Trump's Section 301 weapon, lessons from the past

Within hours of the February 20 ruling of the United States Supreme Court that U.S. President Donald Trump lacked authority to impose his infamous reciprocal tariffs, the U.S. administration invoked Section 122 of the Trade Act of 1974 to impose a 10% temporary surcharge on imports, effective February 24 to July 24, 2026. Section 122 requires the existence of a "balance of payment" (BOP) crisis. This has already been challenged by 24 U.S. States in the United States Court of International Trade, on the ground that, like the preceding tariffs, these too have no legal basis, nor is there any BOP crisis facing the U.S.

Under World Trade Organization (WTO) rules of international trade, import restrictions, not tariffs, are permissible in limited situations involving serious BOP difficulties, which could arise due to actual or any imminent threat of serious decline in a country's monetary reserves. None of these situations exists for the U.S.

In any event, since the Section 122 tariffs have a limited 150-day shelf life, Mr. Trump promised "other tools" and initiated two sets of "Section 301" proceedings – one alleging "Structural Excess Capacity and Production in Manufacturing Sectors", and another alleging "Failure to Impose and Effectively Enforce a Prohibition on the Importation of Goods Produced with Forced Labor". India is listed in both proceedings, along with the European Union (EU), Japan, Singapore, South Korea, China and many others. The factual and economic rationale for both, at best, is specious.

Furthering unilateral action

Section 301 sits under "Title III" of the U.S. Trade Act in the chapter "Enforcement of United States Rights under Trade Agreements and Response to Unfair Trade Practices". Section 301 authorises the Office of the United States Trade Representative to investigate foreign trade practices and impose unilateral tariffs based on a determination that such practices are unjustifiable, discriminatory, or restrict U.S. commerce, or violate trade agreements.

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The Section 301 proceedings demand action from India and other developing nations to revive multilateral rules

A clear anomaly in Section 301 is that it provides the U.S. the right to unilateral determination of what is governed by rules of international trade. To state the obvious, one cannot be the judge of one's cause. To address this, soon after the WTO came into being in 1995, the EU initiated a dispute against the U.S. arguing that because Section 301 provides unilateral rights to the U.S. without any assessment of its international obligations, such a provision violated WTO law.

The WTO disputes panel agreed that even the threat of conduct prohibited by the WTO would enable one country to exert undue leverage on others. It compared Section 301 to a "big stick", that, merely by being carried could be "as effective a means to having one's way as actually using the stick".

The panel, however, refrained from holding Section 301 as illegal based on an assurance from the U.S. administration that it would render determinations "in conformity" with its WTO obligations. This deference to the U.S. was predicated on the U.S.'s standing by that assurance. That deference has today come to haunt WTO members.

Now, key decimator

A 2020 report of the U.S. Congressional Research Service (CRS) notes that until the start of the Trump administration (in 2016), the U.S. stood by its word and used Section 301 primarily to build cases and pursue dispute settlement at the WTO. The report acknowledges that the Trump administration changed that and started using Section 301 as a weapon to impose tariffs as punitive measures. Pursuant to Section 301 proceedings against China in 2017, unilateral tariffs up to 25% were imposed. A WTO panel held in 2020 that these tariffs violated the U.S.'s commitments under the WTO. The U.S. did not blink and appealed the panel ruling to the WTO's appellate process. The only catch was that there was no WTO Appellate Body by 2020, since the U.S. had, single-handedly, blocked its constitution.

The U.S., as the chief architect of the WTO, including its enforceable dispute settlement mechanism, has been its chief decimator. Had the panel in 1999 ruled that Section 301 required amendment to ensure WTO consistency, the U.S. – then a trustworthy member of the multilateral system that it had helped create – would very likely have amended the section to eliminate any possibility of unilateral tariff imposition. And Mr. Trump's toolkit would have fallen short of one potent weapon.

The issue of trade agreements

Events over the past year have especially demonstrated the fragility of multilaterally agreed rules, and the significant systemic leverage the U.S. has been able to exercise by unabashed violation of those rules. And yet, we are also seeing some limits to that leverage. Malaysia has officially called its reciprocal trade agreement with the U.S. "null and void" after the U.S. Supreme Court's decision. Unlike Malaysia, India had not yet signed an agreement with the U.S., and the government has indicated that it hopes for a "mutually beneficial trade agreement". The pressures of the Section 301 proceedings will, no doubt, play a role in the conclusion of any negotiation.

Indian businesses need to actively participate in both Section 301 proceedings and make clear submissions exposing the absurdity of these so-called investigations. At the broader level, the core challenge for India and other developing countries is the need to revive multilateral rules. There is no substitute for the strength that comes from coalition-building to dilute the U.S.'s raw power advantage. India must step up and play that role.

The views expressed are personal