Trump Administration Trade Policy: A Historical Perspective and Key Questions & Takeaways

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August 19, 2025

The Historical Perspective

President Trump recently called the word "tariff" the most beautiful word in the dictionary. I, However, President Trump's love of tariffs is not new. Long before becoming President, Donald Trump as a private business person took out a full-page ad in the New York Times in 1987 calling for tariffs on Japan and China. Tariffs, also referred to as customs duties, are a tax on imported products. The importer is legally responsible for paying the tariff, but often times the cost of an increased tariff is actually split between importer and exporter as the importer uses leverage to insist on a price cut in order to continue purchasing from the foreign exporter. Foreign governments do not pay import duties, but tariffs can certainly impact the exports from and economies of foreign nations.

From 1947 through 2012 – 65 years – U.S. trade policy was largely focused on cutting-tariffs reciprocally with other nations through trade negotiations. To be sure, the United States was one of the largest users of anti-dumping and countervailing duty remedies that imposed additional duties on dumped (i.e. products sold in the U.S. market below home market price) and subsidized imports causing or threatening to cause material injury to a U.S. industry. However, these trade remedy tariff actions, while an irritant to foreign trading partners, impacted roughly only 1% of U.S. imports in any given year. The tariff-cutting negotiations resulted in the United States maintaining one of the lowest average tariff rates in the world.

The United States entered the General Agreements on Tariffs and Trade (GATT) in 1947 and often led the push for new negotiating rounds that would cut tariffs among GATT membership. GATT membership continued to grow throughout the decades and in the 1970's the so-called Tokyo Round of GATT negotiations not only focused on tariff-cutting but also on reducing non-tariff barriers such as subsidies and protectionist technical standards. In the 1980's, the United

States began entering free trade agreements, first with Israel (1985) and then with neighboring Canada (1989), that essentially eliminated tariffs imposed on trade between the United States and its free trade agreement partner. The United States also led the launching of a new round of GATT negotiations, the Uruguay Round in 1986. The Uruguay Round led to the creation of the World Trade Organization (WTO) in January 1995 with a strengthened and more legalized dispute settlement system, obligations liberalizing trade-in-services and protecting trade-related intellectual property rights, and, of course, more tariff cuts among negotiating countries. WTO membership was 128 nations at its inception, an increase of more than 100 nations since the original GATT 1947. The United States also finalized the North American Free Trade Agreement (NAFTA) in 1994 creating tariff-free trade between the United States, Canada and Mexico, as well as reducing non-tariff barriers to trade and seeking to ensure adequate enforcement of labor and environmental laws of the three countries. Throughout the next 15 plus years, the United States continued to enter free trade agreements, although efforts to conclude a hemispheric wide Free Trade Agreement of the Americas (FTAA) were abandoned in 2007. By 2012, the United States had 20 total free trade agreement partner countries. But it was clear liberalized trade was becoming ever more controversial in the political arena. It was a several-year struggle to obtain Congressional approval of the last three FTAs that entered into force in 2012: Columbia, Panama, and South Korea. The Doha Round of WTO negotiations, launched in 2001, had collapsed by then and was officially ended in 2015. President Obama's administration negotiated and then signed in February 2016 a Trans-Pacific Partnership (TPP) free trade agreement with 11 other nations, including Japan, in the Asia-Pacific. (The United States did at the time maintain free trade agreements already with 6 of the 11 nations, but not Japan, the largest economy of the other 11 nations). The TPP nations, including the United States, represented over 40% of global GDP. However, Congressional approval of the TPP could not be secured in 2016 as the House of Representatives rejected a bill extending trade adjustment assistance that was seen as a necessary accompaniment to TPP approval legislation. Both 2016 Presidential candidates – Donald Trump and Hillary Clinton – took positions during the campaign opposing the TPP.

First Trump Administration (2017-2021)

On his first day in office, President Trump issued a memorandum withdrawing the U.S. signature from the TPP, indicating he would not proceed to seek Congressional approval for the TPP. The first Trump Administration did utilize several trade statutes delegating authority to the President to raise tariffs that had lay dormant for decades. Section 301 of the Trade Act of 1974, that delegates authority to increase in tariffs against products from a country that maintains unreasonable or discriminatory trade practices that burden or restrict U.S. commerce, had not been utilized to raise tariffs since prior to the WTO's creation. In 2018, Section 301 was utilized to raise tariffs on roughly two-thirds of China's imports into the United States as high as an

