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No More IEEPA Tariffs?
The Legal Bases of an Alternative Regime

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Since retaking office in January 2025, President Trump has accelerated and expanded his use of tariffs. Although many of these actions had been taken pursuant to a novel application of the International Emergency Economic Powers Act (IEEPA), the Supreme Court held in Learning Resources, Inc. v. Trump *that IEEPA does not authorize the President to impose tariffs. This adverse decision notwithstanding, the administration continues to signal that its tariff regime will continue under different legal authorities.*

This Essay thus trains attention on the likely legal bases of that alternative regime. I focus on six tools that have been or could be mobilized by the executive: (1) Section 232 national security trade actions, (2) Section 301 retaliatory trade actions, (3) Section 201 safeguards, (4) antidumping and countervailing duties, (5) Section 122 balance of payments actions, and (6) Section 338 discriminatory act actions. In addition to describing the non-IEEPA tariff toolkit, I highlight considerations that will affect their future use, including the actors typically involved in demanding and administering the laws, the nuances of their respective processes, the expected scope and duration of resulting trade actions, and their vulnerability to legal challenge. A deeper understanding of the variation within and between relevant authorities yields lessons not only for a motivated executive, but also for reformers seeking examples of how to limit presidential tariff powers.

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Introduction

President Donald Trump has long been a proud, self-proclaimed "tariff man."[1] Building on his own efforts during his first administration, as well as those of the Biden administration, the second Trump administration has threatened and imposed double-to-triple digit tariffs on most countries around the world.[2] The on-again, off-again nature of these tariffs notwithstanding,[3] the average effective tariff rate stood at an estimated 16.9 percent on January 19, 2026—which would be the highest rate since the early 1930s.[4]

Underlying much of the President's tariff actions during his first year back in office was the International Emergency Economic Powers Act (IEEPA), a statute that had never previously been the basis for tariffs.[5] IEEPA empowers the President to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[6] Since retaking office, President Trump has declared many so-called national emergencies, ranging from fentanyl to bilateral trade deficits, to justify an expanding tariff regime.[7]

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[1] *See* Anne O. Krueger, *Tariff Man Doubles Down*, PROJECT SYNDICATE (Mar. 24, 2025), https://www.project-syndicate.org/commentary/trump-tariff-agenda-means-trouble-for-american-and-global-economies-by-anne-o-krueger-2025-03 [https://perma.cc/U4ZE-HLRG].

[2] *See, e.g.*, Julian Arato, Kathleen Claussen & Timothy Meyer, *The "America First Trade Policy" in Practice*, 119 AM. J. INT'L L. 668, 668–69 (2025); Lawrence J. Liu & Alex Zhang, *Tariffs and the Progressive Fiscal Constitution*, 103 WASH. U.L. REV. (forthcoming 2026); Kathleen Claussen & Timothy Meyer, *The Foreign Commerce Power*, 114 CALIF. L. REV. (forthcoming 2026).

[3] *See* Talya Minsberg, *A Timeline of Trump's On-Again, Off-Again Tariffs*, N.Y. TIMES (Aug. 7, 2025), https://www.nytimes.com/2025/03/13/business/economy/trump-tariff-timeline.html [https://perma.cc/LW6Q-AVEH].

[4] *See State of Tariffs: January 19, 2026*, BUDGET LAB, https://budgetlab.yale.edu/research/state-tariffs-january-19-2026 [https://perma.cc/7HKP-SE93].

[5] *See* CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IN11129, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA) AND TARIFFS: HISTORICAL BACKGROUND AND KEY ISSUES 1 (Feb. 20, 2020), https://crsreports.congress.gov/product/pdf/IN/IN11129/8 [https://perma.cc/PS4Q-4MXV].

[6] 50 U.S.C. § 1701(a) (2024).

[7] Exec. Order No. 14,257, 90 Fed. Reg. 15,041 (Apr. 7, 2025); Exec Order No. 14,193, 90 Fed. Reg. 9,113 (Feb. 7, 2025).

These trade actions resulted in numerous lawsuits challenging their legality. By late February 2026, the Supreme Court held that IEEPA does not authorize the President to impose tariffs, invalidating many—though importantly not all—of the President's expanded tariff regime.[8] Leading up to the Court's decision, much ink had been spilled on what would happen if the Court indeed struck down the IEEPA tariffs. Aside from the potential complexities surrounding rebates and any non-prospective relief,[9] and without commenting on the wisdom of tariffs as a matter of economic policy, most commentators agreed that the President's use of tariffs would continue under alternative legal authorities.[10] Indeed, voices within the Trump administration had privately (and increasingly publicly) acknowledged such a plan B.[11] And during a press conference held on the heels of the Court's decision, the President himself repeatedly cited the existence of alternative authorities.[12]

This Essay thus trains attention on the legal bases of that predicted and assuredly forthcoming non-IEEPA tariff regime. I focus on six tools: (1) Section 232 national security trade actions, (2) Section 301 retaliatory trade actions, (3) Section 201 safeguards, (4) antidumping and countervailing duties

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[8] Learning Resources, Inc. v. Trump, No. 24-1287 (Feb. 20, 2026).

[9] *See, e.g.*, Amy Howe, *How the tariffs could be refunded if the court sides against Trump*, SCOTUSBLOG (Dec. 18, 2025), https://www.scotusblog.com/2025/12/the-tariffs-rebate-debate [https://perma.cc/DBV5-MED6].

[10] *See, e.g.*, Arato, Claussen & Meyer, *supra* note 2, at 676; Ana Swanson, *Trump Expands Tariffs Beyond Supreme Court's Reach*, N.Y. TIMES (Sept. 26, 2025), https://www.nytimes.com/2025/09/26/us/politics/trump-tariffs-supreme-court.html [https://perma.cc/YL5D-MHPK]; Brad W. Setser, *How Court Rulings Could Affect Trump's Aggressive Trade Policies*, COUNCIL FOREIGN RELS. (Aug. 31, 2025), https://www.cfr.org/expert-brief/how-court-rulings-could-affect-trumps-aggressive-trade-policies [https://perma.cc/67D8-5H37].

[11] *See* William Alan Reinsch, *Finding Plan B*, CSIS (Sept. 15, 2025), https://www.csis.org/analysis/finding-plan-b [https://perma.cc/GH6J-ACB4]; Gavin Bade & Kim Mackrael, *Trump's Team Plots Plan B for Imposing Tariffs*, WALL ST. J. (May 29, 2025), https://www.wsj.com/economy/trade/trump-trade-tariff-strategy-pivot-bfe11596 [https://perma.cc/NR2D-NTPK]; Gavin Bade, *Trump Can Reimpose 10% Levy if Supreme Court Strikes Down Tariffs, Hassett Says*, WALL ST. J. (Jan. 16, 2026), https://www.wsj.com/livecoverage/stock-market-today-dow-sp-500-nasdaq-01-16-2026/card/trump-can-reimpose-10-levy-immediately-if-supreme-court-strikes-down-tariffs-hassett-says-QWMNvMUVyrLuLvE5TAlc [https://perma.cc/G2WR-N6HY]; Ana Swanson, *Trump's Trade Negotiator Says Response to Court Loss Would Be Immediate*, N.Y. TIMES (Jan. 19, 2026), https://www.nytimes.com/2026/01/19/us/politics/trump-tariffs-supreme-court-greer-trade.html [https://perma.cc/ECK2-D8BP].

[12] *See* Tonny Romm & Ana Swanson, *The Trade Statutes Trump Will Use to Keep Imposing Tariffs*, N.Y. TIMES (Feb. 20, 2026), https://www.nytimes.com/2026/02/20/us/politics/trump-other-options-tariffs.html.

(AD/CVDs),[13] (5) Section 122 balance of payments actions, and (6) Section 338 discriminatory act duties. Although commentators and practitioners had elsewhere identified these legal authorities to varying degrees,[14] I consolidate and extend those analyses. In addition to describing the non-IEEPA tariff toolkit in more detail and bringing in less-discussed alternative bases, I compare the tools to highlight considerations that would likely inform an administration's mobilization of the statutes. Such considerations include the typical actors involved in demanding and administering the laws, the nuts and bolts of the respective processes, the scope and duration of resulting actions, and the potential for successful litigation. Unlike IEEPA tariffs, which were driven by the President through a streamlined unilateral process that ultimately proved vulnerable to legal challenge, other laws in the tariff toolkit differ in ways that would affect their usefulness and/or their legality. In doing so, this approach appreciates that tariff policy often implicates different administrative agencies with their own processes and practices, as well as various nonstate actors who engage the trade administrative state.[15]

Despite this Essay's careful detailing of non-IEEPA authorities and relevant considerations, I stress that it need not merely serve as a field guide for interested administrations, which have assuredly already identified these tools. Rather, an understanding of the differences between the laws might

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[13] Because tariffs imposed under the antidumping and countervailing duty laws involve substantially similar procedures and are often pursued simultaneously, I discuss them as one legal basis for purposes of this Essay.

