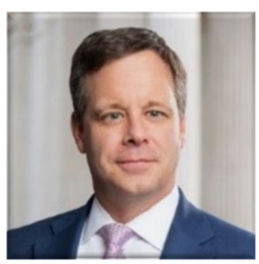
Preparing for New Potential Tariffs: Legal Authorities and Tariff Mitigation Strategies

Barnes & Thornburg Webinar

By: Luis Arandia, Jr., Matthew Morgan, & David Spooner

Jan. 30, 2025

Presenters from Barnes & Thornburg LLP



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Questions asked will be answered in the hypothetical.

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Today's Topics

- Setting the Stage
  - Trump 1.0 & 2024 Campaign Promises
  - America First Trade Policy Memorandum
- Presidential Tariff Powers & Timelines
  - Legislative, IEEPA, Section 301
- Tariff Mitigation Strategies

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SETTING THE STAGE

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Trump 1.0 Tariffs (2018-2020)

- **Section 301 Tariffs** on China (up to 25%) and European Union (up to 25%).
- **Section 232 Tariffs** on Steel (25%) and Aluminum Articles (10%)
- **Section 201-Safeguard Tariffs** on Solar Products (up to 30%) and Residential Washers (up to 30%)

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2024 Campaign Promises

- Increasing Section 301 tariffs on Chinese-origin goods to at least 60 percent.
- Revoking Permanent Normal Trade Relations (PNTR) status for China. This would reset the normal tariffs on China even higher, to as much as a 100% on some products.
- Global 10% – 20% tariff on all imported commodities.
- 25% tariff on imports from Mexico and Canada
- 100% tariffs on the BRICS group of nations (Brazil, Russia, India, China, South Africa) if they move away from the U.S. dollar.

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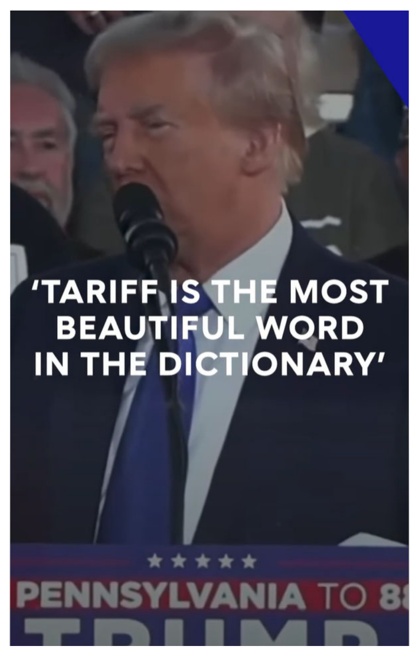
Donald J. Trump
@realDonaldTrump

The idea that the BRICS Countries are trying to move away from the Dollar while we stand by and watch is OVER. We require a commitment from these Countries that they will neither create a new BRICS Currency, nor back any other Currency to replace the mighty U.S. Dollar or, they will face 100% Tariffs, and should expect to say goodbye to selling into the wonderful U.S. Economy. They can go find another "sucker!" There is no chance that the BRICS will replace the U.S. Dollar in International Trade, and any Country that tries should wave goodbye to America.

7.22k ReTruths **27.1k** Likes Nov 30, 2024, 6:40 PM



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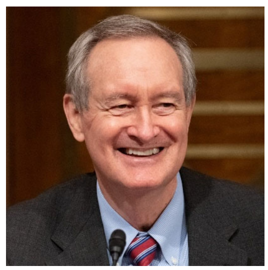
USTR: Jamieson Greer

DHS: Kristi Noem

Commerce: Howard Lutnick

State: Marco Rubio

Finance: Mike Crapo



NSC: Mike Waltz

America First Trade Policy

- On January 20, 2025, the White House released President Trump's "America First Trade Policy." Wide-ranging document with details still to be sorted out, but generally directs U.S. government to review **"unfair and unbalanced trade**" issues, such as:
  - U.S.-Mexico-Canada Agreement (USMCA)
  - Application of antidumping and countervailing duty (AD/CVD) laws
  - $800 *de minimis* exemption from tariffs
  - Trade with China, including additional modifications to Section 301 tariffs
  - Section 232 steel and aluminum tariffs
  - Directing assessment of legislative proposals regarding Permanent Normal Trade Relations with China.
- Most of the report deadlines are **April 1, 2025**.

