

KIRKLAND ALERT

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Trump Administration Imposes Substantial Tariffs Ushering in *America First* Trade Agenda

On January 22, 2018, President Trump acted on recommendations from the U.S. International Trade Commission (“ITC”) to impose tariffs on imports of large residential washing machines (“washers”) and solar cells and modules that were the subject of two “safeguard” investigations.¹ These decisions affirm that the Trump administration is prepared to utilize a robust toolkit of remedies when countries are viewed as engaging in unfair trade with the U.S., particularly with respect to China. Companies — and their investors — would be well-advised to examine the international exposure of their enterprise value chains, as the cost of doing business may increase both for inbound transactions as import duties rise and for outbound transactions if trading partners retaliate.

The View from Washington

The announcement came on the first business day after the one-year mark of President Trump’s inauguration and one day before he was scheduled to travel to Davos to address the World Economic Forum. Though the investigations were operating under their own statutory deadlines, the timing of the announcement also serves notice to the world that the Trump administration remains serious about trying to rebalance trade deficits and otherwise carry out its [“America First” international trade agenda](#).

These decisions may also be a prelude to additional protective measures to come, as the Trump administration [soon is to make determinations](#) concerning whether imports of steel and aluminum are posing a threat to national security, and thereafter whether China’s intellectual property and technology transfer practices constitute unfair trade. All of this takes place against the backdrop of U.S. efforts to try to renegotiate the North American Free Trade Agreement (“NAFTA”), where U.S. trade officials are set to meet their counterparts from Canada and Mexico later this week for a further round of discussions.

The Section 201 Investigations

The investigations on washers and solar cells and modules were undertaken under Section 201 of the Trade Act of 1974 (“Section 201”), which authorizes the president to impose tariffs, tariff rate quotas and other measures, in response to an ITC determination that increased imports of an item are a “substantial cause of serious

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injury” to domestic producers.² In both investigations, the ITC found a dramatic increase in imports into the U.S. particularly from China, which was accompanied by a serious decrease in domestic production.³

- For washers, the president approved applying a safeguard tariff-rate quota for three years, with the first year imposing a 20 percent tariff on the first 1.2 million units of imported finished washers and a 50 percent tariff on all subsequent imports of finished washers and covered parts, excluding the first 50,000 covered parts.
- For solar cells and modules, the president decided to apply safeguard tariffs for four years, with the first year imposing a 30% tariff on modules and cells, but exempting the first 2.5 gigawatt of imported cells.⁴

Section 201 investigations are distinct from the more conventional antidumping and countervailing duty investigations, which are country-specific and require a finding that the imports are unfairly priced and/or impermissibly subsidized. Safeguard investigations are “global” and often are termed “escape clause” actions because they can authorize remedial action even in the absence of otherwise unfair trade, or if antidumping or countervailing duties in place are viewed as having not curtailed imports sufficiently. These are the first two such safeguard investigations in seventeen years, suggesting the Trump administration seeks to reach back to the international trade architecture that existed prior to China’s accession to the World Trade Organization (“WTO”) in 2001.

Key Takeaways

- Additional trade actions may be coming in the future. President Trump’s National Trade Policy Agenda expressed the Trump administration’s intent to aggressively enforce U.S. trade laws, which is now becoming realized. As it is likely there will continue to be an upward trend in trade enforcement actions, investors should closely examine the import profiles of target companies to evaluate the top-line impact of the president’s “America First” international trade agenda.
- [Business in or with China continues to carry heightened risk.](#) The tariffs on washers and solar cells and modules come during a time of increased stress on the U.S.-China bilateral relationship. China is the focus of growing scrutiny by U.S. lawmakers and enforcement authorities, and the trade remedy actions are emblematic of the tensions being applied to China-facing trade matters generally, which extend to anti-corruption, economic sanctions, export controls and foreign investment clearance under CFIUS. Companies contemplating transactions with a China nexus should factor in more extensive due diligence and enhanced scrutiny by U.S. regulators.
- China and others may take retaliatory action. As the U.S. continues to implement its trade enforcement agenda, the risk also increases that China and other countries targeted may respond with trade actions of their own. Though the prevailing practice within the international trading system has been to adjudicate

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disputes via institutions such as the WTO, if the U.S. is perceived now as acting unilaterally, trading partners may respond in kind, also imposing import duties or otherwise increasing local regulatory requirements. Companies doing business in China or with Chinese counterparties should assess where they may be vulnerable to these increased costs and compliance risks.

- Remedies may be available. Companies and investors affected by the tariffs may find remedies in international investment treaties and free trade agreements, including the NAFTA and the U.S.-Korea Free Trade Agreement, which, e.g., confer certain protections on foreign investments in the U.S. and prohibit the U.S. from imposing restrictions on sales to accord preference to goods produced within its territory. The tariffs imposed may be viewed as violating the terms of these agreements on the basis they penalize foreign imports to confer a benefit on U.S. manufacturers. In the past, companies and investors aggrieved by similar tariffs have brought international arbitration claims to enforce these terms and obtained favorable awards, including direct monetary relief.⁵

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As it is likely there will continue to be an upward trend in trade enforcement actions, investors should closely examine the import profiles of target portfolio companies to evaluate the potential increased costs associated with those acquisitions.

¹ Press Release, Office of the United States Trade Representative, President Trump Approves Relief for U.S. Washing Machine and Solar Cell Manufacturers (Jan. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/president-trump-approves-relief-us>.

² 19 U.S.C. § 2251.

³ Fact Sheet, Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules, Office of the United States Trade Representative (Jan. 22, 2018), <https://ustr.gov/sites/default/files/files/Press/fs/201%20FactSheet.pdf>.

⁴ *Id.*

⁵ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, and *Pope & Talbot v. Canada*, UNCITRAL.

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