[14] *See, e.g.*, Clark Packard & Scott Lincicome, *Presidential Tariff Powers and the Need for Reform*, CATO INST. BRIEFING PAPER (Oct. 9, 2024), https://www.cato.org/briefing-paper/presidential-tariff-powers-need-reform [https://perma.cc/89ZK-RARR]; Warren Murayama, Lyric Galvin & William Alan Reinsch, *Making Tariffs Great Again: Does President Trump Have Legal Authority to Implement New Tariffs on U.S. Trading Partners and China?*, CSIS (Oct. 10, 2024), https://www.csis.org/analysis/making-tariffs-great-again-does-president-trump-have-legal-authority-implement-new-tariffs [https://perma.cc/YMN8-NP89]; Setser, *supra* note 10; Timothy Meyer, *The Prospects and Implications of Legal Challenges to President Trump's IEEPA Tariffs*, NEW N. AMER. INITIATIVE (Oct. 2025), https://www.policyschool.ca/wp-content/uploads/2025/10/IPT12-NNAI-Prosp-Implic-IEEPA-Tariffs.Meyer_.FINAL_.pdf [https://perma.cc/Y3ET-7UA3]; Tom Campbell, *Presidential Authority to Impose Tariffs*, 83 LA. L. REV. 595, 614–16 (2023); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1115–25 (2020); CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R48435, CONGRESSIONAL AND PRESIDENTIAL AUTHORITY TO IMPOSE IMPORT TARIFFS (Apr. 23, 2025), https://www.congress.gov/crs-product/R48435 [https://perma.cc/47DY-NZ4X].

[15] Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 847–53 (2021); Lawrence J. Liu, *Opening the Tariff Toolkit: The Demand for U.S. Administrative Trade Remedies*, 101 N.Y.U. L. REV. (forthcoming 2026).

instead provide concrete examples for possible reform. Those who prioritize restraint on or dispersion of presidential tariff powers, for instance, might prefer some features—like decreased presidential discretion or limiting a resulting action's scope—that would be disfavored by those desiring a speedier President-driven approach.

Part I provides background on the existing tariff regime and reasons to expect its persistence despite the Supreme Court's decision in *Learning Resources, Inc. v. Trump*. Part II introduces a toolkit of non-IEEPA trade laws, detailing the actors and processes involved in enforcing them. Part III focuses on variation between the laws discussed in Part II, with attention to how differences between them might affect their perceived usefulness. The Essay concludes with a brief note on implications not only for a presidential administration, but also for reforms to adjust presidential tariff power.

I. Tariffs Under Trump 2.0

Consistent with actions taken during his first term, as well as those of his immediate predecessor, President Trump has shown a continued penchant for tariffs. In the run-up to the 2024 presidential election, then-candidate Trump advocated for "a system of universal baseline tariffs on most imported goods."[16] Since retaking office, the President and his administration have worked to make good on that promise—announcing, pausing, and in many cases ultimately imposing wide-ranging tariffs.[17] One of the President's more dramatic moves came on April 2, 2025, when he announced in the White House Rose Garden "reciprocal" tariffs on almost all trading partners, which would lead to a ten percent baseline tariff on most U.S. imports.[18] That zeal for tariffs continues into year two of the administration. By mid-January 2026, for instance, President Trump had already threatened tariffs on European NATO allies as part of ongoing efforts to acquire Greenland.[19]

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[16] *Agenda47: President Trump's New Trade Plan to Protect American Workers*, DONALD J. TRUMP (Feb. 27, 2023), https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-new-trade-plan-to-protect-american-workers [https://perma.cc/UR44-PEMV].

[17] *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Trump Administration's Trade Policy and the International Trading System*, 119 AM. J. INT'L L. 680, tbl. 1 (2025).

[18] *See* Danielle Kurzleban, *Trump unveils sweeping 10% tariff and 'reciprocal' tariffs on dozens of nations*, NPR (Apr. 2, 2025), https://www.npr.org/2025/04/02/nx-s1-5345802/trump-tariffs-liberation-day [https://perma.cc/2G8U-RYFR].

[19] *See* Kevin Breuninger, *Trump Says He Reached Greenland Deal 'Framework' with NATO, Backs Off European Tariffs*, CNBC (Jan. 21, 2026), https://www.cnbc.com/2026/01/21/trump-tariffs-nato-greenland-davos.html [https://perma.cc/4XJD-WP38].

Although the imposition of tariffs has been uneven as the President has simultaneously sought to use them as a negotiation tactic, many threats have ultimately gone into effect. The effective average tariff rate as of August 7, 2025—the date when many of the President's "reciprocal" tariffs entered into effect—reached 18.6 percent.[20] And that rate was still around seventeen percent as of January 19, 2026.[21] Those numbers are especially dramatic considering that the average tariff rate on dutiable imports remained around five percent from the mid-1970s up until the first Trump administration.[22]

On the one hand, President Trump's interest in tariffs is consistent with the increasingly aggressive trade actions taken since the beginning of his first term.[23] On the other hand, the primary legal tools underlying the administration's tariff hikes have changed. Previously, the President's tariff regime mostly consisted of what I have called "administrative trade remedies," which I broadly define as any domestic law aimed at defending domestic industries against imports and is administered by an administrative agency.[24] That broad definition includes not only "traditional" trade remedies like antidumping and countervailing duties or safeguards, but also previously dormant tools like Section 232 national security actions or Section 301 retaliatory trade actions. Critically, many of these tools were mobilized by nonstate actors who then proceeded through administrative investigations accompanied by some, even if varying, levels of process.

In contrast, "the bulk of the tariffs" imposed under during year one of Trump 2.0 were issued pursuant to IEEPA.[25] Although that change in legal authority might seem technical and therefore trivial, it is noteworthy for at least two reasons—both of which relate to presidential power over tariff policy. First, IEEPA tariffs do not require an agency investigation prior to imposition. Rather, the President need only declare a national emergency via executive order. Second, decisions about the size, scope, and duration of IEEPA tariffs are concentrated in the President. There are not even recommended agency actions, let alone binding ones. Indeed, the announcement of national emergencies and subsequent IEEPA tariffs in February 2025 took place prior to the confirmations of Commerce Secretary Howard Lutnick and U.S. Trade Representative Jamieson Greer.

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[20] *State of U.S. Tariffs: August 7, 2025*, BUDGET LAB, https://budgetlab.yale.edu/research/state-us-tariffs-august-7-2025 [https://perma.cc/WJT7-DTCS].
[21] BUDGET LAB, *supra* note 4.
[22] *See* Liu, *supra* note 15.
[23] *See* Liu & Zhang, *supra* note 2.
[24] *See* Liu, *supra* note 15.
[25] *See* Setser, *supra* note 10.

This is not to say that lawyers in the first Trump administration were uncreative in their use of tariff authorities. Then-President Trump dusted off tools that had not been used in some cases for decades.[26] But the current administration had largely bypassed much of the statutory and administrative processes present in other authorities that would theoretically slow, or even limit, presidential tariff actions.

This novel use of IEEPA generated a raft of litigation. At the trial level, at least two cases resulted in decisions holding the IEEPA tariffs illegal.[27] In one of them, *V.O.S. Selections, Inc. v. Trump*, the U.S. Court of Appeals for the Federal Circuit then held on an expedited appeal that the tariffs exceeded the President's authority under IEEPA.[28] The Trump administration petitioned for a writ of certiorari to the Supreme Court, which agreed to hear the case, again on an accelerated timeline.[29] Oral arguments occurred on November 5, 2025,[30] and the Court issued its decision on February 20, 2026. Although splintered, a majority of six Justices agreed that "IEEPA does not authorize the President to impose tariffs."[31]

Despite the Court's invalidation of the IEEPA tariffs, this Essay argues that such a decision will not portend the end of the President's tariff regime. First, there is nothing to suggest that President Trump has soured on tariffs as a matter of policy. Whether as a means of reciprocity, raising revenue, negotiating new trade agreements, or boosting domestic manufacturing, the administration continues to tout their supposed benefits.[32] Reasonable minds

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[26] *See* Liu, *supra* note 15.

[27] V.O.S. Selections, Inc. v. United States, 772 F.Supp. 3d 1350 (Ct. Int'l Trade 2025); Learning Resources, Inc. v. Trump, 784 F.Supp. 3d 209 (D.D.C. 2025).