PRESIDENTIAL TARIFF POWERS & TIMELINES

Congressional Power over Tariffs & Delegation to the President

- Under the U.S. Constitution, Congress has the power to impose and collect taxes, tariffs, duties, and the like, and to regulate international commerce.
- Because the President does not have express constitutional authority over international commerce or trade, the President must find tariff authority delegated from Congress via statute.
- After 1934, Congress continued to provide specific limited authority to the President on trade-related action

Legislative Vehicles: Tax Extenders

House Budget Committee Compilation List of Revenue Options for Must-Pass Tax Bill in 2025

- **Codify and Increase 301 Tariffs on China ($100 billion in 10-year savings)**:
  - The current 301 tariffs bring in approximately $40 billion per year. This option would codify the 301 tariffs in addition to increasing the tariffs on products already subject to 301.
- **10 Percent Tariff ($1.9 trillion in 10-year savings)**:
  - This option would create a 10% across the board tariff on all imports.
- **H.R. 7679, End China's De Minimis Abuse Act ($24 billion in 10-year savings)**:
  - Legislation requiring de minimis value shipments to also pay any existing 301 tariffs would reduce the volume of de minimis shipments from China by half.

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Legislative Vehicles: Other Bills

- **Restoring Trade Fairness Act**
  - Bipartisan bill to revoke China's Permanent Normal Trade Relations (PNTR).
  - Minimum 35% tariff (in proportion to the estimated value of the goods or transaction) tariff for Chinese-origin *non-strategic goods* and a minimum 100% ad valorem tariff for all Chinese-origin *strategic goods.*
  - Strategic goods based on the Biden administration's Advanced Technology Product List and China's Made in China 2025 plan.

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Legislative Vehicles: Other Bills

- **Reciprocal Trade Act**
  - Introduced by nine House Republicans
  - Would grant the President the authority to impose a tariff on an import that is either equal to the duty imposed by a foreign country or equal to the "effective rate of duty of the nontariff barriers applied by the foreign country."
  - Would authorize the President to negotiate agreements with foreign countries that are committed to reducing tariff rates for products identified by the executive branch.

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Legislative Vehicles- Timelines

- **Tax Bill**
  - Key tax provisions in the 2017 Tax Cuts and Jobs Act (TCJA) are scheduled to expire on December 31, 2025.
  - It is unclear whether the House or the Trump White House would agree on the revenue proposals involving tariff revenue.
  - While there is a consensus that the tax extenders legislation must move in 2025, it is impossible to predict exactly when the legislation may move.

- **Restoring Trade Fairness Act & Reciprocal Trade Act**
  - Majority Republican Congress could pass the bills by December 2026 (2^{nd} session of 119^{th} Congress)
  - The Restoring Trade Fairness Act would direct tariff revenue to U.S. farmers and manufacturers injured by possible Chinese retaliation. Unclear whether this provision would potentially only draw Republican support.
  - Unclear on how the proposed legislation would move e.g., stand-alone bills or in broader legislative package.

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International Emergency Economic Powers Act (IEEPA) (50 U.S.C. §§1701 *et seq*.)

- Enacted in 1977, IEEPA provides broad authority to declare emergencies in response to national security or economic threats.
- Authorizes the President to "regulate" the importation of any "any property in which any foreign country or national … has any interest" in response to an "unusual and extraordinary threat, which has its source … outside the United States, to the national security, foreign policy, or economy of the United States."

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IEEPA-Timelines and History

- IEEPA permits the President to act <u>immediately</u> to address this "unusual and extraordinary" threat
- **There is no waiting period for IEEPA tariffs, but a national emergency must be declared first.**
- **No President has actually used IEEPA to impose tariffs.**
- In 1971, President Nixon imposed a 10% tariff on all imports into the United States in response to a monetary crisis using IEEPA's precursor statute, the Trading with the Enemy Act of 1917 (TWEA). This remains the only time a President has used emergency authority, like that provided by IEEPA, to impose a tariff.

