

Trade Policy

Trade Probes Surge During Trump's First Year in Office



Snapshot

- Eighty-two anti-dumping, countervailing duty investigations launched in 2017, most since 2001
- Not all Trump: Global economic conditions, changes to trade laws play role

By Brian Flood

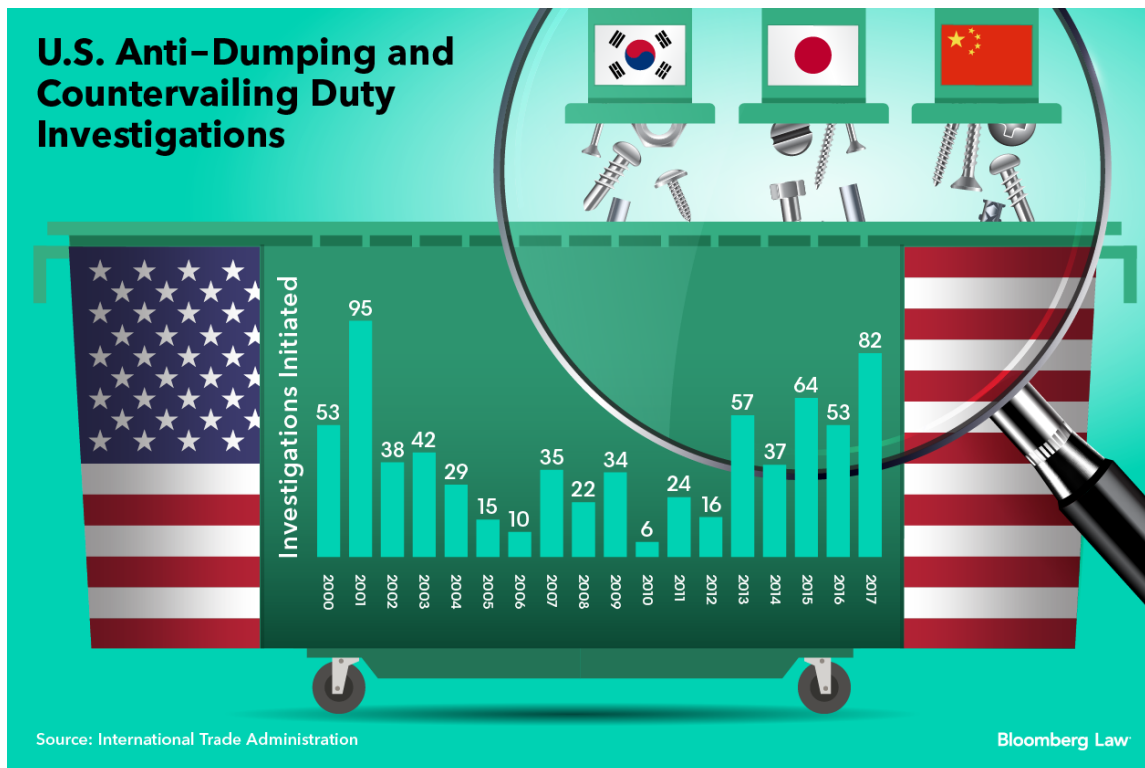
The Trump administration is boasting that trade enforcement investigations—the type of inquiries that can lead to protective duties on unfairly traded foreign imports—were much higher under the first year of President Donald Trump's term than the last year of Barack Obama's.

A Bloomberg Law data analysis indicates that 2017 really was a red letter year for trade enforcement: 82 anti-dumping and countervailing duty investigations were launched in 2017, more than in any year since 2001, and more than double the 2000-2016 average of about 37 per year.

In news release after news release announcing the start of new investigations, the Commerce Department called trade enforcement “a prime focus of the Trump administration” and noted the huge uptick of anti-dumping and anti-subsidy (that is, countervailing duty) investigations launched compared to Obama's final year in office.

But can the administration really claim credit? These kinds of cases are almost always launched because of petitions filed by the private sector. Analysts tell Bloomberg Law that Trump's “America First” approach to trade is only one factor responsible for this surge, as it convinces companies their claims will be heard by a sympathetic administration. Other factors include global economic conditions and recent changes to the trade laws that made it easier for the U.S. to impose duties, and more likely to impose higher duties, which also encourages domestic companies to file duty petitions, the analysts said.

As such, the Trump team can claim some credit for this uptick. Nevertheless, the administration will soon play a bigger role in whether this surge continues, analysts said. That's because if the administration uses unconventional methods to control foreign imports—such as its recently announced “national security” restrictions on steel and aluminum, and tariffs to punish China's intellectual property theft—ironically, there will be less of a need for U.S. industry to push for “traditional” duties.



Business's Prerogative

Anti-dumping (AD) and countervailing duties (CVD) are the most common way that the U.S. fights unfair practices by its trading partners. Anti-dumping duties affect goods found to be sold in the U.S. at less than fair value; countervailing duties hit goods from companies that benefited from alleged unfair government subsidies.