[28] 149 F.4th 1312 (Fed. Cir. 2025).

[29] *See* Ann E. Marimow & Adam Liptak, *Supreme Court Agrees to Review Trump's Sprawling Tariffs*, N.Y. TIMES (Sept. 9, 2025), https://www.nytimes.com/2025/09/09/us/politics/trump-tariffs-supreme-court.html. At the Supreme Court, *V.O.S. Selections, Inc.* was consolidated with *Learning Resources, Inc. v. Trump*. Although the latter was dismissed for lack of jurisdiction, because it is listed first in the Court's opinion, I refer to the tariffs case throughout this Essay as "*Learning Resources*."

[30] *Supreme Court Appears Skeptical of Trump's Tariffs*, WALL ST. J. (Nov. 5, 2025), https://www.wsj.com/livecoverage/supreme-court-tariffs-case-stock-market-11-05-2025 [https://perma.cc/NA3N-HS3N]; *Highlights of the Supreme Court Arguments on Trump's Tariffs*, N.Y. TIMES (Nov. 5, 2025), https://www.nytimes.com/live/2025/11/05/us/trump-tariffs-supreme-court [https://perma.cc/Z2CY-ZQ3J].

[31] Learning Resources, Inc. v. Trump, No. 24-1287, slip op. at 20 (Feb. 20, 2026); *see also* Learning Resources, Inc. v. Trump, No.24-1287, slip op. at 1 (Feb. 20, 2026) (Kagan, J., concurring) (agreeing with the conclusion that IEEPA "does not authorize the President to impose tariffs.").

[32] *See* Liu & Zhang, *supra* note 2.

can differ on whether tariffs can achieve any—let alone all—of these goals or whether short-term gains justify potential long-term consequences. Critical to this Essay, however, is that *the administration* believes that tariffs should play an important role in U.S. economic policy. And we should not expect this interest in tariffs to be fleeting, especially given their popularity even during previous administrations.

Second, there are numerous non-IEEPA legal authorities that the administration can mobilize to continue expanding tariffs. Indeed, some trade law experts have already at least noted their existence.[33] Leading up to the Court's decision, the Trump administration itself had increasingly acknowledged the possibility of employing them if the IEEPA tariffs were deemed illegal.[34] And shortly after receiving news of the adverse decision, President Trump quickly asserted that he will employ alternative authorities to continue his tariff agenda.[35] Given that tariffs will remain popular and legally possible, Part II takes a closer look at these alternative legal authorities.

II. Non-IEEPA Tariff Toolkit

Part II introduces various domestic statutes that might underpin a non-IEEPA tariff regime: (1) Section 232 national security trade actions, (2) Section 301 retaliatory trade actions, (3) Section 201 safeguards, (4) antidumping and countervailing duties (AD/CVDs), (5) Section 122 balance of payments actions, and (6) Section 338 discriminatory act duties. In anticipation of the considerations described in Part III, I discuss not only the text of the statute, but also the actors involved, the tariff decisionmaking process, and previous or ongoing use of this authority by the Trump administration. I order my discussion of the tools from those that recent presidential administrations have wielded most often to the least. It is also worth noting at the outset that although each statute delegates certain tariff powers to the executive, that authority originates from and can thus ultimately be reclaimed in whole or in part by Congress.[36]

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[33] *See supra* note 14 and accompanying text.
[34] *See supra* note 11 and accompanying text.
[35] *See* Romm & Swanson, *supra* note 12.
[36] U.S. CONST. art. I, § 8.

a. National Security Trade Actions (Section 232)

Section 232 of the Trade Expansion Act of 1962 allows for the adjustment of imports of products that are found to be a threat to national security.[37] Unlike tariffs imposed under IEEPA, Section 232 tariffs follow some amount of statutorily required administrative process. Accordingly, they require investigations that bring in actors beyond the President.

The Section 232 tariff process begins with the initiation of an investigation by the Secretary of Commerce—a cabinet official—upon "request of the head of any department or agency, upon application of an interested party, or upon his own motion."[38] Following initiation, the Secretary investigates the national security effects of the relevant products, in consultation with the Secretary of Defense and other officers.[39] In addition to inter-agency consultation, the statute states the Secretary shall "hold public hearings or otherwise afford interested parties an opportunity to present information and advice" if appropriate and with reasonable notice.[40] Although the statute formally tasks the Secretary of Commerce with leading the investigation, investigations are presently administered by the department's Bureau of Industry and Security.[41]

Section 232 investigations are usually completed within 270 days of initiation. At that time, Commerce submits a report detailing its findings and any recommendations to the President.[42] If Commerce makes an affirmative determination, the President has ninety days to take action.[43] The President has discretion as to both "the nature and duration of the action,"[44] though the statute does ask Commerce and the President to consider domestic production capabilities and the impact of trade restrictions on the economy.[45] The President then submits to Congress a statement of reasons behind the decision.[46] Commerce has sometimes implemented processes for applying for

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[37] 19 U.S.C. § 1862 (2024).
[38] *Id.* § 1862(b).
[39] *Id.*
[40] *Id.*
[41] *See Section 232 Investigations: The Effects of Imports on the National Security*, BUREAU INDUS. & SEC., https://www.bis.gov/about-bis/bis-leadership-and-offices/SIES/section-232-investigations [https://perma.cc/DB9C-33AD].
[42] 19 U.S.C. § 1862(b)(3)(A).
[43] *Id.* § 1862(c)(1).
[44] *Id.* § 1862(c)(1)(ii).
[45] *Id.* § 1862(d).
[46] *Id.* § 1862(c)(2). The statute does state that Congress can block the President's action if it concerns imports of petroleum or petroleum products, a disapproval provision that some argue

Section 232 tariff exclusions (or inclusions), though they are not mandated by statute and thus subject to the administration's discretion.[47]

The use of Section 232 tariffs has increased significantly in recent years. Although there were 26 initiated Section 232 national security investigations between 1963 and 1986, the statute laid dormant until April 2017, when the then-Trump administration self-initiated investigations into imported steel and aluminum.[48] Between 2017 and the Court's decision in *Learning Resources*, there had already been 21 initiated Section 232 investigations, of which seventeen were self-initiated by Commerce.[49] And of those, twelve were initiated during the first year of President Trump's second term, all self-initiated. Recent and ongoing investigations are examining the national security effects of various imports, including robotics and industrial machinery, wind turbines, semiconductors, and pharmaceuticals.[50]

b. Retaliatory Trade Actions (Section 301)

Section 301 of the Trade Act of 1974 permits trade actions against foreign acts, policies, or practices that violate U.S. trade agreements or are unjustifiable and burden U.S. commerce.[51] Like Section 232 national security tariffs, Section 301 actions are taken pursuant to some amount of

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could serve as a model for an expanded disapproval resolution procedure. *See* Scott Lincicome & Inu Manak, *Protectionism or National Security? The Use and Abuse of Section 232*, CATO INST. (Mar. 9, 2021), https://www.cato.org/policy-analysis/protectionism-or-national-security-use-abuse-section-232 [https://perma.cc/7KPS-8XW2] (discussing but ultimately disagreeing with the proposals given the tendency towards congressional inaction). It is unlikely, however, that such a provision would be enforceable given the Supreme Court's invalidation of the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983).

[47] *See* Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46,026 (Sept. 11, 2018); *The US Will Expand Existing Section 232 'National Security' Duties on Imports of Steel and Aluminum Products Effective March 12, 2025*, BAKERHOSTETLER (Feb. 14, 2025), https://www.bakerlaw.com/insights/the-us-will-expand-existing-section-232-national-security-duties-on-imports-of-steel-and-aluminum-products-effective-march-12-2025 [https://perma.cc/3AMB-NXQM].

[48] *See* RACHEL F. FEFER, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2022) (Section 232 numbers), https://crsreports.congress.gov/product/pdf/IF/IF10667 [https://perma.cc/2VAF-32XE].

[49] *See Section 232 Investigations*, *supra* note 41. Note that this list does not include the initiated investigation into mobile cranes because that investigation was terminated prior to completion. Notice of Termination National Security Investigation of Imports of Mobile Cranes, 85 Fed. Reg. 82,436 (Dec. 18, 2020).

[50] *See Section 232 Investigations*, *supra* note 41.

[51] 19 U.S.C. § 2411(a)(1) (2024).

administrative process. The primary actors and issues under investigation differ, however.

