

Could a President Trump Shackle Imports?

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Trump's statements on Trade



“The 45% is a threat that if they don't behave, we will tax [China]. It doesn't have to be 45, it could be less.”

“Every car and every part manufactured in this plant that comes across the border, we're going to charge [Mexico] a 35% tax.”

“I think NAFTA has been a disaster. I think our current deals are a disaster.”

“[If foreign countries don't concede,] we're going to renegotiate or we're going to pull out ... These trade deals are a disaster, Chuck. The World Trade Organization is a disaster.”



Legal Grounds for Trump's Threats

- Pursuant to Article I, section 8 of the US Constitution, Congress has often delegated to the president the power to restrict or liberalize foreign commerce.
- Congress could amend powers delegated to the president under the Trading with the Enemy Act of 1917 (TWEA), the International Emergency Economic Powers Act of 1977 (IEEPA), and other acts.
- But, there is no chance that appropriate amendments will be enacted before January 20, 2017, and very little chance if Trump is elected.
- Nor is it likely that US courts would intervene to stop a trade war.

Trade Agreements



NAFTA Implementation Act (January 1994)

- NAFTA Chapter 22: any member can withdraw after giving six month's written notice to the other parties.
- Under Section 201 of the Act the US president can proclaim additional duties as necessary to maintain the general level of reciprocal concessions with Canada and Mexico.
- Similar actions are possible under other free trade agreements (FTAs).

WTO

- Withdrawing from the WTO seems cataclysmic, not least because the US would lose market access rights globally.
- However, US withdrawal could revert current US MFN tariffs to the Smoot-Hawley levels (column 2 of the HTS). Trump might invoke Section III of the Uruguay Round Agreements Act of 1994 to proclaim less draconian tariffs.

Limited Statutes



Trade Expansion Act of 1962, Section 232(b):

- The president can impose import restrictions after a finding that national security is at risk.
- Used as one legal ground for Nixon's 10% tariff in 1971.

Trade Act of 1974:

- Section 122: To deal with large and serious US balance of payment deficits, the president can impose maximum 15% tariff or quantitative restrictions for 150 days. No national security investigation is required.
- Section 301: After a finding that a foreign country unfairly restricts US commerce, the president can take retaliatory actions including trade measures.

Almost Unlimited Statutes



Trading With the Enemy Act of 1917 (TWEA)

- Section 5(b) delegates to the president broad wartime powers to regulate all forms of international commerce, and to freeze and seize foreign assets. The statute does not define wartime.
- President Trump could invoke the TWEA to impose any tariff rate he chose, on imports from any country he designated.

The International Emergency Economic Powers Act of 1977 (IEEPA)

- The act gives the President wide powers to regulate all forms of international commerce and to freeze assets in a national emergency, defined as an unusual or extraordinary threat.

Legal Challenges against Trump



Multinational Corporations

- Auto companies such as GM and Chrysler, apparel firms such as Gap and Levi, and information technology giants such as Apple and Qualcomm would all seek preliminary injunctions to prevent the US Customs Bureau from collecting the new tariffs or restricting imports.
- Two famous test cases for preliminary injunctions are *Youngstown Sheet & Tube v. Sawyer* (1952) and *Texas v. United States* (2015).

US trading partners hurt by US measures

- Could bring a GATT Article XXIII Nullification or Impairment case, claiming compensation because their legitimate expectations of trade benefits have been denied.
- Or they could simply retaliate.



Conclusion

- Trump's threats to raise tariffs and to withdraw from the NAFTA and other trade agreements are amply supported by existing statutes.
- Americans cannot count on the courts or Congress to deter Trump from carrying out trade threats.
- If threats turn into actual restrictions, the US can expect legal battles in the WTO.
- These possibilities should prompt the Congress to review existing delegations of power pursuant to Article 1, section 8, and narrow the named statutes through appropriate amendments.