

Drinker Biddle

Section 301 Tariffs in Perspective: Charting a Course in Today's Volatile Trade Landscape

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Agenda

1. Overview and impetus for the Section 301 investigation
2. Summary of USTR's Section 301 findings
3. Analysis of the products affected by the tariffs
4. The timeline and opportunity for comment
5. The Chinese reaction and U.S. counter-reaction
6. Important tariff classification issues as they apply to coverage under the scope of Section 301
7. Proactive steps that companies can take

1. Overview and Impetus for the Section 301 Investigation

THE WALL STREET JOURNAL.

POLITICS

U.S. to Apply Tariffs on Chinese Imports, Restrict Tech Deals

'It's out of control,' President Donald Trump says of U.S. trade deficit with China



Impetus for the Section 301 Investigation

- More than just a concern over trade deficits with China
- The United States Trade Representative (USTR) has concluded that China has *“a policy of forced technology transfer; of requiring licensing at less than economic value; of state capitalism, wherein they go in and buy technology in the United States in non-economic ways; and then, finally, of cyber theft.”*
- *“Technology is probably the most important part of our [U.S.] economy. There’s 44 million people who work in high-tech knowledge areas. No country has as much technology-intensive industry as the United States. And technology is really the backbone of the future of the American economy.”* – USTR Amb. Robert Lighthizer (Mar. 22, 2018)
- Growing trade deficits are simply symptoms of a larger problem

A fundamental reassessment and realignment of U.S. trade and national security policy regarding China is underway

- Multiple but interrelated concerns:
 - China's trade and national security policies
 - Erosion of the U.S. defense-industrial base
 - Trade deficits
 - Re-prioritizing U.S. manufacturing
 - Foreign availability of technologies previously unique to U.S. forces
- Section 301 investigations are one of the Trump Administration's most important "go-to" tools to address these issues

Background on Section 301

- Last summer, President Trump launched an investigation into Chinese trade practices that are responsible for expropriating the intellectual property of U.S. firms.
- The investigation is premised upon Section 301 of the Trade Act of 1974, a statute that gives the President authority to take all appropriate action, including retaliatory action, to get another country to end a policy or practice which violates international trade agreements or burdens U.S. commerce.

Background on Section 301 (cont.)

- At the time of the investigation was launched, Amb. Lighthizer said that the WTO is “*not equipped*” to deal with China’s industrial and economic policy
- “*The sheer scale of their coordinated efforts to develop their economy, to subsidize, to create national champions, to force technology transfers, and to distort markets in China and throughout the world is a threat to the world trading system that is unprecedented,*” Lighthizer said

The Section 301 Mechanism

- Authorizes the President to take all appropriate action, including retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory, and that burdens or restricts U.S. commerce.
- Section 301 cases can be self-initiated by USTR or as the result of a petition filed by a firm or industry group
 - Section 301 used in the 1980s and 1990s to address trade frictions with Japan on semiconductors, steel, auto parts, other sectors
 - Last major Section 301 actions were over 20 years ago and involved sectors like autos (Korea) and beef and dairy products (Canada, EU)
- Section 301 permits the USTR to develop a flexible set of trade and investment measures designed to bring maximum pressure on U.S. trading partners to alter their discriminatory trade and investment practices

2. Summary of the USTR Findings

Section 301 Investigation of China

- Since August 2017, USTR has been investigating alleged harm done to U.S. trade and U.S. companies from Chinese policies such as “Made in China 2025” and forced technology transfers as well as IP infringement in China
- On March 22, President Trump announced the results of the investigation and ordered USTR to take various trade actions against China
- USTR’s Section 301 Report details the findings and basis for the proposed trade actions

OFFICE of the UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT

**FINDINGS OF THE INVESTIGATION INTO
CHINA'S ACTS, POLICIES, AND PRACTICES
RELATED TO TECHNOLOGY TRANSFER,
INTELLECTUAL PROPERTY, AND INNOVATION
UNDER SECTION 301 OF THE TRADE ACT OF 1974**



March 22, 2018

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Results of the Section 301 Investigation of China

1. USTR will propose additional tariffs on imports of products “supported by China’s unfair industrial policy.”

- These are intended to be mainly products of the industries targeted for promotion under China’s “Made in China 2025” program
- USTR issued its proposed list of dutiable products on April 6
- Approximately 1,300 categories of imported products are included
- The list targets the products of Chinese companies and Chinese subsidiaries of non-Chinese companies

2. USTR has filed a WTO dispute settlement proceeding against China’s technology licensing practices

3. The U.S. Treasury Department is in negotiations with China to open China to more unrestricted foreign investment

- If these negotiations fail, Treasury is authorized to restrict Chinese investments in “sensitive U.S. technology”
- The restrictions may apply to Chinese investment in the United States and joint ventures and other agreements with Chinese companies outside the United States

3. Analysis of the products affected by the proposed tariffs

USTR's Section 301 Notice and Proposed Tariff List



14906

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Authority No. 257-1 of December 11, 2015).

Alyson L. Grunder,
Deputy Assistant Secretary for Policy, Bureau of Educational and Cultural Affairs, Department of State.