Section 301 retaliatory trade investigations can be self-initiated by the United States Trade Representative (USTR)—an agency located in the Executive Office of the President—or initiated by the USTR upon petition by "any interested person."[52] Within the USTR, investigations are conducted by the Section 301 Committee, a staff-level body of the interagency Trade Policy Staff Committee.[53] On the date of initiation, the USTR "shall request consultations with the foreign country concerned regarding the issues involved in such investigation."[54] The USTR is also tasked with publishing a summary of the petition in the Federal Register and "shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing."[55]

Section 301 investigations not involving trade agreements are usually completed within a year and culminate in a determination on what retaliatory action, if any, to take.[56] Such actions include imposing duties or other import restrictions, withdrawing or suspending trade agreement concessions, or entering into a binding agreement with the foreign government to address the challenged conduct.[57] Prior to a determination, the statute again requires consultations, including an opportunity "for the presentation of views by interested persons."[58] Although Section 301 actions are targeted at a specific country's practices, they need not be targeted at specific imports. For example, in response to a 2017 Section 301 investigation against Chinese forced technology transfers, the USTR in part proposed tariffs on imports ranging from vaccines to tires to pump parts.[59]

After its determination, the USTR should act within thirty days, though the statute also specifies that any action is "subject to the specific direction, if

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[52] *Id.* § 2412(a), (b).
[53] ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974, 1 (May 13, 2024), https://crsreports.congress.gov/product/pdf/IF/IF11346 [https://perma.cc/7EDU-7RZ9].
[54] 19 U.S.C. § 2413(a)(1).
[55] *Id.* § 2412(a)(4).
[56] *Id.* § 2414(a).
[57] *Id.* § 2411(c).
[58] *Id.* § 2414(b)(1)(A).
[59] Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906 (Apr. 6, 2018).

any, of the President."[60] A Section 301 trade action stays in place until the USTR decides to modify or terminate it, again subject to presidential direction and public input.[61] The action should, however, expire after four years unless the domestic industry benefitting from the action seeks and receives from the USTR a continuation.[62] The USTR is also expected to keep Congress apprised of Section 301 investigation developments semiannually.[63] Similar to Section 232 actions, the USTR has sometimes established a Section 301 tariff exclusion process, but they are similarly not mandated by statute.[64]

Section 301 investigations had become relatively uncommon until the beginning of the first Trump administration.[65] Since 2017 until *Learning Resources*, however, there have been twelve initiated Section 301 investigations.[66] Two were initiated during the first year of the second Trump administration, both self-initiated by the USTR "[i]n accordance with the specific direction of the President."[67] These investigations respectively target China's implementation of its commitments under the January 2020 Phase One Agreement and various Brazilian practices.

c. Global Safeguard Measures (Section 201)

Section 201 of the Trade Act of 1974 governs safeguard measures, which are imposed on imports entering at such increased quantities that they are a "substantial cause" of "serious" injury, or the threat thereof, to a domestic

[60] 19 U.S.C. § 2415(a)(1).
[61] *Id.* § 2417(a).
[62] *Id.* § 2417(c).
[63] *Id.* § 2419.
[64] *See, e.g.*, Procedures To Consider Requests for Exclusion of Particular Products From the Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 32,181 (July 11, 2018).
[65] ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., R46604, SECTION 301 OF THE TRADE ACT OF 1974: ORIGIN, EVOLUTION, AND USE 8 (Dec. 14, 2020), https://crsreports.congress.gov/product/pdf/R/R46604 [https://perma.cc/8BJQ-HBZA]
[66] *See Section 301 Investigations*, OFF. U.S. TRADE REP., https://ustr.gov/issue-areas/enforcement/section-301-investigations [https://perma.cc/YW4S-A4AV].
[67] *See* Initiation of Section 301 Investigation: Brazil's Acts, Policies, and Practices Related to Digital Trade and Electronic Payment Services; Unfair, Preferential Tariffs; Anti-Corruption Enforcement; Intellectual Property Protection; Ethanol Market Access; and Illegal Deforestation, 90 Fed. Reg. 34,069 (July 18, 2025); Initiation of Section 301 Investigation: China's Implementation of Commitments Under the Phase One Agreement; Notice of Hearing; and Request for Public Comments, 90 Fed. Reg. 48,733 (Oct. 28, 2025).

industry.[68] Section 201 safeguards are also referred to as "global" safeguards because they apply to the targeted import regardless of country of origin. Although the statute does leave the President with discretion as to whether and how to act, it too involves a relatively defined administrative process.

Section 201 safeguard investigations are conducted by the U.S. International Trade Commission (ITC), an independent bipartisan agency. They are typically initiated upon petition by a representative industry entity, though they can also be initiated by the President, the USTR, relevant congressional committees, or the ITC itself.[69] Usually within 180 days of the filing of the petition, the ITC makes an injury determination and transmits a report to the President with findings and recommendations.[70] In coming to this determination, the statute instructs the ITC to hold public hearings and also goes into greater detail on the specific factors that should be applied.[71]

Ordinarily within sixty days of receiving the ITC's determination and recommendation, the President has discretion to "take all appropriate and feasible action within his power" to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[72] The statute again identifies relevant factors, including the ITC's recommendation and report, domestic industry efforts, the probable effectiveness of any actions, economic benefits and costs, the national economic interest, the potential for retaliation, and national security.[73] Any increase in duty rate is capped at fifty percent.[74] Once in place, the President can reduce, modify, or terminate a safeguard action largely at his discretion.[75] He does not, however, have much flexibility as to duration. By statute, safeguards usually expire within four years and cannot exceed eight.[76] As with national security and retaliatory trade actions, the President is expected to keep Congress informed of his safeguard-related decisions.[77] Although the statute theoretically even permits Congress to disapprove of the President's

[68] 19 U.S.C. § 2251(a). Although Article XIX of the General Agreement on Tariffs and Trade and the WTO's Agreement on Safeguards also have rules governing this tool's use, this Essay focuses on the implementation of safeguards in U.S. domestic law.
[69] 19 U.S.C. § 2252(a), (b).
[70] *Id.* §§ 2252(b)(2)(A), (f)(1).
[71] *Id.* § 2252(c).
[72] *Id.* § 2253(a)(1)(B).
[73] *Id.* § 2253(a)(2).
[74] *Id.* § 2253(e)(2)
[75] *Id.* § 2254(b)(1); *see* Solar Energy Indus. Ass'n v. United States, 86 F.4th 885, 895–98 (Fed. Cir. 2023).
[76] 19 U.S.C. § 2253(e)(1).
[77] *Id.* §§ 2253(b), 2254(a).

decision via joint resolution,[78] that provision would likely run afoul of *INS v. Chadha* if enforced.[79]

As for their recent popularity, Section 201 has been mobilized less frequently than Section 232 and Section 301. Indeed, there have only been five initiated Section 201 safeguard investigations between the first Trump administration and this writing. Four were initiated by industry petition, with the one exception being a Trump 1.0 USTR-initiated investigation into blueberry imports that resulted in a no-injury determination by the ITC.[80] And the only investigation initiated thus far during President Trump's second term, a challenge of quartz imports, was triggered by industry petition.[81]

d. Antidumping and Countervailing Duties (AD/CVDs)

Title VII of the Tariff Act of 1930 governs the imposition of antidumping and countervailing duties.[82] The former are imposed on products that are sold at less than fair value such that they materially injure or threaten to materially injure a domestic industry.[83] The latter are imposed on imports receiving actionable government subsidies and are thus materially injuring or threatening to materially injure domestic industry.[84] Although the remedies concern different unfair trade practices, dumping versus subsidization, this Essay discusses them together because they have substantially similar processes and are often even sought simultaneously. AD/CVD investigations involve high amounts of administrative process and—as will be discussed more fully in Part III—leave the least amount of discretion to the President.

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[78] *Id.* § 2253(c).
[79] *See* Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1209 (1986) (assuming "that *Chadha* killed all legislative vetoes, including all those found in trade statutes"); Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law after the* Chadha *Case*, 79 AM. J. INT'L L. 912, 926 (1985) (noting that 19 U.S.C. § 2253(c) "both on its face and in practice, probably violated the rule in the *Chadha* case").
[80] *See* Fresh, Chilled, or Frozen Blueberries, Inv. No. TA-201-77, USTIC Pub. 5164 (Mar. 2021), https://www.usitc.gov/publications/safeguards/pub5164.pdf [https://perma.cc/A8RA-CE8S].
[81] Quartz Surface Products; Institution of Investigation, Scheduling of Public Hearings, and Determination That the Investigation Is Extraordinarily Complicated, 90 Fed. Reg. 55,165 (Dec. 1, 2025).
[82] Like safeguard measures, the WTO has agreements on members' use of antidumping and countervailing duty tools that will not be discussed here.
[83] 19 U.S.C. § 1673.
[84] *Id.* § 1671.

