

Trump Eyeing Another Novel Approach To Muscle China On IP

By **Alex Lawson**

Law360, New York (August 2, 2017, 10:35 PM EDT) -- The Trump administration has not been shy about getting creative with its enforcement of U.S. trade laws, and it appears poised to do so again by reviving a largely dormant statute to crack down on China's alleged flouting of U.S. tech companies' intellectual property rights in a move that will win no favors with Beijing.

Months after dusting off a rarely invoked law to potentially stonewall steel and aluminum imports based on national security, President Donald Trump is now mulling whether to use a similarly exceptional statute to tackle a long-standing gripe of the U.S. business community: Beijing's rules requiring foreign companies to hand over sensitive tech as a condition of operating there.

To do that, the administration is said to be eyeing Section 301 of the Trade Act of 1974, a law that gives the Office of the U.S. Trade Representative wide latitude to impose trade sanctions on nations that are hampering U.S. business interests.

"This shows that USTR is going to take an aggressive approach and that Section 301 is one of the primary tools to make that happen," Wiley Rein LLP partner Timothy Brightbill told Law360. "The United States has to find a way to address these Chinese acts and practices ... whose aim is to take U.S. intellectual property and know-how and industrial knowledge."

Once invoked, Section 301 triggers an investigative process and offers the U.S. a two-pronged approach for addressing what it perceives as unfair trade practices in other nations. It can either shepherd a complaint to the dispute settlement provision of a relevant trade agreement, or, if the conduct at issue is not covered by a trade agreement, the U.S. can impose unilateral sanctions.

The U.S. has no free trade agreement in place with China, so the central question at play if a Section 301 case is launched is whether the issue of forced technology transfer falls under the purview of the World Trade Organization.

There is a certain amount of tension between the remedies outlined in Section 301 and the arbitration process enshrined in Geneva. Prior to the WTO's inception in 1995, the law was the primary means for extracting trade concessions from major partners.

The law's use has waned with the rise of the WTO, which has become the primary forum for settling international trade disputes. But the Trump administration has developed a fairly icy relationship with

the WTO, hinting at its ineffectiveness as a global referee and showing a distaste for the scope of some of its rulings.

So while it is possible that the invocation of Section 301 could lead to the filing of a new WTO case — as happened with a petition from the United Steelworkers in 2010 — the administration's track record suggests that it is eyeing a more direct solution.

"This may be a resort to unilateral or bilateral action in the context of trade disputes in order to get leverage, which they consider to be more effective or at least necessary in addition [to] or instead of multilateral WTO dispute settlement," former Assistant USTR and Senate Finance Committee trade counsel Bruce Hirsh told Law360.

The European Union challenged the legality of Section 301 at the WTO in 1999, and the case was effectively settled when the U.S. clarified its position that it could not use the law to punish countries for apparent WTO violations without looping the WTO into the process. This effectively drew the bright line for potential unilateral action under the law.

With that in mind, the central question is whether the forced transfer of foreign technology falls under the purview of the WTO's various rules covering investment, services and intellectual property. If it does, the U.S. would ostensibly be forbidden from going it alone on its punishment of China.

Former Deputy U.S. Trade Representative and current Crowell & Moring LLP partner Robert Holleyman said that that question depends on how broadly or narrowly the U.S. intends to structure its allegation, which will take shape during the investigative stage after a potential Section 301 case is triggered.

"You can look at the underlying issues around openness to computing services ... and I think an arguable case can be made that there are existing WTO obligations that are implicated by virtue of forced tech transfer," Holleyman told Law360.

The technology transfer issue is hardly a new one, as it has been a fixture in USTR's annual National Trade Estimate report on foreign trade barriers for many years. If administrations past thought they had solid legal footing to pursue a WTO case, they likely would have.

Specific negotiating objectives on state-sponsored trade secret theft and tech transfer have also found their way into U.S. Trade Promotion Authority and the now-dead Trans-Pacific Partnership, further suggesting that the rules already on the books did not go far enough.

So treading into largely untested waters will put the administration in a tough spot, Hirsh said, but one that it's likely been contemplating for some time.

"It will be difficult for the administration to identify areas in which they could retaliate that wouldn't violate WTO rules, but I would fully expect that they've been very busy researching how they might retaliate without violating WTO rules," he said.

While the appeal of Section 301 is that it effectively allows the administration to play judge, jury and executioner as it decides how to address China's policies, the downside is that unilateral action is rarely popular on the global stage.

Even if the U.S. does not use Section 301 to build a WTO case, it's likely the matter will head to Geneva

anyway if China feels that the process has been breached. It could also opt to impose its own retaliatory measures outside of the WTO's strictures, according to Akin Gump Strauss Hauer & Feld LLP partner Hal Shapiro.

"If the U.S. or any country imposes unilateral sanctions that otherwise should have been handled through the WTO, I think you can expect a very large international adverse reaction," Shapiro told Law360. "Many countries have strong support for the WTO and find that action, particularly by a leading economy, destabilizing."

Another potential drawback for the administration, particularly in a case where it would initiate a Section 301 case on its own as opposed to accepting an industry petition, is that it creates possibly undue pressure to act by drawing attention to the case and locking itself into a formal statutory process.

"There's an old adage that it's good to have a wall behind you in a gunfight so that you don't get scared and run away. ... The problem with the wall is that if you get scared, it's hard to run away," he said. "By invoking 301 as opposed to use an informal mechanism, you are putting pressure on yourself as a government to take action. They're certainly free to do that, but it just raises the stakes."

--Editing by Pamela Wilkinson and Mark Lebetkin.