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**OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE**

[Docket No. USTR-2018-0005]

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

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of determination, request for comments, and notice of public hearing.

May 22, 2018: Due date for submission of post-hearing rebuttal comments.

ADDRESSES: USTR strongly prefers electronic submissions made through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments in sections F and G below. The docket number is USTR-2018-0005. For alternatives to on-line submissions, please contact Sandy McKinzy at (202) 395-9483.

FOR FURTHER INFORMATION CONTACT: For questions about the ongoing investigation or proposed action, contact Arthur Tsao, Assistant General Counsel, at (202) 395-5725. For questions on customs classification of products identified in the Annex to this Notice, contact Evan Conceicao at Evan.M.Conceicao@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

A. Proceedings in the Investigation

On August 14, 2017, the President issued a Memorandum (82 FR 39007) instructing the Trade Representative to

USTR's Proposed Tariff List

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ANNEX

Note: All products that are classified in the 8-digit subheadings of the Harmonized Tariff Schedule of the United States (HTSUS) that are listed in this Annex are covered by the proposed action. The product descriptions that are contained in this Annex are provided for informational purposes only, and are not intended to delimit in any way the scope of the proposed action. Any questions regarding the scope of particular HTSUS subheadings should be referred to U.S. Customs and Border Protection. In the product descriptions, the abbreviations “nesoi” and “nesi” mean “not elsewhere specified or included”.

HTS subheading	Product Description
28443010	Thorium compounds
28443020	Compounds of uranium depleted in U235
28443050	Uranium depleted in U235, thorium; alloys, dispersions, ceramic products and

Scope of the Proposed Tariff List

USTR's list of items potentially subject to Section 301 tariffs covers a wide range of articles.

- Certain pharmaceuticals and chemicals;
- Certain steel/aluminum articles (significant overlap with Section 232 tariffs);
- Certain consumer electronics (including televisions and recording media);
- Certain measurement instruments and medical devices;
- Certain mechanical machinery and electronic components and parts thereof (excluding wireless and telecommunications devices);
- Certain vehicles, including automobiles, passenger and commercial watercraft, and rail locomotives and rolling stock;
- Certain military explosives, firearms and artillery;
- Certain engines, boilers, nuclear reactors, and parts thereof; and
- Certain aircraft and parts thereof.

4. Timeline & Opportunity for Comment

Timeline and Comments

Stakeholders can voice their comments to USTR during a notice and comment period:

- April 23, 2018: Due date for filing requests to appear and a summary of expected testimony at the public hearing, and for filing pre-hearing submissions.
- May 11, 2018: Due date for submission of written comments.
- May 15, 2018: Public hearing at the U.S. International Trade Commission (500 E Street SW, Washington, D.C., 20436, beginning at 10:00 a.m. ET).
- May 22, 2018: Due date for submission of post-hearing rebuttal comments
- USTR will take comments into account in determining next steps, but there is no set timeline for imposition of the proposed tariffs and other measures

Comments being sought from both sides of the issue

- Some companies may find that the Section 301 actions would harm their interests and may wish to oppose or propose modifications to the tariff list and other measures
- Other companies may determine that Section 301 measures promote their interests and may wish to comment in favor or to press USTR to go further
- If comments are not filed, companies will lose an important opportunity to get their comments on the record and before key decision makers in the Administration and Congress
- Both sides should also be prepared to consider filing rebuttal comments after they have reviewed the affirmative comments
 - Rebuttal comments will be due by May 22nd

5. The Chinese reaction and U.S. counter-reactions

In response to the Section 301 case, China is taking a carrot and stick approach

- China has issued its own list of U.S. products that will be subject to 25% duties when imported into China if the U.S. list goes into effect
- China is also considering options to restrict key U.S. industries and investments in China in an effort to pressure the United States to withdraw or modify the Section 301 measures
 - For example, the delay in Chinese antitrust approval of an acquisition by U.S. company Qualcomm is reportedly linked to these efforts
- At the same time, China has floated proposals to open some sectors, such as autos, to new foreign investment

China's retaliation list targets politically-sensitive sectors like agriculture, autos, and aerospace