Administration of AD/CVD investigations is divided between the Department of Commerce and the ITC. The former determines whether a challenged import is being dumped or subsidized, the latter whether the alleged unfair trade practice has caused requisite injury.[85] Within Commerce, AD/CVD investigations are primarily conducted by the International Trade Administration's Enforcement and Compliance office.

AD/CVD investigations are almost always initiated following petitions brought on behalf of a domestic industry against specific products from certain countries, though they can also be self-initiated by Commerce.[86] When a petition is filed, Commerce determines whether the petition properly alleges the necessary elements while the ITC makes a preliminary injury determination.[87] Commerce then investigates and issues a preliminary dumping or subsidization determination, which is when import duties begin to be assessed. The two agencies then continue their respective investigations and issue separate final determinations. Final antidumping determinations are usually issued by 280 days of the filing of the petition, and final countervailing duty determinations by 205 days.[88] If both are affirmative, Commerce issues an AD/CVD order within a week of the ITC's final determination. The AD/CVD laws define in detail the factors to be considered by the investigating agencies in coming to their determinations.[89] Also notably, the duty rates are calculated by the agencies, agency determinations are not reviewed by the President, and orders must be issued in accordance with the agencies' decisions.

Once an AD/CVD order is in place, an interested party may petition for an annual administrative review by Commerce to determine whether to adjust the duty rate[90] or a changed circumstances review by the agencies to determine whether a revocation of the order is warranted.[91] Every five years, AD/CVD

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[85] *See* Jay Charles Campbell, *The Trade Litigant's Gauntlet: The Hanging Judge and the Teflon Tribunal*, 31 NW. J. INT'L L. & BUS. 1, 4, 37 (2011).
[86] 19 U.S.C. §§ 1673a, 1671a.
[87] *Id.* §§ 1673b(a), 1671b(a).
[88] *Statutory Time Frame for Antidumping Duty Investigations*, INT'L TRADE ADMIN., https://www.trade.gov/statutory-time-frame-AD/CVD-investigations?anchor=content-node-t7-field-lp-region-2-1 [https://perma.cc/LNE2-H7AN]; *Statutory Time Frame for Countervailing Duty Investigations* INT'L TRADE ADMIN., https://www.trade.gov/statutory-time-frame-AD/CVD-investigations?anchor=content-node-t7-field-lp-region-2-2 [https://perma.cc/WA7D-D4ZC].
[89] 19 U.S.C. § 1677.
[90] 19 C.F.R. § 351.213 (2025); *see* James M. DeVault, *U.S. Antidumping Administrative Reviews*, 10 INTL. TRADE J. 247, 249 (1996).
[91] 19 U.S.C. § 1675(b).

orders are also subject to a sunset review, during which Commerce determines whether dumping would likely continue if an order were revoked and the ITC determines if injury would likely continue.[92] If Commerce or an interested party believes that an AD/CVD order is being circumvented, they can seek to adjust the existing order.[93] The regulations governing circumvention leave the investigation primarily to Commerce and place the ITC in a mostly consultative role.[94] Again, however, it is worth emphasizing that such decisions to modify and terminate AD/CVD orders are made pursuant to agency investigations in accordance with statutes and regulations.

The AD/CVD laws have and continue to be the most frequently mobilized tariff authority.[95] Indeed, between government fiscal years 2002 and 2024, 733 antidumping and 348 countervailing duty investigations were initiated.[96] Of those, only two were self-initiated by Commerce, however—a simultaneously filed AD/CVD investigation into aluminum extrusions from China. Since the beginning of the second Trump administration, AD/CVD filings have remained high, and I am unaware of any additional self-initiated investigations as of this writing.[97]

e. Balance of Payments Actions (Section 122)

Section 122 of the Trade Act of 1974 permits the imposition of duties in response to "fundamental international payments problems," including "serious United States balance-of-payments deficits."[98] Unlike other statutory authorities discussed in this Essay, Section 122 does not describe an administrative process or refer to an administrative agency. Rather, the law allows the President to impose tariffs or quotas pursuant to presidential proclamation.[99] The law does cap tariff surcharges to fifteen percent, describes applications that are consistent with nondiscriminatory treatment, and stresses

[92] *Id.* §1675(c); 19 C.F.R. § 351.218.
[93] 19 C.F.R. § 351.226(b), (c).
[94] 19 U.S.C. § 1677j; 19 C.F.R. § 351.226(f)(8).
[95] *See* Liu, *supra* note 15.
[96] *Id.*
[97] On the high rate of filings, see Zachary Walker, Dan Stirk & Caitlyn Quinn, *Number of New Antidumping and Countervailing Duty Petitions Remains High in Fiscal Year 2025*, PICARD KENTZ & ROWE (Nov. 19, 2025), https://pkrllp.com/news-insights/number-of-new-antidumping-and-countervailing-duty-petitions-remains-high-in-fiscal-year-2025 [https://perma.cc/3VGN-FEFJ].
[98] 19 U.S.C. § 2132(a).
[99] *Id.*

the temporary nature of this remedy—limiting any actions to 150 days.[100] At the same time, the statute grants the President authority to exempt certain countries from trade actions if he determines that this best serves the purposes of Section 122, and Congress can seemingly extend the duration of any trade action beyond the 150-day limit.[101]

Similar to IEEPA, tariffs had never been imposed under Section 122 prior to the second Trump administration. In anticipation of the Supreme Court's ruling, commentators and practitioners had already begun to identify its potential applications, however,[102] with current officials also increasingly referencing the provision in public discussions of a non-IEEPA plan B.[103] And on the night of the Court's decision in *Learning Resources*, the President issued a proclamation pursuant to Section 122 to impose a global ten percent tariff that would go into effect just three-plus days later.[104]

f. Discriminatory Act Duties (Section 338)

Section 338 of the Tariff Act of 1930 empowers the President to impose trade restrictions on a country that "discriminates in fact" against U.S. commerce by placing it "at a disadvantage compared with the commerce of any foreign country."[105] Unlike the previous authorities, Section 338 has not been mobilized by recent administrations. Outside of brief references by

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[100] *Id.* § 2132(a)(3)(A).
[101] *Id.* § 2132(a), (d).
[102] *See, e.g.*, Packard & Lincicome, *supra* note 14; Murayama, Galvin & Reinsch, *supra* note 14; ZIRPOLI, *supra* note 14; *Trade Deficits Could Trigger Tariffs Under U.S Law*, SANDLER, TRAVIS & ROSENBERG (Dec. 10, 2024), https://www.strtrade.com/trade-news-resources/str-trade-report/trade-report/december/trade-deficits-could-trigger-tariffs-under-u-s-law [https://perma.cc/RP6Z-RUXV].
[103] *See, e.g.*, Swanson, *supra* note 11; Bade & Mackrael, *supra* note 11.
[104] *Imposing a Temporary Import Surcharge to Address Fundamental International Payments Problems*, WHITE HOUSE (Feb. 20, 2026), https://www.whitehouse.gov/presidential-actions/2026/02/imposing-a-temporary-import-surcharge-to-address-fundamental-international-payments-problems. A day after the Court's decision, the President announced his intention to raise the duty rate to the maximum 15 percent, though it remains unclear as of this writing whether and when a formal order will be promulgated. *See* Ana Swanson & Tony Romm, *Fresh Off a Supreme Court Loss, Trump Could Face New Challenges on Tariffs*, N.Y. TIMES (Feb. 24, 2026), https://www.nytimes.com/2026/02/24/us/politics/trump-tariffs-new-legal-challenges.html [https://perma.cc/F4KK-FXPV].
[105] 19 U.S.C. § 1338(a)(2).

current administration officials,[106] there had been limited to no discussion of this tool in the public record since 1949.[107]

Although the Trump administration has demonstrated that past practice need not necessarily guide future use, I nonetheless hesitate to draw firm conclusions about how the statute would be applied today. Such hesitation notwithstanding, statutory text and historical practice serve as instructive guideposts. On the one hand, the statute clearly leaves the President with discretion to determine whether a trade action is appropriate and the form that action takes. It also allows the President to act via proclamation and does not require any consultations with Congress. Nor does the statute offer guidance on modification or termination of any actions.

On the other hand, if the President chooses to increase import duties, the statute caps them at fifty percent.[108] And although the statute does not describe the details of any administrative process, its language does suggest some investigative role for the ITC. Namely, it tasks the ITC to "ascertain and at all times to be informed" whether any countries are engaged in discriminatory acts and to "bring the matter to the attention of the President, together with recommendations."[109] Discussions in annual reports from the 1930s by the then-Tariff Commission suggest that Section 338 investigations were sometimes even triggered by private petition, though such petitions were not made public and hearings seemingly not held.[110] The historical record also indicates that the statutory provision was used as a bargaining chip with trading partners up until the mid-twentieth century, though it appears that no President has ever imposed trade restrictions under Section 338.[111]

III. Mobilization Considerations

Equipped with an understanding of different non-IEEPA tariff tools and their historical use, Part III presents considerations that might affect an administration's mobilization of these tools. Although predicting the moves of a mercurial President is difficult, an appreciation of the differences among

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[106] *See, e.g.*, Swanson, *supra* note 11; Bade, *supra* note 11.
[107] John Veroneau & Catherine Gibson, *The President's Long-Forgotten Power To Raise Tariffs*, LAW360 (Dec. 14, 2016), https://www.cov.com/en/news-and-insights/insights/2016/12/the-presidents-long-forgotten-power-to-raise-tariffs [https://perma.cc/S779-C4PA].
[108] 19 U.S.C. § 1338(d), (e).
[109] *Id.* § 1338(g).
[110] *See* Veroneau & Gibson, *supra* note 107.
[111] *Id.*; Packard & Lincicome, *supra* note 14.

these laws will enhance understanding of future actions. Additionally, those calling for reforms to the statutory scheme will benefit from grasping the nuances within existing laws. Below, I focus on five relevant considerations: (1) who primarily initiates any tariff-setting process, (2) that process's level of insulation from presidential discretion, the (3) scope and (4) expected duration of resulting trade actions, and (5) their potential vulnerability to legal challenge.

a. Initiator

A comparison of the non-IEEPA tools available first reveals differences in who typically initiates the tariff-setting process. Although all the tools allow for self-initiation by the President or his administration, in practice most have been initiated via petition by nonstate actors.

At one extreme is the AD/CVD tool. As discussed, of the 1,081 total initiated AD/CVD investigations between fiscal years 2002 and 2024, only two were self-initiated by Commerce. And even that investigation relied on a petition drafted by private industry and their lawyers.[112] This low rate of self-initiation is notable given the first Trump administration's emphasis on increased top-down AD/CVD enforcement.[113] Similarly, Section 201 safeguard investigations are usually triggered via private petition. The one twenty-first century example of a self-initiated global safeguard investigation again came during the first Trump administration. There, the USTR initiated an investigation into fresh, chilled, or frozen blueberry imports but failed to receive an affirmative injury determination from the ITC, ending safeguard efforts.[114]

At the other extreme are tools that have or would likely be mobilized by the President himself. President Trump's IEEPA tariffs, for instance, began with executive orders declaring national emergencies that then served as the bases for tariffs.[115] Similarly, the Section 122 trade action announced by President Trump on February 20, 2026, need not involve an agency investigation or consultations and was quickly imposed following presidential proclamation.[116]

Between these extremes are tools with a historical mix of initiators. Prior to the establishment of the WTO in 1995, Section 301 investigations were

[112] Liu, *supra* note 15.
[113] *Id.*
[114] Fresh, Chilled, or Frozen Blueberries, *supra* note 80.
[115] *See supra* note 7 and accompanying text.
[116] *See* WHITE HOUSE, *supra* note 104.

primarily triggered by private petition. Between 1995 and 2020, however, the USTR self-initiated 74 percent of investigations.[117] For the most part, that trend continues. Beginning with the Section 301 investigation into China's technology transfer practices initiated in 2017, the USTR has self-initiated ten of the last dozen investigations prior to *Learning Resources*. The only exceptions were an investigation into Chinese shipbuilding practices triggered by petition from a coalition of unions and a petition against Chinese fentanyl that was withdrawn after the reelection of President Trump.[118]

Section 232 national security investigations have, perhaps unexpectedly, also involved private petitioners. During the first Trump and Biden administrations, four of nine national security investigations were initiated by petition.[119] And another Commerce-initiated investigation came after requests to investigate by congresspeople and domestic producers.[120] That said, the pattern has shifted dramatically with the second Trump administration, which has self-initiated all twelve of its Section 232 investigations in 2025.

Where Section 338 would fall is at this point less clear. On the one hand, private actors did historically file petitions.[121] On the other hand, there have been no Section 338 investigations since the 1930s and no available precedents for would-be petitioners to draw on.[122] Moreover, mentions of Section 338 by current officials suggest that the administration sees it as a tool ripe for self-initiation.

b. Insulation from Presidential Decisionmaking

Another difference among the statutes is the insulation of any potential decisionmaking process from direct presidential involvement. As with initiators, the statutes and practice outline a range of possibilities.

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[117] SCHWARZENBERG, *supra* note 65, at 8.
[118] LABOR UNIONS REQUEST SECTION 301 INVESTIGATION OF CHINA'S SHIPBUILDING AND MARITIME POLICIES (2024), https://www.congress.gov/crs-product/IN12338 [https://perma.cc/KZT6-M2AW]; Richard P. Ferrin, Carrie Bethea Connolly & Morgan Alexis Howard, *Section 301 Petition Pulled, But Tariffs Still on the Horizon: Facing Fentanyl's Petition Is Withdrawn*, FAEGRE DRINKER (Dec. 5, 2024), https://www.faegredrinker.com/en/insights/publications/2024/12/section-301-petition-pulled-but-tariffs-still-on-the-horizon [https://perma.cc/L5XV-8V27].
[119] Liu, *supra* note 15.
[120] *Id.*
[121] *See* Veroneau & Gibson, *supra* note 107.
[122] *Id.*

Section 122 again occupies one end of the spectrum. The statute seems to solely empower the President to determine whether international payments problems require special import measures. Indeed, it does not specify a role for Congress, administrative agencies, or the public. Nor does it identify external processes or factors that the President should consider. The President can also unilaterally suspend, modify, or terminate his proclamation.[123] Section 122 thus provides no distance between the President and the trade action.

The AD/CVD tool, by contrast, is much more insulated. First, the President is not directly involved in the decisionmaking process. Once Commerce and the ITC make affirmative determinations, duties are automatically imposed. These agencies also enjoy a relatively high amount of insulation in coming to those determinations. The ITC is an independent agency that consists of a bipartisan group of six commissioners who sit on staggered nine-year terms following Senate confirmation. Although Commerce is an executive agency, the staff who work on AD/CVD investigations have historically been career bureaucrats whose day-to-day decisions rely more on agency precedent than input from political appointees.[124] Related to this is the level of legalization of the AD/CVD process that comes with statutes, regulations, rules of practice, and norms that have been shaped through hundreds of cases across many decades.

Investigations under Section 201, Section 232, or Section 301 all involve more presidential involvement than AD/CVDs, but less than Section 122. Section 301 is arguably the least insulated of the three. Although Section 301 investigations are often initiated and conducted by the USTR, that agency is housed within the Executive Office of the President and is traditionally viewed as "the President's principal trade advisor and trade 'spokesman.'"[125] The statute also emphasizes that any actions or subsequent modifications and terminations are "subject to the specific direction, if any, of the President."[126]

Whereas presidential involvement likely appears throughout Section 301 investigations, that is perhaps tempered in Section 232 and Section 201 investigations by their bifurcated processes. In both, the President has ultimate discretion over any action taken, but that discretion does not formally come into play until after the completion of agency investigations. For Section 201 investigations, the ITC first determines whether there is requisite injury to

[123] 19 U.S.C. § 2132(g) (2024).
[124] *See* Liu, *supra* note 15.
[125] *See* Claussen, *supra* note 15, at 876–81 (describing the rise of the USTR as a "trade super-agency").
[126] 19 U.S.C. § 2415(a)(1).

domestic industry. If it finds none, as it did in the discussed blueberries case, the President does not have an opportunity to impose safeguards.

Similarly, with Section 232 investigations, Commerce first determines whether there is a national security threat. Although we might reasonably expect Commerce's investigation to be more affected by the President, especially given the Bureau of Industry and Security's national security focus, an affirmative agency decision is not a given. Even during the first Trump administration, Commerce determined that vanadium imports did not pose a national security threat, albeit in an investigation initiated by petition.[127] Whether that would occur in self-initiated investigations or during the second Trump administration remains to be seen. But it does suggest that agencies and their investigations need not be trivial, especially when compared to tools that lack any separation between the trade action and the President.

Because of the lack of recent precedents, Section 338 presents more of an unknown. However, we might reasonably expect or call for presidential insulation that resembles Section 201 safeguard investigations. Namely, Section 338 cases could theoretically involve an investigation conducted by the ITC, recommendations from the ITC, and the President's engagement with those recommendations.

c. Scope

An additional consideration is the scope of non-IEEPA trade tools. Scope refers here to the countries and products affected by a trade action. IEEPA was notable for its widespread application to almost any product from any trading partner. Section 122 is similar in that it can—and arguably should considering its nondiscriminatory principle—be applied to almost any import from any country.

The tool with the narrowest scope is AD/CVDs. Each AD/CVD order is targeted at specific products from a single country. Although the investigator's initiator controls the definition of the relevant product, the petitioner does not always benefit from broadening the definition to include as many imports as possible. Because AD/CVDs require a nexus between the targeted imports and alleged injury, petitioners try not to define the product so broadly that injury can no longer be established.[128] The relatively narrow

[127] Publication of a Report on the Effect of Imports of Vanadium on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 86 Fed. Reg. 64,748, 64,754 (Nov. 18, 2021).
[128] *See* Liu, *supra* note 15.

application of AD/CVDs also contributes to the so-called "whack-a-mole" problem, wherein the import at issue might move from one country to another.

Other non-IEEPA tools target either specific products or specific countries. Section 201 safeguards and Section 232 national security measures apply to specific products coming from any country. Like AD/CVDs, safeguards and national security actions require some careful consideration of how to define the import at issue, but they need not worry about whether an import's country of origin changes. Because Section 201 investigations also require a connection between imports and injury whereas Section 232 investigations involve a vaguer threat determination, the latter is arguably broader in scope.

Section 301 investigations, on the other hand, are directed against the acts, policies, or practices of specific countries. Given the statute's emphasis on changing certain state behaviors rather than merely slowing imports, Section 301 tariffs can be applied to a wider range of products. As discussed, the Section 301 investigation against Chinese IP practices initiated by the first Trump administration initially resulted in duties on goods like vaccines, tires, and pump parts.[129] Section 301 also allows for creativity in crafting remedies beyond duties, as illustrated by the use of port fees in response to supposedly discriminatory Chinese shipbuilding practices. Although we do not have examples of recent Section 338 trade actions, the similarities to Section 301 suggest that we could expect actions of comparable scope and creativity.

d. Duration

Non-IEEPA trade tools also differ in meaningful ways as to expected duration of the remedy. Although AD/CVD orders are subject to sunset reviews every five years, and potentially to annual administrative reviews or changed circumstances reviews, they tend to stay on the books for much longer. As I document in detail elsewhere, one of the main reasons lawyers advise their clients to pursue AD/CVDs over other potential tools is the expectation that these orders will last for at least ten years, if not decades.[130]

A number of other tools, however, have statutorily defined time limits. Section 201 safeguards are expected to expire within four years and must expire within eight.[131] Actions taken pursuant to Section 122 last for only 150

[129] *See* 83 Fed. Reg. 14,906 (Apr. 6, 2018).
[130] *See* Liu, *supra* note 15.
[131] 19 U.S.C. § 2253(e)(1) (2024).

days without extensions by Congress.[132] And though the administration has wide latitude to modify Section 301 actions,[133] such actions end after four years unless the USTR receives and grants a continuation request by the domestic industry benefitting from the 301s.[134]

Section 232 and Section 338 do not specify the duration of potential trade actions. Silence leaves the President and his administration with significant discretion in continuing, modifying, or terminating actions taken under these authorities.[135]

Although presidential discretion adds volatility that might frustrate industries or consumers that prefer certainty,[136] it does give an administration additional trade policy levers—especially when negotiating with other countries. Indeed, the second Trump administration has already modified and suspended threatened actions multiple times. For example, the administration has delayed or paused Section 301 port fees on Chinese ships throughout the course of ongoing bilateral negotiations.[137] And during the first Trump presidency, his administration sometimes set up processes to exclude certain imports from Section 232 and Section 301 tariffs.[138]

e. Vulnerability to Legal Challenge

This section assesses the non-IEEPA authorities' potential vulnerability to challenge in federal court. It begins with a discussion of relevant case law concerning the statutes with some amount of explicit presidential involvement: Section 201, Section 232, Section 301, Section 122, and Section 338. It then separately discusses judicial review of AD/CVD determinations.

Like existing scholarship, I suggest that the more President-driven authorities are likely more resilient to litigation.[139] Although these statutes do

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[132] *Id.* § 2132(a)(3)(A).
[133] *Id.* § 2417(a).
[134] *Id.* § 2417(c).
[135] *See* USP Holdings, Inc. v. United States, 36 F.4th 1359, 1370–71 (Fed. Cir. 2022) (holding in a Section 232 case that the statute grants the President the authority to impose a tariff indefinitely and remove it when deemed necessary).
[136] *See* Liu, *supra* note 15 (discussing industry frustration with the ability of the President to modify Section 232, Section 301, and even Section 201 trade actions).
[137] *See* Peter Eavis, *Halt in Fees on Chinese Vessels Endangers U.S. Shipbuilding Efforts*, N.Y. TIMES (Nov. 11, 2025), https://www.nytimes.com/2025/11/11/business/commercial-shipbuilding-us-china.html [https://perma.cc/VS4C-6GCE].
[138] *See supra* notes 47, 64 and accompanying text.
[139] *See, e.g.*, Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PA. L. REV. 1955, 1958 (2024) (noting that in lawsuits probing at the origins,

not include judicial review provisions, colorable legal challenges can be brought under the Court of International Trade's residual jurisdiction.[140] In reviewing such challenges, the courts have consistently emphasized their limited role in international trade disputes involving discretionary decisions by the President.[141] For asserted statutory violations, the courts only set aside presidential action when it involves "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority."[142] Because those circumstances are "limited," "such relief is only rarely available."[143] And they decline to review presidential findings of fact or motivations altogether.[144]

Although much of this doctrine was developed in cases concerning Section 201 safeguards,[145] the Federal Circuit has extended it to litigation of Section 232 national security actions—which also have an agency determination followed by presidential action.[146] Given the potential two-stage process alluded to in Section 338, we should expect the same scope of review for any future discriminatory act challenges. Assuming that the use of Section 122 continues to resemble President Trump's IEEPA actions, the courts would likely adopt a similar restricted scope of review in those cases.[147]

In cases challenging agency—rather than presidential—action, the Administrative Procedure Act (APA)'s seemingly broader standard of review applies.[148] For a tool like Section 301, where actions taken by the USTR are nonetheless subject to direction by the President, the line between presidential versus agency action is arguably difficult to discern. So far, the Federal Circuit has adopted a formalist approach. In *HMTX Industries v. United States*, the court rejected the government's assertions that modifications to a Section 301

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scope, and exercise of delegated foreign commerce powers, courts have "usually upheld the challenged action").

[140] 28 U.S.C. § 1581(i).

[141] *See, e.g.*, Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89–90 (Fed Cir. 1985); Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1346 (Fed. Cir. 2018); Solar Energy Indus. Ass'n v. United States, 86 F.4th 885, 895 (Fed. Cir. 2023).

[142] *Maple Leaf Fish Co,* 762 F.2d at 89.

[143] *Silfab Solar, Inc.*, 892 F.3d at 1346.

[144] *Maple Leaf Fish Co,* 762 F.2d at 89.

[145] *See supra* notes 141–144 and accompanying text.

[146] *See* PrimeSource Building Prods., Inc. v. United States, 59 F.4th 1255, 1260 (Fed. Cir. 2023) (citing *Maple Leaf Fish Co.*); USP Holdings, Inc. v. United States, 36 F.4th 1359, 1365 n.3 (Fed. Cir. 2022) (same).

[147] *See* V.O.S. Selections, Inc. v. United States, 772 F. Supp. 3d 1350, 1369–70 (Ct. Int'l Trade 2025) (discussing the scope of review and citing *Maple Leaf Fish Co.*).