additional 25%. (These additional duties apply on top of the existing normal trade relations (NTR) (or most-favored-nation, MFN) rate found in Column 1 of the Harmonized Tariff Schedule of the United States (HTSUS) that varies by good but generally averages around 4%). Section 301 requires an investigation by the U.S. Trade Representative's office to determine if a foreign country's trade practice is unreasonable or discriminatory and burdens or restricts U.S. commerce. The Trump Administration also reinvigorated Section 232 of the Trade Act of 1962 that delegates authority to the President to raise tariffs on imports threatening to impair U.S. national security. In 2018, President Trump raised tariffs on steel (by 25%) and aluminum (by 10%) using Section 232 authority. The previous use of 232 to raise tariffs was in the mid-1980's. The Trump Administration also used Section 201 of the Trade Act of 1974, or so-called safeguards relief, for the first time since 2001. After required investigations by the U.S. International Trade Commission (ITC), tariffs were imposed on washing machines and solar panels. In terms of tariff-cutting, President Trump utilized residual tariff-cutting authority to reach a mini-deal with Japan, in which Japan gave TPP-tariff treatment to most U.S. agricultural goods, and the United States reciprocally eliminated or reduced tariffs on certain Japanese agricultural and industrial goods (e.g. machine tools, fasteners, steam turbines, bicycles, bicycle parts, and musical instruments). The second chapter of the Japan mini-deal dealt with digital trade. President Trump also used a Section 232 investigation of auto and auto parts imports as leverage to renegotiate the NAFTA and reach a new free trade agreement with Canada and Mexico called the US-Mexico-Canada (USMCA) agreement. The USMCA tightened auto rules of origin from the prior NAFTA, added a digital trade chapter, and created a new labor complaint mechanism as well as other changes, but essentially USMCA is a 90% overlap with the prior NAFTA as it did not cut tariffs further since NAFTA already eliminated them between the three countries. The Trump Administration reached a so-called Phase I trade deal with China in January 2020 as well that had many purchasing commitments for China (in an attempt to lessen the U.S. trade deficit with China) and did lower, at the margins, some U.S. Section 301 tariffs imposed on imports from China (from 15% down to 7.5% on roughly 20% of Chinese imports into the United States). These purchasing commitments by China were never met as the COVID pandemic hit the world a few months after the agreement was reached leading to a recession.

Biden Administration (2021-2025)

The Biden Administration kept in place the additional Section 301 tariffs on China's imports throughout the four years of President Biden's term of office. The Biden Administration did reach an agreement with the EU, Japan and the United Kingdom to eliminate imposition of extra tariffs on steel under Section 232 with so-called tariff rate quotas (TRQs) whereby so long as imports did not exceed a negotiated amount such imports would not face the additional Section 232 tariffs. The first Trump Administration also negotiated similar TRQ deals with countries such as South Korea and Brazil and reached voluntary export restraint deals on steel

with Canada and Mexico. No traditional tariff-cutting FTAs were negotiated during the Biden Administration. As U.S. Trade Representative Katherine Tai explained: "When efficiency and low cost are the only motivators, production moves outside our borders. It becomes increasingly consolidated in one economy—such as the [People's Republic of China]—which manipulates cost structures, controls key industries, and became a dominant supplier for many important goods and technologies." Rather, the Biden Administration launched negotiations on an Indo-Pacific Economic Framework (IPEF). The IPEF involved negotiations on four pillars: 1. Trade (without discussion of tariff cuts); 2. Supply chain resilience; 3. Clean energy, decarbonization, and infrastructure; and 4. Taxation and anti-corruption. An IPEF supply chain agreement was reached in early 2024, but trade pillar was never concluded, in part due to disagreements over labor issues. Similar negotiations were launched in the Americas, and with a couple individual countries. An agreement with Taiwan, the U.S.-Taiwan Initiative on 21st Century Trade, was concluded in June 2023 but did not involve tariff reductions. Instead, it had commitments on anticorruption, good regulatory practices, services domestic regulation, customs administration and trade facilitation, and small and medium-sized enterprises.

Second Trump Administration (2025-present)

As President Trump took office for his second term in January 2025, the United States had concluded no traditional tariff-cutting FTAs with any new countries since 2012 (13 years) and there had been no major WTO tariff-cutting negotiating round since 1994 (31 years), and no significant sectoral tariff-cutting (such as on information technology products) in the WTO for at least a decade. Indeed, the Japan mini-deal struck in 2018 really was the one and only significant example of a tariff-cutting agreement in the decade prior to the start of the second Trump Administration.

The first 200 plus days of the second Trump Administration has seen a bevy of tariff increases and threats of tariff increases as well as announcements of trade agreements with over eight countries. It has also seen novel use of the International Emergency Economic Powers Act (IEEPA) as authority to raise tariffs.