附件

对美加征关税商品清单

序号	税则号列	商品名称 ^①	Article Description
1	12019010	黄大豆	Yellow soya beans excl. seed
2	12019020	黑大豆	Black soya beans excl. seed
3	10059000	其他玉米	Maize excl. seed
4	11022000	玉米细粉	Maize (corn) flour
5	52010000	未梳的棉花	Cotton, not carded or combed
6	14042000	棉短绒	Cotton linters
7	10079000	其他高粱	Grain sorghum excl. seed
8	23033000	酿造及蒸馏过程中的糟粕及残渣	Brewing or distilling dregs & waste
9	10011900	其他硬粒小麦	Durum wheat
10	10019900	其他小麦及混合麦	Other wheat or maslin nes
11	02011000	整头及半头鲜、冷牛肉	Fresh or chilled bovine carcasses&half carcasses
12	02012000	鲜、冷的带骨牛肉	Fresh or chilled unboned bovine meat (excl. carcasses)
13	02013000	鲜、冷的去骨牛肉	Fresh or chilled boneless bovine meat
14	02021000	冻的整头及半头牛肉	Frozen bovine carcasses & half carcasses
15	02022000	冻的带骨牛肉	Frozen unboned bovine meat (excl. carcasses)
16	02023000	冻的去骨牛肉	Frozen boneless bovine meat
17	02062900	其他冻牛杂碎	Frozen edible bovine offal (excl. tongues & livers)
18	20089300	用其他方法制作或保藏的蔓越橘	Cranberries, prepared or preserved, nes
19	20091100	冷冻的橙汁	Frozen orange juice, unfermented, not containing added spirit
20	20091200	非冷冻的, 白利糖度值不超过20的橙汁	Not frozen orange juice, of a Bris value not exceeding 20
21	22083000	威士忌酒	Whiskeys
22	24011010	未去梗的烤烟	Flue-cured tobacco, not stemmed/stripped
23	24011090	其他未去梗的烟草	Tobacco other than flue-cured, not stemmed/stripped

In response, USTR is preparing a second tariff list



USTR Robert Lighthizer Statement on the President's Additional Section 301 Action

Washington, D.C. – U.S. Trade Representative Robert Lighthizer today released the following statement in support of the President's direction that the Office of the United States Trade Representative (USTR) consider additional measures under Section 301 of the Trade Act of 1974 regarding China's unfair acts related to technology transfer, intellectual property, and innovation:

"President Trump is proposing an appropriate response to China's recent threat of new tariffs. After a detailed investigation, USTR found overwhelming evidence that China's unreasonable actions are harming the U.S. economy. In the light of such evidence, the appropriate response from China should be to change its behavior, as China's government has pledged to do many times. Economies around the world – including China's own – would benefit if China would implement policies that truly reward hard work and innovation, rather than continuing its policies that distort the vital high-tech sector.

"Unfortunately, China has chosen to respond thus far with threats to impose unjustified tariffs on billions of dollars in U.S. exports, including our agricultural products. Such measures would undoubtedly cause further harm to American workers, farmers, and businesses. Under these circumstances, the President is right to ask for additional appropriate action to obtain the elimination of the unfair acts, policies, and practices identified in USTR's report."

U.S. Counter-reactions

- The new tariff list is reported to cover an additional \$100 billion of imports from China
- The new list will be issued under the authority of the March 22, 2018 Section 301 Report
- USTR is also reported to be considering launching additional Section 301 investigations of China's trade and investment restrictions in other sectors, such as cloud computing
 - These investigations could lead to additional U.S. tariffs and other trade measures
- Scrutiny of Chinese investments and Chinese companies is also likely to continue to increase through other statutory mechanisms, such as the Committee on Foreign Investment in the United States (CFIUS) and U.S. export controls

6. Tariff classification issues

Tariff Classification

- Art of assigning a distinct tariff classification number to imported merchandise based upon the *Harmonized System*
 - 10-digit code under HTSUS (last 2-digits are statistical)
- Based on language of the HTSUS and specific rules of interpretation
- Classification can be very complicated and may lead to disagreement between CBP and the importer
- **Section 301 duties are applied based on specific 8-digit HTSUS codes**

Risk and Opportunity

- General Rule: Importers must exercise reasonable care in classifying imported goods or face civil penalties
- 301 Duties pose new risk for potentially misclassified goods:
 - Potential overpayment if classified in subject provision
 - Potential underpayment if misclassified outside scope
- Opportunity: Importer may be able to reclassify goods
 - Move out of subject tariff provision
 - Potential duty refunds on past entries

Tariff Classification Review

- Gather data
 - Tariff classification database.
 - ACE or ITRAC import data.
 - Future imports (from buyers/planners).
- Review and quantify goods on 301 list (past + future).
- Review classification of all goods from China.
 - This includes direct imports and third-party suppliers.
- Actual/Potential Misclassifications?
 - Ruling request for certainty (NY Ruling = 30 days).
 - Protest/PSC for duty refunds.
 - Prior disclosure.
- **CUSTOMS WILL BE WATCHING.**
 - **Compile support/documentation for any classification change**
 - **Avoiding duty is not a valid reason for change**

My Goods Are on the List – Now What?

- Tariff Classification Considerations:
 - Tariff Engineering
 - Classified as parts - are they really parts?
 - Sets
- Origin Considerations:
 - Change sourcing
 - Change manufacturing process/location (substantial transformation)
- Value Considerations
 - First Sale
 - Non-Dutiable Charges

7. Proactive steps companies can take

Companies can take a number of steps to protect their interests

- Closely monitor developments at USTR, including the possible new tariff list and new Section 301 investigations
- Consider submitting comments to USTR by May 11 and testifying at the USTR hearing on May 15
- Work directly and with industry groups and trade associations to make your views known to members of Congress and administration officials
- Examine opportunities for changing sourcing and investment patterns if the U.S. or China impose additional tariffs
- Factor the potential for continued trade friction with China into long-term planning and investment decisions