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2019 IEEPA Tariff Threat Against Mexico

- On May 30, 2019, President Trump threatened to invoke the emergency tariff powers under IEEPA and impose a 5% tariff on all imported goods from Mexico in response to the border crisis.
- The escalating tariff would have begun on June 10, 2019, but an agreement was announced on June 7, 2019.

STATEMENTS & RELEASES

Statement from the President Regarding Emergency Measures to Address the Border Crisis

IMMIGRATION | Issued on: May 30, 2019

Donald J. Trump @realDonaldTrump

I am pleased to inform you that The United States of America has reached a signed agreement with Mexico. The Tariffs scheduled to be implemented by the U.S. on Monday, against Mexico, are hereby indefinitely suspended. Mexico, in turn, has agreed to take strong measures to....

8:31 PM · Jun 7, 2019

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Jan. 26, 2025, IEEPA Tariff Threat Against Colombia

Donald J. Trump @realDonaldTrump

I was just informed that two repatriation flights from the United States, with a large number of Illegal Criminals, were not allowed to land in Colombia. This order was given by Colombia's Socialist President Gustavo Petro, who is already very unpopular amongst his people. Petro's denial of these flights has jeopardized the National Security and Public Safety of the United States, so I have directed my Administration to immediately take the following urgent and decisive retaliatory measures:

-Emergency 25% tariffs on all goods coming into the United States. In one week, the 25% tariffs will be raised to 50%.

-A Travel Ban and immediate Visa Revocations on the Colombian Government Officials, and all Allies and Supporters.

-Visa Sanctions on all Party Members, Family Members, and Supporters of the Colombian Government.

-Enhanced Customs and Border Protection Inspections of all Colombian Nationals and Cargo on national security grounds.

-IEEPA Treasury, Banking and Financial Sanctions to be fully imposed.

These measures are just the beginning. We will not allow the Colombian Government to violate its legal obligations with regard to the acceptance and return of the Criminals they forced into the United States!

28.3k ReTruths 115k Likes Jan 26, 2025, 1:28 PM

THE WHITE HOUSE
WASHINGTON

FOR IMMEDIATE RELEASE
01/26/25

Statement from the Press Secretary

"The Government of Colombia has agreed to all of President Trump's terms, including the unrestricted acceptance of all illegal aliens from Colombia returned from the United States, including on U.S. military aircraft, without limitation or delay. Based on this agreement, the fully drafted IEEPA tariffs and sanctions will be held in reserve, and not signed, unless Colombia fails to honor this agreement. The visa sanctions issued by the State Department, and enhanced inspections from Customs and Border Protection, will remain in effect until the first planeload of Colombian deportees is successfully returned. Today's events make clear to the world that America is respected again. President Trump will continue to fiercely protect our nation's sovereignty, and he expects all other nations of the world to fully cooperate in accepting the deportation of their citizens illegally present in the United States."

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Feb. 1, 2025, IEEPA Tariffs- Mexico, Canada, China?

- Jan. 28, 2025, White House Press Briefing by Press Secretary Karoline Leavitt
- “*All I can point you to is what the president has said on this front: the February 1st date for Canada and Mexico and also the China tariff that he has discussed.*
- *He rejected the 2.5 percent tariff. He said that was a little bit too low. He wants it to be higher.*
- *I'll leave it to him to make any decisions on that front.*”

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Section 301 of the Trade Act of 1974

- U.S. Trade Representative enforcement tool to retaliate against foreign import restraints.
- Three categories of acts, policies, or practices of a foreign country that are potentially actionable:

1. Trade agreement violations;
2. Acts, policies or practices that are unjustifiable and that burden or restrict U.S. Commerce;
3. Acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce

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Section 301- Timelines

- A new Section 301 action requires an investigation conducted by USTR, followed by a recommendation to the President.
- Investigation includes a public hearing, solicitation of public comments, and consultations with the foreign government(s). The investigation must take no longer than one year.
- A new Section 301 tariff action would require a U.S. Trade Representative to be in place after confirmation by the Senate – may take a couple months in a new Administration.
- There is no minimum amount of time prior to imposition of tariffs under a new Section 301 investigation, but consultations, a hearing, and solicitation and consideration of public comments takes some time.

