

**THOMPSON &
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Trade Wars: Reasons, Results & Reactions!

International Trade Webinar Series

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Background

The Trump Administration's "trade war" has become a disruptive, long-term reality fought on three fronts:

1. Tariffs on steel
2. Tariffs on aluminum
3. Tariffs on a broad array of Chinese products

Investigations underway now could result in tariffs on uranium, automobile and automotive parts



National Security Tariffs

- Section 232 of the Trade Expansion Act of 1962 authorizes the President to “adjust” imports that “threaten to impair the national security”



National Security Tariffs

The Commerce Department conducted Section 232 investigations of steel (primarily, flat, long, pipe and tube, semi-finished, and stainless) and aluminum imports, and made the following findings:

- Steel, and domestic steel production, is essential to national security, including “defense requirements” and “U.S. critical infrastructure sectors including transportation systems, the electric power grid, water systems, and energy generation systems.”



National Security Tariffs

- The domestic steel industry has been “adversely affected” by lower-priced steel imports, Commerce concluded, losing market share and closing production facilities. The agency provided several recommended remedies
- Based on these findings, the United States imposed additional duties of 25% on steel articles classified in HTS subheadings 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90

National Security Tariffs

- The tariffs apply to all countries except Argentina, Brazil and South Korea, which agreed to quantitative restrictions (quotas) in their imports
- In its aluminum investigation, the Commerce Department concluded that “Present quantities and circumstance of aluminum imports are weakening our internal economy and threaten to impair the national security”

National Security Tariffs

Additional duties of 10% were imposed on

1. unwrought aluminum (HTS 7601)
2. aluminum bars, rods, and profiles (HTS 7604)
3. aluminum wire (HTS 7605)
4. aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607)
5. aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609)
6. and aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70) from all countries except Argentina and Australia which agreed to quotas

Section 301 Tariffs

- Section 301 of the Trade Act of 1974 authorizes the United States Trade Representative (USTR) to investigate:
- “an act, policy, or practice of a foreign country” that is
- inconsistent with trade agreements or otherwise “unjustifiable”,
- or else “is unreasonable or discriminatory and burdens or restricts United States commerce”



Section 301 Tariffs

- If such a “violation” is found, USTR has a broad array of remedies it can adopt in response:
- suspend the benefits provided to the offending country under trade agreements,
- impose duties or other restrictions on imports from that country
- conduct negotiations to terminate the offensive behavior
- USTR has determined that the Chinese government has violated United States intellectual property rights, thereby imposing an unreasonable burden on U.S. trade with China



Section 301 Tariffs

- The agency concluded that the Chinese government requires U.S. firms operating in China to transfer technologies and intellectual property to Chinese companies
- It also found claims that the Chinese government has obstructed the ability of U.S. firms to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermines U.S. firms' control over their technology in China

Section 301 Tariffs

- In addition, the Chinese government directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important by Chinese government industrial plans



Section 301 Tariffs

- Finally, USTR asserted that the Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets, or confidential business information, which harms U.S. companies and provides competitive advantages to Chinese companies or commercial sectors

Section 301 Tariffs

- As a result of these findings, the United States has imposed additional duties on Chinese-origin imports
- The duties are imposed on specific 10-digit subheadings in the Harmonized Tariff Schedule (HTS)
- There are three separate groups of products to be covered by the Section 301 duties

Section 301 Tariffs

- **Group 1** was proposed on April 6, 2018, to apply additional duties of 25% to 1,333 HTS subheadings with annual trade valued at \$50 billion
- These Group 1 duties were effective on July 6, 2018, and apply to 818 HTS subheadings valued at \$34 billion

Section 301 Tariffs

- **Group 2** was proposed on June 20, 2018, to apply 25% duties to an additional 284 HTS subheadings with annual trade value of \$16 billion
- This proposal's purposes was to make up for the \$16 billion in imports that were removed from Round 1
- The Group 2 duties went into effect on August 23, 2018, covering 279 tariff items valued at \$16 billion

Section 301 Tariffs

- **Group 3** was proposed on July 17, 2018, to impose 10% duties on 6,031 HTS subheadings in which Chinese imports valued at \$200 billion are classified
- The proposal was amended to increase the tariff rate to 25%
- Duties at the 10% rate were effective on September 24, 2018, applicable to 5,745 subheadings
- The rate will increase to 25% on January 1, 2019
- The value remains unchanged at approximately \$200 billion

Is This Legal?

- The increased tariff rates constitute violations of U.S. obligations under the General Agreement on Tariffs and Trade and NAFTA, as well as any other bilateral trade agreements to which the United States is a party
- GATT Article II.1(a) (“bound tariffs”) prohibits signatories from increasing their tariff rates above those to which they have committed; increased U.S. tariffs would violate this principle



Is This Legal?