IEEPA, enacted in 1977, provides the President authority to take certain actions "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Among the actions the President is authorized to take are the following: "…(B) investigate, block during the pendency of an investigation, ***regulate***, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, ***importation*** or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any

interest by any person, or with respect to any property, subject to the jurisdiction of the United States." IEEPA does not expressly authorize "tariffs" as many other trade statutes do, such as Section 301 and Section 232. However, it has been argued that IEEPA does give the power to "regulate…importation" and President Nixon's reliance on that language to increase tariffs in 1971 under a predecessor statute was upheld by U.S. courts. Further, Congress did not expressly limit the use of tariffs under IEEPA (as had been recommended by some testifying before Congress at the time).

In line with a promise made on his first day back in office, President Trump announced on March 4 that he was using IEEPA as authority to impose 25% additional duties on Canadian and Mexican goods, before two days later clarifying that goods meeting USMCA rules of origin would not face the additional duties. In July, the tariff on Canadian goods was increased to 35%. The unusual and extraordinary threat was the fentanyl and human trafficking across the United States' border with the two neighboring countries. A good deal of Canadian and Mexico goods enter the United States at NTR/MFN tariff rates if those rates are low rather than at the duty-free USMCA rate because many businesses wish to avoid the administrative cost of the paperwork for USMCA eligibility. However, the percentage of exports from Canada and Mexico to the United States at USMCA rates has risen dramatically in the past several months as businesses have scrambled to complete paperwork necessary to be USMCA compliant and avoid the large IEEPA-based tariffs on non-USMCA-eligible imports into the United States.

Also, in early March, China had 20% additional IEEPA-based tariffs imposed on its imports into the United States, and that number rose to 145% as the two countries engaged in retaliatory actions before a truce was reached in May that placed additional U.S. tariffs on goods from China at 30% and China's additional tariffs on U.S. goods at 10%. That truce was extended an additional 90 days on August 12. Similar to Canada and Mexico, the threat that the IEEPA tariffs were being used to address was the flow fentanyl into the United States from China.

President Trump used Section 232 authority and the prior 232 investigations to eliminate the TRQs on steel (and aluminum) and reinstall the 25% tariff on steel and impose a 25% tariff on aluminum. Subsequently, in early June, those additional tariff rates were raised to 50% on both steel and aluminum. On March 26, President Trump imposed a 25% tariff on imported autos and auto parts relying on Section 232 and the prior investigation on autos and auto parts. An additional duty on copper of 50% was imposed in late July under Section 232 authority.

In early April, on the White House lawn, President Trump announced "Liberation Day" reciprocal tariffs that over 85 nations would face. For some nations, those tariffs would be as high as 30-50%. The unusual and extraordinary threat these IEEPA-based tariffs were responding to, according to President Trump's executive order, was "a lack of reciprocity in our bilateral trade relationships, disparate tariff rates and non-tariff barriers, and U.S. trading

partners' economic policies that suppress domestic wages and consumption, as indicated by large and persistent annual U.S. goods trade deficits." A week later, President Trump gave a 90-day pause to the reciprocal duties to allow time for negotiations with individual countries and established a baseline additional reciprocal tariff of 10% on all countries not subject to separate IEEPA tariffs (Canada, Mexico, and China). The United States and United Kingdom (UK) reached a deal within the 90-day window but for other countries, there was an additional 30-day pause and a new set of threatened tariff rates. The UK deal in late May was a signal of the approach that would occur in other negotiations. It did not eliminate the additional duties on the UK Rather, the U.K. would only face 25% (rather than 50%) tariffs on steel and aluminum and only a 10% additional tariff on autos and auto parts (rather than 25%). For other goods, the UK would keep the 10% baseline tariff rather than face a higher reciprocal tariff.

Over the past month plus, the Trump Administration has reached additional trade deals with the EU and Japan, as well as South Korea, Cambodia, Pakistan, Thailand, Indonesia, Vietnam, and the Philippines. All the agreements keep an additional tariff on goods from those countries but at a rate lower than the threatened reciprocal rate. For example, the EU agreement places a 15% additional tariff on EU products that is lower than the threatened 30% reciprocal tariff and yet higher than the 10% baseline rate. Most of these tariffs are in addition to the normal NTR/MFN rate. While the agreements also feature reductions or other market access commitments by the foreign partner country, and some commitments to invest in U.S. industry, there are a lot of unknowns in the agreements and even disagreements between the countries when describing the agreements in public statements. For these reasons, these agreements are perhaps better described as frameworks that will need further negotiation to fill in the details. No finalized text of any of the agreements has been publicly released.