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Section 301- Exclusions?

- The President would determine whether any new Section 301 tariff action would include a product exclusion process.
- For the Section 301-China actions, the prior Trump Administration USTR established an exclusion process for each tranche, as well as opportunities for interested parties to submit comments on whether to extend or reinstate exclusions.
- Current Section 301-China exclusion process (until March 31, 2025) for particular machinery used in domestic manufacturing classified within a subheading under chapters 84 and 85 of the Harmonized Tariff Schedule of the United States.
- No exclusion process for the Section 301- EU tariff actions (March 2020 to March 2021).

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Section 232 of the Trade Expansion Act of 1962

- Section 232 authorizes the President to impose tariffs or quotas if imports of an article threaten U.S. national security.
- Bureau of Industry and Security (BIS) conducts investigation. If BIS finds imports impair national security, then BIS sends findings and recommendations to the President.
- The President decides whether to concur with findings and whether to implement actions.

Section 232- Timelines

- A <u>new</u> Section 232 action requires that BIS submit a report to the President with recommendations within 270 days after the initiation of an investigation.
- The statute requires the President to be in receipt of a report by BIS before implementing Section 232 tariffs or quotas. The statute does not impose any other procedural requirements or stipulate a minimum “waiting period.”
- In the prior investigations, the Commerce Department held hearings and solicited public comments prior to delivering its report to the White House, but these steps are not explicitly required by the statute.
- Thus, the only reason that action under Section 232 cannot be immediate is that the statute requires the President to receive a report from the Commerce Department before taking action.

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Section 232- Exclusions?

- The President would determine whether any new Section 232 tariff action would include a product exclusion process.
- For the Section 232- Steel and Aluminum tariff actions, the prior Trump Administration established an exclusion process that is specific to the importer.
  - Only directly affected individuals or organizations located in the United States, who are using steel and or aluminum in business activities in the United States, are eligible parties.
- Per BIS guidance, Section 232- Steel and Aluminum product exclusion will be granted if the article is not produced in the United States:
  - (1) in sufficient and reasonably available amount,
  - (2) satisfactory quality, or
  - (3) there is a specific national security consideration warranting an exclusion.

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Section 201 of the Trade Act of 1974

- Allows the President to impose temporary duties and other trade measures if the U.S. International Trade Commission (ITC) determines a surge in imports is a substantial cause or threat of serious injury to a U.S. industry.
- Section 201 cases investigate import surges of fairly traded goods.
- The President may opt to implement the ITC's recommendations, modify them, or do nothing.

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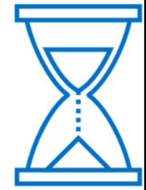
Section 201- Timelines



- Because the ITC is an independent, bipartisan commission, it is almost certain that the Commission would take the full time allotted by law in a Section 201 investigation, regardless of any pressure from the White House.

- Under the law, the ITC has 180 days (which would include a hearing and the solicitation of public comments) to make a recommendation to the president regarding what relief would prevent or remedy the injury and facilitate industry adjustment to import competition.

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Section 201- Exclusions?

- The President would determine whether any new Section 201 tariff action would include a product exclusion process.

- For the Section 201 Solar Products tariff actions, the prior Trump Administration established a limited product exclusion process.

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Other Tariff Authorities Not Previously Used

- **Section 122 of the Trade Act of 1974:**
  - Authorizes the President, through presidential proclamation, to impose quotas and tariffs of as much as 15 percent for a period not exceeding 150 days against one or more countries that have "large and serious" balance-of-payment surpluses with the United States.

- **Section 338 of the Tariff Act of 1930:**
  - Authorizes the President, through presidential proclamation, to impose "new or additional duties" against a foreign country if the President finds that the country discriminated against U.S. commerce (unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country).

