



## International Trade & Regulatory ADVISORY ■

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### Section 301 Actions Against Chinese Imports: Background, Developments, and Strategy

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While punitive tariffs as high as 25% against most imports from China have been a significant business concern for many importers over the past four years, recent events, including inflation, the bilateral relationship with China, court challenges, a sunset review, and congressional interest in reopening the tariff exclusion process, have increased focus on both the current impact and the future of these tariffs.

#### **China Section 301 Tariff History**

The tariffs on Chinese imports under Section 301 of the Trade Act of 1974 have their roots in an August 2017 investigation initiated by the Office of the U.S. Trade Representative (USTR) into whether China's trade practices were unreasonable or discriminatory. The USTR [imposed](#) the resulting tariffs in four stages between 2018 and 2019. Specifically:

- List 1 tariffs were announced on June 20, 2018 on \$34 billion of U.S. imports at a tariff rate of 25%, effective July 6, 2018.
- List 2 tariffs were announced on August 16, 2018 on \$16 billion of U.S. imports at a tariff rate of 25%, effective August 23, 2018.
- List 3 tariffs were announced on September 21, 2018 on \$200 billion of U.S. imports at a tariff rate of 10%, effective September 24, 2018, because then-President Trump believed that the initial actions were insufficient to cause China to change its trade practices. This rate increased to 25%, effective May 10, 2019.
- List 4 tariffs were announced on August 20, 2019 on \$300 billion of U.S. imports, but the list was split into Lists 4A and 4B. Tariffs on List 4B have never taken effect. Tariffs on List 4A started at 15%, effective September 1, 2019, and then decreased to 7.5%, effective February 14, 2020.

While these tariffs were proposed and implemented, the United States was also negotiating to obtain promises from China that it would change its trade practices in areas such as intellectual property, technology transfer, agriculture, financial services, and currency and foreign exchange. On January 15, 2020, the United States and China signed [Phase One](#) of the U.S.–China Economic and Trade Agreement, pursuant to which China agreed to certain structural reforms to its trade practices and, more concretely, to expand purchases of certain U.S. goods and services by \$200 billion (compared to 2017 levels) during 2020 and 2021.

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This agreement, combined with the change in presidential Administrations in January 2021 (at the midpoint of the Phase One period) and President Biden and his new USTR Katherine Tai's [decision](#) to conduct "a comprehensive, thoughtful USTR-led, whole-of-government review of the bilateral trade relationship" before making significant changes to the prior Administration's tariff actions, meant that these tariffs have continued at 2019 rates.

The USTR did initially conduct exclusion proceedings for each of the tariff lists, and it granted about 2,200 exclusions. Most exclusions lasted for one year. The USTR extended about a quarter of them, but most of those expired on December 31, 2020. On October 4, 2021, the USTR announced a new exclusion process, but this "targeted" exclusion process was [very narrow in scope](#), covering only the 549 exclusions that the USTR previously granted and extended. The USTR eventually [reinstated](#) 352 of these exclusions through December 31, 2022.

## Challenges to the Tariffs

Since their implementation, these tariffs have faced challenges from both China and importers. China has contested these tariffs in three separate World Trade Organization [disputes](#) and has instituted [retaliatory tariffs](#) on \$130 billion of Chinese imports of U.S goods. Neither of these actions, however, is likely to cause the United States to remove these tariffs.

In the United States, HMTX Industries LLC filed suit in the Court of International Trade (CIT) in September 2020 to challenge the legality of the Lists 3 and 4A tariffs, and more than 6,000 other importers subsequently filed similar lawsuits. The scope of this litigation is unprecedented, in terms of both the number of plaintiffs and the value of duties involved. As a result of this litigation, the CIT reported a 1,546% increase in its caseload from 2019 to 2020.

On April 1, 2022, after several rounds of motions and responses, the CIT remanded consideration of the Lists 3 and 4A tariffs to the USTR for further explanation of its review of public comments and the basis for its decisions. While the court agreed with the plaintiffs that the matter is subject to judicial review, the court found that the USTR had not exceeded its authority in imposing the tariffs. Nonetheless, the CIT determined that the USTR's actions under Section 301 were subject to the Administrative Procedure Act and that the USTR failed to provide a sufficient response to the comments it solicited when providing the rationale for its final determinations in the Lists 3 and 4A actions. Instead of vacating the tariff actions as the plaintiffs had requested, however, the court [remanded](#) the actions to the USTR and gave the USTR three months (until June 30) to further explain its justifications for its actions.

If the plaintiffs ultimately prevail in this litigation, it would mean an end to the Lists 3 and 4A tariffs (and significant refunds for the plaintiffs), but this outcome is uncertain. Moreover, the litigation, including appeals by either the plaintiffs or the government, could go on for some time and would have no impact on Lists 1 and 2 tariffs.

## Potential for Sunset and New Exclusions

Section 301 provides for sunset (or termination) of the tariffs after four years, absent a request from an interested party to keep the tariffs in place. On May 3, 2022, the USTR announced that parties have until July 6, 2022 to submit requests to keep the tariffs in place. Technically, the announcement relates to the sunset of Lists 1 and 2, but because the USTR treats Lists 3 and 4A as modifications of the initial actions, the USTR is treating the tariffs on those lists as within the scope of this announcement.

Assuming any party requests continuation of the tariffs, which is almost certain, the USTR will [conduct a review](#) of the tariffs and, as a part of that review, will provide a later opportunity for all interested persons to comment. Given the significant latitude that the statute affords the USTR in evaluating and taking action (or not taking action) in response

to these comments, as well as the current political environment, there is little expectation that the USTR will sunset these tariffs.

Additionally, legislation pending in Congress would not terminate but could create a new exclusion process to afford relief, at least for certain products. Broad trade packages are pending in both houses of Congress, and the possibility of this new Section 301 exclusion process is a significant difference between the two bills. In June 2021, the Senate passed the U.S. Innovation and Competition Act, which would require the USTR to open a new exclusion process. In February 2022, the House passed the America Creating Opportunities, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act, which does not require a new exclusion process.

The Senate then [passed a motion](#) to instruct the conferees to include the exclusion process in the conference version of the bill. It is unclear whether the House conferees will agree to this. While many importers see the opportunity to seek exclusions as essential, especially for inputs that they cannot obtain outside China, the USTR reportedly wrote to the Senate Democratic Caucus to express opposition to the Senate's proposal to require a new Section 301 exclusion process, citing concern that exclusions would undermine the Administration's efforts to combat China's unfair trade practices.

## Inflation and Strategies for Responding to Tariffs

President Biden inherited both Section 301 tariff actions that [he has said he does not believe address](#) China's most significant trade issues and a Phase One trade deal under which China has met only 57% of its commitment to increase purchases of U.S. goods and services, meaning China did not purchase any of the additional \$200 billion of U.S. exports it [promised](#). In the words of one Administration official, their patience with China "is wearing thin."

While the Administration has continued to push China on its commitments, rising inflation now means that the United States may now have a different motivation for pulling back on some of these tariffs. Indeed, Section 301 tariffs currently apply to most U.S. imports of products of Chinese origin. Both White House advisor Daleep Singh and Treasury Secretary Janet Yellen [have said](#) that lessening some of the Section 301 tariffs could help to fight inflation. Similarly, while the U.S. International Trade Commission's (ITC) May 10, 2022 [initiation of an investigation](#) into the economic impact of Section 232 and 301 tariffs on U.S. industries was mandated by the Consolidated Appropriations Act of 2022 and was unrelated to the recent comments about Section 301 tariffs and inflation, interested parties in the investigation will probably discuss the inflationary effects of the tariffs.

Fighting inflation might be the most likely justification for some short-term relief from these tariffs. Relief via other avenues is less likely, since the USTR probably will not sunset the tariffs; the ITC's investigation will last until March 2023, and its outcome will be only a report to congressional committees; and any new exclusion process would provide relief only for some products. The United States could give up significant leverage if it removed all the Section 301 tariffs when China has not met its Phase One commitments, but the key need to slow inflation could offer a basis for lessening the tariffs while continuing to lean on China.

Companies should consider participation in the sunset and impact investigations that the USTR and ITC are conducting because this input will be public and paints a broad picture of how the tariffs affect the economy and individual businesses. Unless or until an exclusion process is available, companies can also evaluate new sourcing options, confirm tariff classifications, and optimize valuation methodologies. Companies should also remain aware of enforcement potential around subject imports – the significant additional duties and the evolving concerns around forced labor increase the risk profile for most imports from China.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Jason M. Waite  
202.239.3455  
jason.waite@alston.com

Bobbi Jo (BJ) Shannon  
202.239.3344  
bj.shannon@alston.com

Kenneth G. Weigel  
202.239.3431  
ken.weigel@alston.com

Chunlian Yang  
202.239.3490  
lian.yang@alston.com

Brian Frey  
202.239.3067  
brian.frey@alston.com

John O'Hara  
202.239.3131  
john.ohara@alston.com

Lucas Queiroz Pires  
202.239.3235  
lucas.queirozpires@alston.com

Michael Press  
202.239.3643  
michael.press@alston.com

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WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500  
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719  
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899  
LONDON: 4th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225  
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260  
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001  
SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001  
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333