Unsurprisingly, legal challenges to the Trump tariff actions have occurred in U.S. courts and in the WTO. Legal challenges in the WTO will not change U.S. policy regardless of their outcome. The WTO Appellate Body collapsed in late 2019 during the first Trump Administration as the United States refused to join a consensus to appoint new appellate body members. Three members are required to hear any appeal and the number of appellate body members fell to two in December 2019. Since that time, WTO cases can still be brought against the United States by other WTO member countries and those cases will be heard by three person panels, but the United States can appeal any panel ruling into the so-called "void." The WTO's dispute settlement understanding guarantees an automatic right to appeal but one does not exist now. Thus, an appeal falls into a void and prevents adoption of the panel report by the WTO's members and prevents the panel ruling from becoming binding. Fifty-seven of the WTO's 166 members are parties an alternative appeal mechanism, called the Multiparty Interim Appeal Arrangement (MPIAA), to prevent the "appeal-into-the-void" problem, but the United States is not party to that arrangement. Many other large WTO members are subject to the MPIAA,

including the EU, Japan, Canada, the UK, and China. At the panel level, the United States will invoke the GATT's so-called national security exception, and prior panel rulings interpreting that exception as not being completely self-judging is one of the reasons the United States allowed the WTO Appellate Body to collapse. In realization of the futility of WTO dispute settlement to change Trump Administration policy, only three countries (Canada, China and Brazil) have brought WTO cases against the IEEPA and Section 232 tariffs imposed in the second Trump Administration, and none of those cases have proceeded to the establishment of a panel as of mid-August 2025; rather, they simply remain in consultations.

Challenges to the IEEPA-based tariffs in U.S. courts do have the possibility of being effective. As of August 2025, at least nine cases have been filed in U.S. courts challenging the legality of President Trump using IEEPA to impose tariffs. Some cases still involve battles over whether U.S. district courts have jurisdiction or whether the U.S. Court of International Trade (CIT) has exclusive jurisdiction over these cases. The Trump Administration has argued that the CIT has exclusive jurisdiction over these cases because that court's jurisdiction extends to any litigation "arising out of" laws "providing for ... tariffs" and that should extend to any dispute involving a change to the Harmonized Tariff Schedule of the United States (HTSUS). While three district courts have agreed that the CIT has exclusive jurisdiction, the U.S. District Court for the District of Columbia (D.C.) agreed with plaintiffs that IEEPA does not "provide for" tariffs and that suits over its use sit outside CIT's jurisdiction.

On the merits of the matter, the CIT in its May 28, 2025 ruling examined three sets of tariffs: 1. the so-called "worldwide" tariffs, essentially the baseline reciprocal tariffs that were imposed on nearly all countries; 2. the "retaliatory" tariffs imposed on China as the two countries ratcheted up tariffs prior to their truce agreement; and 3. the "trafficking" tariffs (or fentanyl and human trafficking tariffs).

In its opinion, the CIT discussed the non-delegation doctrine and the major questions doctrine at the outset of analyzing the worldwide and retaliatory tariffs. Specifically, the CIT stated that "under the nondelegation doctrine, Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to fix such [tariff] rates is directed to conform,'" adding that an intelligible principle must "meaningfully constrain" the President. On the latter doctrine, the CIT stated that "under the major questions doctrine, when Congress delegates powers of 'vast economic and political significance,' it must 'speak clearly.'" In sum, the CIT thought these two doctrines were useful tools to interpret the IEEPA statute, as statutes should not be interpreted in a way that would lead them to running afoul of the Constitution. The CIT also highlighted that when the *Yoshida* court upheld President Nixon's August 15, 1971 order imposing an additional 10% tariff on imports, those tariffs were both temporary and limited by the current rates in Column 2 (non-MFN) of the U.S. tariff schedule. The CIT further

noted that the *Yoshida* court specifically rejected that the words "regulate … importation" could grant an unlimited tariff power to the President. Finally, the CIT pointed to Section 122 of the Trade Act of 1974 as now providing the authority to impose tariffs for balance-of-payments deficits, including trade-in-goods deficits. Section 122, like all other delegated trade authorities, imposes procedural hoops-and-hurdles as well as substantive limits on use of the delegated authority.

On the "trafficking" tariffs, the CIT found that the tariffs did not "deal with" the threats posed by fentanyl and human trafficking. Specifically, the CIT quoted the IEEPA's language that "the authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose." The CIT held that the term "'deal with' connotes a direct link between an act and the problem it purports to address." The CIT found that an attempt to create leverage through tariffs against Canada, Mexico and China in order to pressure those countries to take further actions on fentanyl and human trafficking activities that cross the U.S. border was not directly linked to the unusual and extraordinary threat of those activities. If pressure or leverage creation on other countries was sufficient, the CIT feared there would be no limits to actions taken under IEEPA. As summarized by the Court: "Surely this is not what Congress meant when it clarified that IEEPA powers 'may not be exercised for any other purpose' than to 'deal with' a threat." The CIT ruling was stayed pending an appeal of the decision to the Court of Appeals for the Federal Circuit. The Court of Appeals for the Federal Circuit held oral arguments the last day of July and its decision is anticipated sometime in late August or early Fall. It is quite likely that decision will then be appealed to the U.S. Supreme Court.

On May 29, 2025, the U.S. District Court for D.C. (Judge Rudolph Contreras) also held the IEEPA-based tariffs illegal. Judge Contreras found that "regulate" and taxing authority were two different things; tariffs and taxes raise revenue, and the word "regulate" and those surrounding it in the IEEPA statute did not involve raising revenue. Judge Contreras also pointed out that "every time Congress delegated the President the authority to levy duties or tariffs in Title 19 of the U.S. Code, it established express procedural, substantive, and temporal limits on that authority," and that IEEPA contained no such limits. Additionally, Judge Contreras pointed out that IEEPA also contains authority to regulate exportation and if regulate included taxing authority it would mean that export taxes were authorized by the IEEPA but the Constitution prohibits export taxes. Judge Contreras' ruling is also stayed pending appeal of it to the Court of Appeals for the DC Circuit.

On August 8, 2025, President Trump warned on his social media account that "if a Radical Left Court ruled against us at this late date, in an attempt to bring down or disturb the largest

amount of money, wealth creation and influence the U. S. A. has ever seen, it would be impossible to ever recover, or pay back, these massive sums of money and honor. It would be 1929 all over again, a GREAT DEPRESSION!" U.S. Trade Representative Jameison Greer was more subtle in his recent remarks, indicating confidence that the administration would prevail in the courts but also indicating the administration had alternative plans to rely on other delegated authorities to keep the tariffs in place. U.S. Trade Representative Greer stated in an interview that "[i]f it goes the other way, then we'll manage that. The reality is the countries understand the type of leverage that President Trump has created. That's why they're doing these deals and they're going to stick regardless of what happens in litigation …. It is once in 100 years [that] you have the chance to reorder global trade like this, and we're doing it, and we'll use whatever tools are necessary to do it."

Key Questions & Takeaways

1) ***Is this equivalent to a "forced round" of trade negotiations?*** There has been no successful GATT/WTO round of negotiations since the conclusion of the Uruguay Round in 1994. Some argue President Trump's tariff actions are leading to a "forced round" of trade liberalization. As countries give market access and tariff-cutting commitments to the United States, those commitments must be given to all other WTO countries on a most-favor-nation (MFN) basis under the various WTO agreements, including the GATT (dealing with trade-in-goods). While the public is still waiting on the details of the various commitments countries have made in deals with the Trump Administration, it will be important to see not only what the commitments are but whether they are indeed extended on an MFN basis or whether some countries will ignore their WTO MFN obligations. Of course, the interesting feature of this "forced round" is that the United States does not participate in the tariff-cutting like prior rounds but actually increases tariffs above existing rates. Further, unlike prior negotiating rounds, this forced round only features bilateral negotiations between the United States and others. Bilateral negotiations have long been preferred by the Trump Administration, even going back to President Trump's first term.
2) ***Has Congress given away too much unbounded authority on tariff increases to the President?*** While presidential tariff-cutting authority under trade promotion authority was always time-limited by Congress, large amounts of tariff-raising authority has been delegated to the President without any sunset. Even in the first Trump Administration, there was unhappiness in Congress with the use of Section 232 and attempts by members of Congress to place further limits on it. However, if Congress delegates authority to the President with no sunset on that authority, it is very difficult to terminate or even place further constraints on that authority later as the President will veto any legislation doing so, thus necessitating two-thirds support in both houses of

Congress to override the veto – an uphill climb at any time and even more so today. If IEEPA-based tariffs are ultimately upheld by courts of appeal or the U.S. Supreme Court, this will certainly only increase the power the President has to take tariff-raising actions into the future as IEEPA also has no sunset clause.

3) ***What is the likely final result of the legal challenges in US courts to the IEEPA-based tariffs?*** President Trump's social media post indicates it is only leftist judges that would strike down the IEEPA-based tariffs. However, the three judges on the CIT that ruled against the IEEPA-tariffs were a Reagan appointee, an Obama appointee, and a Trump appointee. Judge Contreras is an Obama appointee, but also notably appointed by Chief Justice John Roberts to serve a term on the United States Foreign Intelligence Surveillance Court. At this point, it is hard to say that there is any link between which President appointed a judge and their views on the use of IEEPA to impose tariffs. U.S. Trade Representative Greer has indicated confidence in ultimate success for the government. The U.S. Supreme Court has a 6-3 majority for conservative justices and has generally supported President Trump's actions in other areas. However, in this case several doctrines of great importance to conservative justices – the non-delegation doctrine and the major questions doctrine – may be implicated at least in terms of influencing statutory interpretation. As discussed below, some justices may also be concerned that if tariffs are allowed under IEEPA that tariff actions could be used for almost an unlimited number of rationales, trade and non-trade-related. Further, some justices may comfort themselves in knowing that even if they deny the President the ability to impose tariffs under IEEPA that other delegated authorities will likely allow the President to closely approximate his current tariff policy.

4) ***If the IEEPA-based tariffs are ultimately invalidated by US courts, what other authorities might the administration rely upon?*** The Trump Administration would need to rely on other so-called three-digit authorities: Section 232, Section 301, and Section 122, all of which have procedural hoops-and-hurdles as well as some substantive limits that must be complied with in order to use the particular delegated authority. While expanding use of those authorities to implement across-the-board tariffs globally may stretch those authorities and lead to a whole new round of litigation, these delegated authorities can likely be used to implement tariffs that closely approximate current policy. For example, Section 232 (19 USC 1862) states: "Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall immediately initiate an appropriate investigation to determine the effects on the national security of imports <u>of the article</u> which is the subject of such request, application, or motion." (emphasis added). The text of the law thus refers to a specific "article" being imported and the history of use of the law also indicates it is to involve

article-specific investigations and actions. However, the tariff actions against specific products can be, and often are, extended to derivative products. For example, steel tariffs have been extended to products such as refrigerators, freezers and stoves. Currently, there are Section 232 investigations underway for the following products: timber/lumber, semiconductors, pharmaceuticals, critical minerals, heavy trucks, aircraft drones, and polysilicon. President Trump has threatened 100% duties recently on semiconductors, and a whole host of derivative products contain semiconductors. Section 301 perhaps has even greater leeway as it provides that "[i]f the Trade Representative determines that (1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and (2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice." While most Section 301 investigations involve a single country, a few focus on particular discriminatory acts (e.g. digital services taxes) engaged in by more than one country. The Office of the U.S. Trade Representative publishes an annual report of trade barriers to U.S. exports in foreign countries (the National Trade Estimates report) and could use that as the basis to launch dozens of Section 301 investigations that focused on individual countries. The 2025 version of the National Trade Estimates report listed trade barriers in approximately 60 countries plus the 27-member European Union. Both Section 232 and Section 301 allow for investigations and determinations to proceed rapidly as both statutes impose maximum but not minimum time frames for various aspects of the process. As to Section 122, even the CIT believes that statute would be appropriate to use for trade-in-goods deficits, but the problem the Trump Administration might see in that authority is that tariffs are capped at 15% and limited to 150 days unless extended by Congress.

5) ***Even if IEEPA-based tariffs are ruled illegal, would tariffs included in the trade deals themselves provided independent authority to continue charging the increased tariffs?*** Tariff-cutting authority for the President lapsed in July 2021. However, the trade deals the second Trump Administration has reached with the EU, Japan, UK and others do not involve the U.S. reducing current tariffs, but rather imposing additional tariffs on products from those countries. Some in Congress might argue such deals need Congressional approval. Indeed, the Congress actually approved the agreement with Taiwan concluded during the Biden Administration after the fact and imposed additional procedural requirements on any future agreements with Taiwan and that agreement did not involve tariff-cutting nor tariff-increases. Presidents in the past have argued

agreements are impliedly approved if they do not include any terms or obligations that conflict with current U.S. law. (This was the argument in support of the digital trade chapter within the U.S.-Japan mini-deal during the first Trump Administration, for example, and also the argument by the Biden Administration for its Taiwan deal). One problem with this argument is that the HTSUS is considered a law and Trump's recent deals imposing additional tariffs make changes to the HTSUS. This may be another issue that leads to litigation in U.S. courts – whether the agreements with foreign countries raising tariffs on products from those countries are valid without Congressional approval and whether they provide an independent basis for changes to the HTSUS.

6) ***Might Congress pass legislation approving of the Trump tariffs or otherwise delegate broad authority to impose across-the-board tariffs globally?*** Most bills introduced in this session of Congress thus far dealing with tariffs would actually limit the President's authority to impose tariffs. Most of these bills have been introduced by Democrats, but Sen. Rand Paul (R-Kentucky) has introduced the No Taxation without Representation Act of 2025 that would require the President to make a tariff proposal to Congress and then have Congress approve the tariff proposal in order for it to take effect. The bill would also eliminate or curtail many existing authorities the President has to impose tariffs. A bi-partisan bill sponsored by Sen. Maria Cantwell (D-Washington) and Rep. Don Bacon (R-Nebraska) would require the U.S. International Trade Commission to assess the economic impact of proposed tariffs by the President under existing authorities and submit the report to Congress 60 days prior to the tariffs being able to take effect. However, any bill limiting or curtailing existing trade authorities will be vetoed by the President. There is one bill, HR735 introduced by Rep. Riley Moore (R-West Virginia) that actual would authorize a "reciprocal" tariff policy that is quite similar to a bill originally introduced in 2019. Interestingly, the bill would seem to require that reciprocal duties be assessed on a good-by-good basis, rather than a country-wide basis. That would require a lot of detailed analysis and research, one reason why the Trump Administration, seeking to act quickly, resorted to country-wide reciprocal duty rates using a formula based on a country's trade deficit with the United States. The bill only has 10 or so co-sponsors. Just in the past few days, Reps. Jared Golden (D-ME) and Greg Steube (R-FL) introduced a bill in the House titled the "Secure Trade Act" that would impose a 10% baseline tariff on all countries and either a 35% (non-strategic products) or 100% (strategic products, such as aircraft engine components and microdrones) tariff rates on imports from China. The bill also authorizes the President to impose even higher tariffs on imports from China than the 35% and 100% rates.

7) ***Is the WTO essentially irrelevant now in terms of establishing and enforcing global trade rules?*** The WTO consisted of essentially three pillars: a forum for negotiation, the dispute settlement system, and the trade-policy review mechanism (TPRM). The first

two pillars have had significant cracks in them for a long time. The last completed large round in the GATT/WTO system concluded in 1994. While some follow-on sectoral agreements (e.g. telecommunications, banking, and information technology products) were concluded in the first several years after the WTO's creation, and there have been a few other notable negotiating achievements such as the expanded WTO procurement agreement in 2012, none of these come close to the scope of a full, comprehensive round of negotiations. The chances of any large-scale WTO negotiation in the foreseeable future is non-existent. The dispute settlement system suffered a massive crack with the collapse of the Appellate Body in late 2019. But over 50 countries subscribe to the MPIAA that allows them to avoid the appeal into the void issue. Still operational, is the TPRM in which the trade and economic policies of members are reviewed periodically, with opportunities for questions and examination by other countries. Various committees of the WTO also continue to operate, such as the sanitary and phytosanitary (SPS) committee that seeks to tackle such barriers to trade through consultation and discussion. In short, the WTO continues to have a role, just one much more limited than it had a decade ago. U.S.-China trade relations essentially fell outside the WTO by the middle of the first Trump Administration. Now U.S.-trade relations with the world are in reality outside the confines of the WTO. Other nations' trade relations with each other, however, to large degree continue to be subject to WTO rules.

8) ***Are tariffs or threats of tariffs also being used for non-trade purposes?*** In addition to the fentanyl and human trafficking rationale for the IEEPA-based tariffs against Canada, Mexico and China, there are numerous other instances in which tariffs have been used for non-trade purposes in the first 200 plus days of the Trump Administration. On August 7th, President Trump issued an EO that found "that the Government of India is currently directly or indirectly importing Russian Federation oil" and thus declared that "articles of India imported into the customs territory of the United States shall be subject to an additional ad valorem rate of duty of 25 percent." This secondary sanction seeks to have India stop such purchases but the move has been criticized because the United States previously encouraged India to buy Russian oil to help stabilize global energy markets. It has also been criticized for setting back relations built by the United States with India over the past five administrations, particularly given neighboring Pakistan's products only face a 19% tariff when imported into the United States. On July 30, Brazil was hit with a 40% (on top of the 10% baseline tariff for a total of 50%) additional tariff rate for restricting the free speech of U.S. citizens on internet platforms and continuing to pursue the prosecution of former President Bolsonaro. (Bolsonaro and his allies have been charged with a plot to kill the winning Presidential candidate and a Brazilian Supreme Court justice in an attempted coup). In April, Mexico was threatened with additional duties over water rights issues between the two countries.

9) ***Tariff Stacking: What tariffs get added on top of others and what ones do not?*** As a general matter, each of the tariffs imposed under Section 301, Section 232 and IEEPA are added on top of each other and on top of the existing Column 1 HTSUS NTR/MFN rate. However, there are numerous exceptions. On April 29, President Trump issued an Executive Order with the following stacking rules: For goods subject to the auto and auto parts tariffs, there will be no additional IEEPA-based duties hitting Canada or Mexico, and no additional duties from Section 232 steel and aluminum tariffs. In early June, it was made clear that goods facing Section 232 steel and aluminum tariffs would not face IEEPA-based tariffs on Canada and Mexico. The Section 232 metals tariffs do stack on top of one another, but Section 232 tariffs only apply to the proportion of metal content in a good. For the additional 25% tariff on goods from India for purchasing Russian oil, those generally stack on top of India's reciprocal tariff rate of 25% but there are exceptions for certain products. The European Union's agreement with the United States, as implemented by Executive Order, states that for a good with a Column 1 duty rate of less than 15%, the sum of its Column 1 duty rate and the additional duty imposed by the Executive Order will be 15%. For EU goods, already facing a Column 1 duty rate higher than 15%, there will be no additional duty. Japan was able to negotiate a similar stacking rule a week after having its initial trade deal always add the 15% agreed tariff on top of the NTR/MFN rate.

10) ***Transshipment: Do goods deemed to be transshipped through a third country for purposes of evading tariffs face even higher tariff rates (than the ones sought to be evaded)?*** Transshipment of goods, i.e. simply passing goods through a third country and claiming the goods have origin of that third country in an effort to avoid higher duties, has long been a concern of the Trump Administration. Indeed, this concern goes back the first term of President Trump, when there were worries Chinese goods were being transshipped through Vietnam in an effort to evade the Section 301 tariffs imposed on Chinese goods. President Trump's July 31 executive order imposes a 40% additional duty on any transshipments meant to evade higher duties. However, there are questions as to how transshipment will be deemed to occur – whether it will be by application of long-standing rules of origin that ask whether a good underwent a "substantial transformation" in a country prior to shipment to the United States or whether new rules might be created that would declare that goods that have some non-trivial content from non-market economies such as China to be declared of Chinese-origin regardless of content or further activities occurring in subsequent countries in the supply chain. For example, the July 22 announcement of the agreement between the United States and Indonesia says that the two countries "will negotiate facilitative rules of origin that ensure that the benefits of the agreement accrue primarily to the United States and Indonesia." The July 31 executive order also directs that "[t]he Secretary of Commerce

> and the Secretary of Homeland Security, acting through the Commissioner of CBP, in consultation with the United States Trade Representative, shall publish every 6 months a list of countries and specific facilities used in circumvention schemes, to inform public procurement, national security reviews, and commercial due diligence."

In sum, the second Trump Administration's tariff policy stands in stark contrast to the focus of U.S. trade policy on reciprocal tariff-cutting negotiations that occurred from 1947 through 2012. To be sure momentum on tariff-cutting agreements slowed dramatically even before President Trump's first term when Congress failed to take action to approve the TPP in 2016 at the end of President Obama's term of office. Trump Administration policy in 2025 even diverges significantly from President Trump's first term. That first-term ultimately featured higher tariffs on two-thirds of Chinese imports, and steel and aluminum, but also a renegotiated NAFTA --the USMCA with bipartisan support in Congress -- that kept tariff-free trade between the three countries and modernized the agreement to include digital trade commitments. The Biden Administration kept the higher rates of duty on Chinese imports and U.S. Trade Representative Tai expressed concerns with China free-riding on U.S. FTAs so in some ways the trade policy of President Trump's first term was followed to some degree by his successor. However, the second term of the Trump Administration now features higher rates of duty on all countries, including allies, and targeted tariffs on many more products on national security grounds with more likely forthcoming soon. The average U.S. tariff rate is at its highest level in nearly a century. The coming months' and years' economic data (growth, inflation, exports, jobs) will show whether this much more aggressive tariff policy was wise or whether an alternative path of liberalizing trade with allies and continuing to work with allies to jointly place tariff and other pressure China to address its overcapacity, subsidization, and non-market practices in key sectors was a better route. To date, other countries have largely abstained from retaliating. Other countries appear to be in wait-and-see mode and hoping the economic impacts of the tariffs change the Trump Administration policy to some degree. Other countries also witnessed the reaction of the Trump Administration to China's retaliation and probably did not want to get involved in a ratcheting up of back-and-forth tariffs at this time. However, other countries no doubt are looking to diversify their trading partners in response to the Trump Administration tariff actions, and this can have long-term consequences similar to more overt retaliation. The Court of Appeals for the Federal Circuit, and even the Supreme Court, may force a somewhat less global approach to tariffs depending on their determinations of the legality of IEEPA-based tariffs since alternative delegated authorities at least have some limits and boundaries. However, Section 232 and Section 301 undoubtedly can be used for major tariff actions that might be able to closely approximate the impact of across-the-board tariffs taken under IEEPA. It will be harder (at least facially) to take non-trade-related tariff actions (like those against Canada, Mexico and China for fentanyl trafficking and against Brazil for its prosecution of former

President Bolsonaro and against India for purchase of Russian oil) if the Supreme Court determines tariffs cannot be imposed under IEEPA.