- GATT Article I.1 (“most favored nation”) prohibits signatories from imposing differential tariff rates on different World Trade Organization countries.
- Tariff increases limited to imports from specific countries would violate this principle
- The requirements of trade agreements do not supersede U.S. law, so a domestic court challenge to alleged WTO violations is unlikely to succeed
- The GATT exception for national security measures may apply to the Section 232 duties

Is This Legal?

GATT requirements do not

- “prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military Establishment [or] taken in time of war or other emergency in international relations”

Is This Legal?

- If the security exception applies, the Section 232 duties are permissible unilateral actions by the United States, but the immediate retaliation by other countries is inconsistent with GATT requirements
- Defending the Section 301 tariffs is more problematic

Is This Legal?

- The WTO agreement has a mechanism for resolving disputes between members, such as allegations that China has violated the Agreement on Trade-Related Aspects of Intellectual Property Rights
- To be WTO-consistent, the United States should have filed a case first and sought compensation if China failed to change its behavior
- China's retaliation against the United States also is inconsistent with WTO requirements

What Can Affected Parties Do?

- Commerce has established a process whereby users of aluminum in business activities in the United States may seek tariff exclusions for their products. Each exclusion request is limited to a single product, and must identify:
 1. The 10-digit HTS code, including its specific dimension,
 2. the quantity of product required (stated in kilograms) under a one-year exclusion and
 3. a full description of the properties of the aluminum product, including chemical composition, dimensions, strength, toughness, ductility, magnetic permeability, surface finish, coatings, and other relevant data

What Can Affected Parties Do?

- Requests must also address whether the product is available from a United States producer and/or whether there is insufficient supply of the U.S.-produced article available
- Domestic aluminum producers are authorized to object to exclusion requests



What Can Affected Parties Do?

There is a similar process available for the steel tariffs

- “Only individuals or organizations operating in the United States that use steel products in business activities in the United States may submit an Exclusion Request”



What Can Affected Parties Do?

- “The exclusion requester must provide factual information on
1. the single type of steel product they require using a 10-digit HTSUS code, including its specific dimension;
 2. the quantity of product required (stated in kilograms) under a one-year exclusion;
 3. a full description of the properties of the steel product it seeks to import, including chemical composition, dimensions, strength, toughness, ductility, magnetic permeability, surface finish, coatings, and other relevant data”
- Domestic steel producers may object to exclusion requests

What Can Affected Parties Do?

- USTR has established a procedure whereby an interested party may seek exclusion of products from the Section 301 tariffs
- There are strict deadlines to apply: October 9, 2018 for Round 1, and December 18, 2018 for Round 2
- The procedure and timing for Round 3 is not yet established
- Responses in support or opposition are due within 14 days afterward, and replies 7 days after that
- Use the form that USTR prepared!

What Can Affected Parties Do?

- Successful Round 1 exclusion requests will be retroactive to July 6, meaning that additional duties deposited with CBP will be refunded
- Exclusions decisions will be published in the Federal Register, and remain in effect for one year after the publication date
- USTR did not address whether there would be a process for extending exclusions beyond that time, in the event the Section 301 duties remain in effect

What Can Affected Parties Do?

Exclusion requests should address the following points:

1. Identification of the particular product in terms of the physical characteristics (*e.g.*, dimensions, material composition, or other characteristics) that distinguish it from other products within the covered 8-digit subheading
2. USTR will not consider requests that identify the product at issue in terms of the identity of the producer, importer, ultimate consumer, actual use or chief use, or trademarks or tradenames.
3. USTR will not consider requests that identify the product using criteria that cannot be made available to the public
4. The 10 digit subheading of the HTSUS applicable to the particular product requested for exclusion

What Can Affected Parties Do?

- Requesters also may submit information on the ability of U.S. Customs and Border Protection to administer the exclusion
- The annual quantity and value of the Chinese-origin product that the requester purchased in each of the last three years
- Whether the particular product is available only from China
- Proposed HTS language to implement the exclusion

What Can Affected Parties Do?

- In addressing this factor, requesters should address specifically whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requester or other U.S. interests
- Whether the particular product is strategically important or related to “Made in China 2025” or other Chinese industrial programs

What Can Affected Parties Do?

Made in China 2025 Programs

- New Information and Communications Technology (ICT) Industry
- Advanced Numerical Control Machine Tools and Robotics
- Aerospace
- Ocean Engineering Equipment and High-Tech Ships
- Advanced Rail Transit Equipment



What Can Affected Parties Do?

Made in China 2025 Programs

- Energy Saving and Smart Vehicles
- Electricity Equipment
- Agriculture Equipment
- New Material
- Biopharmaceuticals and High-Performance Medical Equipment



What Can Affected Parties Do?

- Because products are covered based on HTS classification, do confirm that your classifications are correct.
- Don't change the classification from a covered provision to one that's excluded without evaluating that it's correct.
- Do consider establishing a “first sale” arrangement to lower the dutiable value.
- Don't misrepresent the country of origin of Chinese products.

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