[148] *See* HMTX Industries v. United States, 156 F.4th 1236, 1249 (Fed. Cir. 2025).

action are discretionary presidential decisions unreviewable under the APA, noting that Section 301 identifies the *agency* as the decisionmaker.[149]

We might therefore conclude that Section 301 actions are relatively less resilient to legal challenge, or perhaps that statutes with better-defined processes and limitations are more vulnerable than their underdefined (but not wholly undefined) counterparts. That said, I suggest adopting a more generalized conclusion: Courts have limited powers to set aside executive-driven trade actions. Even in *HMTX*, the Federal Circuit ultimately sustained the challenged Section 301 modifications after the USTR complied with a remand order instructing the agency to further explain how it assessed public comments.[150] And at least with regards to past challenges of executive action taken pursuant to Section 301, Section 201, or Section 232, courts have tended to side with the government.[151]

I anticipate that pending challenges of the President's Section 122 action will face a similar fate. Although claims that trade deficits do not constitute a true balance of payments issue are colorable,[152] relevant lower court precedent—including the decision not to examine whether the President's IEEPA tariffs were imposed pursuant to a true national emergency[153]—suggests that the judiciary will decline to set aside or even review that determination. A more promising open question for litigants, however, could be whether the President's broad exemptions for favored countries such as Costa Rica, Canada, or Mexico square with the narrower nondiscrimination exceptions provided for in the statute.[154]

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[149] *Id.* at 1249–50.
[150] *Id.* at 1242.
[151] Claussen & Meyer, *supra* note 139, at 1958; Joshua E. Kurland, *Dusting-Off Section 201: Re-Examining A Previously Dormant Trade Remedy*, 49 GEO. J. INT'L L. 609, 638 (2018) (describing the "[s]ubstantive aspects of the ITC's and the President's actions" as "essentially unreviewable" given the "very narrow scope for challenging a Section 201 determinations under U.S. domestic law").
[152] *See* Swanson & Romm, *supra* note 104.
[153] V.O.S. Selections, Inc. v. Trump, 149 F.4th 1132, 1330 (Fed. Cir. 2025) ("We are not addressing whether the President's actions should have been taken as a matter of policy."). *See also* Stratos Pahis, *This Is (Not) An Emergency: On Trump's "Reciprocal" Tariffs and the Judicial Decisions Declaring Them Illegal*, (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5333154 (describing this omission by the lower federal courts as a missed opportunity to decide the "key question" of whether the IEEPA tariffs rested on a proper emergency basis). Nor did the Court address this issue in *Learning Resources*.
[154] *Compare* 19 U.S.C. § 2132(d) (describing the exceptions to nondiscriminatory treatment of import restricting actions taken pursuant to Section 122), *with* WHITE HOUSE, *supra* note 104,

Might the Supreme Court's decision in *Learning Resources* change this assessment? Despite the Court's invalidation of the President's IEEPA tariffs, that decision will likely have limited to no effect on the use of other President-driven authorities. Unlike IEEPA, there is no question that the described statutes delegate the authority to impose tariffs.[155] Moreover, given the procedural and substantive limitations present in alternative authorities—such as agency investigations, tariff hike ceilings, or expiration timelines—they cannot individually ground broad-sweeping "tariffs on imports from any country, of any product, at any rate, for any amount of time."[156]

Nor is it likely that the imposition of tariffs under the alternative authorities surveyed here would involve an improper delegation of legislative authority. First, with respect to IEEPA, the Court's majority disagreed on whether to even reach the question. Among the six Justices in the majority, only Chief Justice Roberts, Justice Barrett, and Justice Gorsuch concluded that the IEEPA tariffs violated the so-called major questions doctrine, wherein the Court hesitates to read "extraordinary delegations of Congress's powers" into ostensibly ambiguous statutes.[157] And even among the major-questions-interested Justices, there existed differences as to whether and how the doctrine ought to be applied.[158]

Second, even assuming that the IEEPA tariffs were a constitutionally suspect delegation of Congress's revenue-raising power, because non-IEEPA authorities explicitly grant and limit the power to impose tariffs, they do not raise similar concerns. In fact, the principal opinion listed multiple alternative tariff authorities as examples of seemingly constitutional delegations and in contrast to the Government's assertion that IEEPA "give[s] the President power to unilaterally impose unbounded tariffs."[159] Even Section 122, which is perhaps most similar to IEEPA, specifies the power to impose "a temporary

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at Annex I (providing exceptions for imports from certain countries with trade agreements with the United States).

[155] Learning Resources, Inc. v. Trump, No. 24-1287, slip op. at 14 (Feb. 20, 2026) ("[H]ad Congress intended to convey the distinct and extraordinary power to impose tariffs [in IEEPA], it would have done so expressly—as it consistently has in other tariff statutes.").

[156] *Id.* at 5; *see also id.* at 17 ("When Congress grants the power to impose tariffs, it does so clearly and with *careful constraints*." (emphasis added)).

[157] *Id.* at 7–13.

[158] *Learning Resources*, slip op. at 2 (Gorsuch, J., concurring) (identifying differences among the Justices on whether and how to apply the major questions doctrine).

[159] *Learning Resources*, slip op. at 8 (Feb. 20, 2026) (listing Section 338, Section 201, Section 122, and Section 301 as examples of when Congress has delegated its tariff powers "in explicit terms, and subject to strict limits").

import surcharge" and sets out clear limits on the duty rate and duration.[160] It is also worth noting that Section 232 and Section 301 have thus far survived delegation-related challenges in the lower courts.[161] And, although disagreement among the Justices on how the major questions or nondelegation doctrines ought to apply to statutes implicating foreign affairs suggests a live issue moving forward,[162] scholars have previously documented the growing tendency of the executive to claim Article II powers over foreign commerce and an accompanying tendency of the courts to acquiesce.[163]

The probable exception to the above discussion is again AD/CVDs. The AD/CVD statute includes judicial review provisions that specify the standards of review. In addition to being reviewed for their "accordance with law," affirmative agency determinations are reviewed for substantial evidence, whereas negative determinations are reviewed for arbitrariness, capriciousness, or abuse of discretion.[164] This, coupled with the lack of direct presidential involvement in the decisionmaking process, has resulted in an increased willingness of courts to weigh in on the application of AD/CVD law. Although a full overview of AD/CVD doctrine is beyond the scope of this Essay, one example concerning the countervailing duty statute highlights both the willingness of courts to reverse agency determinations and the potential for ex-post statutory reforms. In *GPX International Tire Corporation v. United States*, the Federal Circuit in a case involving the imposition of AD/CVDs on Chinese tire imports held that the countervailing duty law does not apply to goods from China or other nonmarket economies.[165] In response, the

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[160] 19 U.S.C. § 2132(a) (2024).

[161] *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 569 (1976) (dismissing nondelegation challenges to an earlier form of Section 232); PrimeSource Building Prods., Inc. v. United States, 59 F.4th 1255, 1263 (Fed. Cir. 2023) (dismissing nondelegation challenge of Section 232 and citing Am. Inst. Int'l Steel, Inc. v. United States, 806 F. App'x 982 (Fed. Cir. 2020)); *HMTX*, 156 F.4th at 1254–55 (dismissing nondelegation and major questions doctrine challenges to Section 301).

[162] *See Learning Resources*, slip op. at 12–13; *id.* at 30–39 (Gorsuch, J., concurring); *Learning Resources*, slip op. at 9–17 (Thomas, J., dissenting); *Learning Resources*, slip op. at 45–61 (Kavanaugh, J., dissenting).

[163] *See* Claussen & Meyer, *supra* note 151, at 1974–77; Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 597–612 (2019) (describing the move towards the foreign affairs paradigm in trade policy); *see also* United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 315–22 & n.2 (1936) (describing the distinct difficulties of invalidating a statute delegating foreign affairs authority on nondelegation grounds and identifying in dicta Section 338 as an example of such a statute).

[164] 19 U.S.C. § 1516a (2024).

[165] 666 F.3d 732, 745 (Fed. Cir. 2011).

petitioners bar lobbied Congress,[166] which revised the statute to overturn the Federal Circuit's decision.[167]

Conclusion

This Essay details legal authorities that might serve as the legal bases for a non-IEEPA tariff regime: Section 232 national security actions, Section 301 retaliatory trade actions, Section 201 safeguards, antidumping and countervailing duties, Section 338 discriminatory act actions, and Section 122 balance of payments actions. In describing and comparing these authorities, I also identify key considerations that should affect an administration's future use of these tools. In particular, the tools vary with respect to who tends to initiate relevant investigations, the level of presidential involvement, the duration and scope of resulting trade actions, and their vulnerability to legal challenge.

Although such considerations are relevant to an administration interested in mobilizing these statutes, they might prove equally so to those seeking reform. Indeed, existing authorities present various levers that can be pulled to not only expand, but also limit, presidential power. A comparison of the tools might point, for instance, to statutory provisions or regulations that could increase the likelihood of private petitioning over self-initiation. Or, one might raise the possibility of expanding the role of the ITC or agencies less influenced by the President. Regardless, I suggest that a better understanding of the variety within and among existing tariff authorities is a necessary step for anyone interested in the use of tariffs moving forward.

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[166] *See* Liu, *supra* note 15.

[167] *See* Guangdong Wireless Housewares & Hardware Co. v. United States, 745 F.3d 1194, 1197–98 (Fed. Cir. 2014) (summarizing the change in statute and the effect on doctrine).