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TARIFF MITIGATION STRATEGIES

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Tariff Classification

- Every item that is imported into the United States must be assigned a 10-digit tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) a.k.a. “HTS Code” or “Tariff code”.

- HTS Codes directly impact the general duty rate. Example:
  – Bracket for motor vehicle seat (8302.42.3065) – **3.9% duty rate**
  – Arm rest for motor vehicle seat (9401.90.1080) – **duty free**

- HTS codes impact special high tariffs. Example:
  – China Section 301 duties. Depending on the HTS code, there could be additional 25% or 7.5% tariffs or no additional tariffs.

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Tariff Classification

- Under the U.S. customs laws and regulations, it is the importer's legal responsibility to declare the correct tariff classification.
  – Importers cannot choose whichever HTS code they want (e.g., choosing the HTS code with lowest duty rate).

- Using the wrong tariff classification may result in incorrect overpayments or underpayments for imported goods classified under the wrong tariff codes

- **Potential strategy for tariff mitigation**: if you believe your imported item is using the wrong HTS code at a higher duty rate, importers can seek a binding ruling on prospective imports or file protests on past imports.

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Customs Valuation

- All merchandise imported into the U.S. must be appraised and the proper value must be declared for CBP to assess tariffs owed.
  - CBP's preferred method of appraisement is "transaction value" which is the price actually paid or payable for merchandise when sold for exportation to the U.S.

Risk Areas

- Additions to "Transaction Value" – costs paid by importer and not reflected in the price paid to foreign supplier: packing costs (boxes, labels, etc.), selling commissions incurred by buyer, royalties, license fees for trademarks, brands, "assists"
- Related party transactions. Where the import involves related parties (e.g., subsidiary importing from overseas parent), CBP will likely scrutinize whether the transaction value is acceptable

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Customs Valuation

- **Potential strategies for tariff mitigation**
  - Assess whether any expenses are eligible to be deducted from the transaction value (e.g., costs associated with transport of goods after importation).
  - First sale rule. For certain multi-tiered transactions, importers may be able to able to mitigate the impact of tariffs by declaring the value of the "first sale" which would be lower than the subsequent sale involving the US importer. Example:

Factory A (China) → Parent company (Germany) → Subsidiary (USA)

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Country of Origin Planning

- Companies may establish favorable countries of origin for products by examining whether production in a third country effected a "substantial transformation" of input materials — subject to tariffs — into a new article with a different name, character or use, etc.
- Countries with more favorable origins include countries where such articles are not subject to trade remedies or other enhanced special duties, and countries that have a free trade agreement with the U.S., which provides for reduced duties or duty-free entry (e.g., Korea-U.S., NAFTA, etc.).

Foreign Trade Zones

- Foreign-Trade Zones (FTZs) are secure areas located in or near U.S. Customs and Border Protection (CBP) ports of entry, but legally considered to be <u>outside</u> the Customs territory for the purpose of tariff laws and CBP entry procedure.
- FTZ beneficiaries can lower their tariff bills in situations where the tariff imposed by the U.S. on their inputs is higher than the tariff imposed by the U.S. on the finished products of their foreign competitors.
- Where zone manufacturing results in a finished product that has a lower tariff rate than the rates on the constituent foreign inputs, the finished product may be entered into the U.S. customs territory when it leaves the zone at the duty rate that applies to the finished product.

Other Tariff Mitigation Strategies

- **Tariff Engineering**
  - Modifying the design or condition of an imported product to reduce duty expenses associated with that product.
  - Merchandise is classifiable in its condition as imported and an importer has the right to fashion merchandise to obtain the lowest rate of duty and the most favorable treatment,
- **Potential Product Exclusion Requests?**
  - Any announcement of a product exclusion request process will be published in Federal Register. In previous cases, USTR and BIS established product exclusion request website for interested parties to submit requests.

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Lobbying Strategies

- Lobbying before U.S. Congress and the administrative agencies can provide different types of potential solutions with respect to tariff actions.
- For example, combining lobbying efforts before members of Congress with an exclusion request can provide a comprehensive approach to obtaining the requested relief.

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Thank you!

Any Questions?

Please send any follow-up questions to:

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