What Does the Promised Trade War Mean for Companies?

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President-elect Donald Trump has promised action that could drastically change the rules for U.S. importers and exporters, foreign shippers to the United States and service providers. Whether and how these promises translate to policy outcomes is highly uncertain. This update notes specific promises made by President-elect Trump during the campaign and offers analysis of key aspects of U.S. trade law, including relevant international agreements, that will affect how and whether certain of Trump's goals are implemented and potential responses by U.S. trading partners. We then propose steps for corporations to assess and inoculate against risks, and to also identify and take advantage of potential opportunities.

Changes to Tariffs and Actions Against Unfairly Traded Goods

The Trump administration can quickly and unilaterally change tariffs broadly on U.S. imports and target goods that are unfairly traded. President-elect Trump has indicated he will use executive authority to take a number of actions that would fundamentally change U.S. trade policy, including:

1. Terminating and renegotiating trade agreements;

2. Labelling China a currency manipulator;

3. Identifying unfair trade practices under Section 301 of the Trade Act of 1974; and

4. Self-initiating U.S. trade remedy proceedings and disputes at the World Trade Organization (WTO) dispute settlement body.

President-elect Trump has specifically targeted China and Mexico in his statements and suggested that he would impose across-the-board tariffs against imports from these countries.

United States law provides numerous channels for the Trump administration to quickly, and perhaps without notice, raise tariffs and target perceived unfair foreign trade practices. For example, Section 125 of the Trade Act of 1974 allows the president to impose immediate and temporary blanket tariffs on imports from any country to address trade deficits with that country.

The Trump administration also can rely on long-standing executive authority to identify and remedy unfair foreign trade practices. Under Section 301 of the Trade Act of 1974 (Section 301), the president can direct the Office of the U.S. Trade Representative (USTR) to raise tariffs or suspend a trade agreement after finding that a foreign country has policies that are considered unreasonable or discriminatory to U.S. interests. Previous administrations used the WTO dispute settlement system when the unfair trade allegations fell within the WTO's ambit. Section 301, however, could be used by the president to impose restrictions on trade unilaterally where the president finds that the foreign unfair trade practice is not covered by an international agreement with dispute settlement provisions (e.g., the WTO or NAFTA).

Finally, President Trump could attempt to remedy currency manipulation through U.S. countervailing proceedings or, failing this, could seek express statutory authority to do so.

Imports from Mexico and China Face a Particularly High Risk

While it seems possible that the Trump administration action may involve many (or all) countries, Mexico and China have been identified as particular targets for punitive action. The president-elect campaigned on a promise to renegotiate NAFTA, referring specifically to Mexico, and to counter China's perceived unfair trade practices and currency manipulation. For this reason, imports from China and Mexico carry greater risk than imports from other countries. Note, however, that the president-elect's campaign identified other countries as engaging in unfair trade practices (e.g., South Korea).

Scope and Type of Action is Highly Uncertain

Pursuant to U.S. law, the scope of products, services and countries that can be targeted by trade actions is virtually unlimited. For example, increased tariffs could be very broadly applied under authority to renegotiate trade agreements, or they could be narrowly applied under U.S. antidumping and countervailing duty proceedings. Moreover, any of these remedies could exclude certain products, leaving the door open for U.S. companies to make the case as to why their products should be outside the scope of punitive action. Thus, it is not possible to determine the scope of potential trade actions at this time.

WTO Will Not Quickly Restore the Status Quo

Companies and countries that hope the WTO (or FTAs) will check the Trump administration may be disappointed. As a preliminary matter, please note that administration officials often will be well aware, prior to taking punitive action, whether the specific action violates international trade rules. Here is why:

1. Under U.S. law, WTO obligations have no effect unless those obligations are formally adopted into U.S. law. Where U.S. law permits administrative action, clear WTO obligations to the contrary can lawfully be ignored by the administration. Also, the U.S. Congress can pass laws that are inconsistent with U.S. WTO obligations.

2. The Trump administration has proposed actions under Free Trade Agreements (FTAs) (e.g., renegotiating NAFTA). Dispute settlement bodies of the WTO generally have declined to enforce FTA provisions, and dispute settlement options within certain FTAs may prove ineffective.

3. Obtaining and then enforcing a WTO decision against the United States would take years. This gives the Trump administration ample time to take aggressive action before facing any economic consequences authorized by the WTO.

4. Even if the WTO were to authorize retaliatory action, the Trump administration might choose to maintain WTO-inconsistent measures in the face of retaliatory action by other WTO members.

5. WTO members may respond in kind with unilateral retaliation against the United States rather than (or in addition to) pursuing claims through the WTO's dispute settlement system.

The WTO or NAFTA, therefore, is likely not an effective means to constrain the Trump administration, especially in the short term. Rather, WTO and NAFTA dispute settlement proceedings should be viewed as a long-term strategy for imposing costs for measures violating relevant trade agreements.

Actions Companies Should Consider Now

Given the likelihood that major changes in U.S. trade policy are imminent, we recommend the following actions now to minimize risks to supply chains and to maximize how companies influence those changes.

- **Identify Interests and Prepare to Exercise Political Clout**. Given the broad potential scope and type of remedies and ability to exclude products or industries from those remedies, prepare to use associations (e.g., AmCham, NFTC and specific sector groups) and political connections to advance your company's interests.
- **Assess Supply-Chain Options**. Consider alternative sources to current suppliers. In particular, assess the need for imports from China and Mexico. Consider asking your suppliers to act as importers of record for shipments to the United States to reduce the risk of liability for imported products.
- **Analyze Whether Trade Actions Are Cause for Terminating Agreements**. Review your supply agreements to determine whether trade actions are cause to terminate the agreements.
- **Increase Trade Due Diligence in Corporate Acquisitions**. Assessing a target's exposure to trade liability should be given increased priority. Companies that may seem attractive targets for acquisition could become virtually worthless as a result of increased import duties or punitive action.
- **Monitor Trade Developments**. Establish monitoring mechanisms to track trade-related developments that could impact your supply chains or interests.
- **Document Foreign Barriers to Trade.** The Trump campaign committed itself to identifying all violations of trade agreements with the United States and to using all available tools to remedy those violations. To the extent foreign trade barriers harm a company, its leaders should document them and bring them to the attention of the Trump administration.

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