While the government itself may launch AD/CVD investigations at its own prerogative, such "self-initiated" cases are extremely rare. When the Trump administration launched AD/CVD investigations into common alloy aluminum sheet from China in November, they were the first self-initiated investigations in more than a quarter century.

Instead, virtually all AD/CVD investigations come at the request of domestic industries that are supposedly being harmed by competition from the unfair imports. So, any investigation of the uptick in these investigations has to ask: What is encouraging companies to file these cases?

America First

A central tenet of Trump's presidential campaign was that he was going to get tough on foreign countries that he said have been ripping off the U.S. for decades. In office, he surrounded himself with trade hawks such as Peter Navarro, head of the White House National Trade Council, and Commerce Secretary Wilbur Ross.

If businesses believe that their claims will find a friendlier audience in the Trump administration than they would have in the past, they may be encouraged to file petitions for duties, said Richard Weiner, an international trade attorney with Sidley Austin LLP.

When business leaders hear some of Trump's protectionist rhetoric, they may think it's an opportune time to file, agreed William Reinsch, the Scholl Chair in International Business at the Center for Strategic and International Studies, and former head of the Commerce Department's Bureau of Industry and Security.

Business leaders and their lawyers might think “these guys are on our side,” said Duane Layton, global head of Mayer Brown's international trade law practice and former senior counsel for the Commerce Department.

But that explanation only goes so far. The president's influence over anti-dumping and countervailing duty investigations is limited, especially compared to other trade measures, said Dan Ikenson, director of trade policy studies at the Cato Institute, a libertarian think tank. Before the U.S. may impose these duties, not only does the Commerce Department have to find unfair trading, the International Trade Commission must also find that the imports are materially hurting domestic industry. The president's influence over the ITC is relatively limited, because it is an independent agency with both Democratic and Republican members. Ikenson pointed out that the ITC recently declined to impose duties on Bombardier aircraft from Canada in a recent high-profile decision.

Even the Commerce Department, while headed by Ross and thus under the administration's direct control, doesn't have unfettered discretion on when to impose duties. The law requires the agency to make certain prescribed findings backed up by substantial evidence before it can find imports are unfairly traded and duties are justified, Layton said.

Other Influences

There are other factors driving this surge in duty investigations, analysts told Bloomberg Law. Broader economic conditions such as the strength of the U.S. dollar also affect the competitiveness of foreign imports versus U.S. goods, and in turn, whether domestic companies want to bring cases to protect against those imports, Weiner said.

Indeed, over the past 18 years, the U.S. dollar was the strongest since circa 2001, fell steadily until 2011, and then rebounded. That roughly tracks the trend in AD/CVD cases initiated over that time period.

“I think probably, more than any single event, these things are determined by the state of the economy,” said Reinsch.

Another important factor that could be contributing to the uptick could be the passage of the Trade Preferences Extension Act of 2015, Weiner said. This legislation made significant changes to the AD/CVD law, which made it easier for the ITC to find injury and for Commerce to calculate higher duty rates. A higher chance of winning duties, plus a chance for higher duties, could be encouraging more U.S. companies to file petitions.

A New Normal?

Whether this trend continues is going to depend on several factors, only some of which are in the Trump administration's control.

The changes in the trade law are permanent, but it remains to be seen if Commerce and the ITC will consistently use their newfound authorities under the 2015 trade law to actually issue more duty orders and set higher duty rates, Ikenson said. If the companies filing now don't get better results than in the past, we may see the business community's enthusiasm flag, he said.

So far, though, there have been signs that the Commerce Department is willing to flex its new muscles. After some public urging from Navarro, Commerce used its newly expanded authority to find “particular market situations” to raise anti-dumping duties on certain South Korean oil drilling equipment.

Ironically, Trump's aggressive approach to trade could actually discourage some companies from filing AD/CVD cases, because it might diminish the need for these traditional trade remedy duties. For example, given the president's recently announced “national security” restrictions on steel and aluminum imports, Weiner said, there might be less of an impetus for U.S. manufacturers of these metals to bring new AD/CVD cases.

Similarly, the administration recently announced tariffs on up to \$60 billion worth of as-yet-unspecified Chinese goods in response to China's intellectual property practices. Businesses that were considering asking for duties on those goods now may feel they're no longer necessary.

But to the extent duty petitions track macroeconomic trends, there's only so much that any White House can directly control.

To contact the reporter on this story: Brian Flood in Washington at bflood@bloomberglaw.com
To contact the editor responsible for this story: Jerome Ashton at jashton@bloomberglaw.com

Contact us at <http://www.bna.com/contact-us> or call 1-800-372-1033

ISSN 2325-6117

Copyright © 2018, The Bureau of National Affairs, Inc. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy.