

ALERT

Administration Increases Section 301 Tariffs on Chinese Imports, Floats Possible Action under the International Emergency Economic Powers Act

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On Friday, August 23, 2019, after the Chinese Government unveiled its plan to impose additional tariffs on approximately \$75 billion in annual U.S. imports, the Administration made two announcements of its own.

First, the Administration announced that it would increase the existing and planned Section 301 tariffs on China by 5%. Specifically:

- Chinese-origin goods subject to the first three rounds of Section 301 tariffs, *i.e.*, Tranches 1, 2, and 3, will be subject to 30% duties effective October 1, 2019. Currently, the Section 301 tariff rate applicable to such goods is 25%.
- Chinese-origin goods subject to the forthcoming Tranche 4A and Tranche 4B tariffs will face additional duties of 15%, rather than the previously announced 10%. The effective date of the tariffs remains September 1, 2019 for Tranche 4A goods, and December 15, 2019 for Tranche 4B goods.

Separately, the President also Tweeted that American companies were being ordered “to immediately start looking for an alternative to China.” After media reporting suggested that such an order would be beyond the scope of the Administration’s authority, he pointed to the 1977 International Emergency Economic Powers Act as the potential basis for such action. This has raised a number of questions, including:

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Practice Areas

International Trade

- **What is the International Emergency Economic Powers Act (IEEPA)?**

IEEPA is a 1977 federal law that provides the President with authority to regulate economic transactions with foreign countries. The law has been used more than 50 times since its passage, generally to block financial transactions, freeze foreign-held assets, and limit exports. According to the Congressional Research Service, it provides the President with “sweeping powers . . . to control economic transactions.”

- **Can the President use IEEPA authority to “hereby order” U.S. companies to leave China?**

Probably, if not necessarily in those terms. The statute gives the President broad discretion to implement measures that could effectively force U.S. companies to stop doing business in China. In May, for example, the President cited IEEPA authority to issue an executive order that would prohibit the acquisition of information and communications technology (ICT) products or services “designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction of a foreign adversary”

There does not appear to be any reason that the President could not issue a similar order, applicable to a broader array of sectors in which U.S. multinational investments in China are concentrated. “Persons owned by, controlled by, or subject to the jurisdiction of” would be broad enough to apply to several kinds of businesses owned in whole or in part by U.S. interests and operating under Chinese laws, including Wholly Foreign-Owned Enterprises, Joint Ventures, or other Foreign Invested Enterprises.

- **How would an IEEPA action proceed?**

As a prerequisite to the exercise of his powers under IEEPA, the President would need to declare a national emergency, transmit the proclamation to Congress, and publish it in the Federal Register. He would also be required to “immediately” transmit a report to Congress explaining the reasons for the emergency, the actions to be taken, and identifying the foreign countries affected. In the case of the ICT action noted above, the President further directed several agencies to coordinate under the Commerce Department’s lead and issue implementing rules within 150 days of the proclamation.

Following the emergency declaration, the President would need to report to Congress on the action every six months. If he fails to do so, the action would automatically terminate. The action could also be terminated by joint resolution of Congress. While there is some scope for judicial review, there is great deference to the President in areas such as this, which overlap with Article II powers.

- **Does the President actually want to order U.S. companies to leave China?**

Unclear. The impetus for the original Section 301 action was a set of acts, policies, and practices such as intellectual property theft and forced technology transfer, which have been supported or tolerated by the Government of China. These unfair acts have allowed China and Chinese firms to inappropriately gain strategic competitive advantages over U.S. companies and the U.S. economy.

However, since the Section 301 tariffs were first put into effect, suggestions have been made that the actual goal of the tariffs is to de-link the U.S. and Chinese economies, most specifically by incentivizing U.S. companies to move their supply chains out of China. While tariffs have the practical effect of reducing Chinese exports to the United States, action under IEEPA could more decisively separate the two countries' economies, by making it practically impossible to import goods from China.

Should you have any questions regarding the tariffs, please do not hesitate to contact one of the attorneys listed on this alert.