treatment of American goods.

Section 338 was likewise discussed, and construed broadly, in the context of trade relations with Japan and China. Internal memoranda from the late 1930s show that State Department officials considered invoking Section 338 in response to Japan’s steps to alter China’s trade relationships in Japan’s favor. Section 338 later appears in U.S. diplomatic correspondence with respect to trade relations with China. A telegram in 1949 from Secretary of State Dean Acheson to the consul at Shanghai mentions Section 338 as a possible response to discrimination by China against American trade, and observes that Section 338 would permit the president not only to impose tariffs but also to exclude Chinese goods entirely.

Our research has uncovered no public record relating to Section 338 since the Acheson telegram in 1949. The Tariff Commission’s 1942-1943 report states that activity under Section 338 had been limited due to wartime trade controls. Subsequent annual reports discuss the commission’s actions under other provisions of the Trade Act of 1930, but Section 338 receives no further mention.

While Section 338 provides the president with statutory authority to raise tariffs, such action would run counter to U.S. commitments under the World Trade Organization and other trade agreements. In these agreements, the United States agreed not to raise tariffs above established “bound” rates, which are often zero. WTO and other trade agreements allow countries to raise tariffs above the “bound” rate only for specific and agreed-upon purposes, such as to offset subsidies as defined by the WTO’s Agreement on Subsidies and Countervailing Measures. But in negotiating the WTO and other trade agreements, the U.S. did not preserve the right to raise tariffs under Section 338 criteria. As such, any action by the president to use this authority to raise tariffs or block imports would invite trade challenges by affected countries. Nonetheless, the Trump administration could see Section 338 as possible leverage in trade disputes.

We cannot explain why Section 338 disappeared from public view after 1949 even though it has remained in the statute books. Our raising awareness of this tariff authority is not a call for its use. Section 338 is a blunt tool that would certainly invite WTO challenges. But, as the incoming administration considers tools potentially available to address unfair trade practices, Section 338 is a long-forgotten but apparently still available tool.

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