



TARIFFS & TRADE WARS

HOW I LEARNED TO STOP WORRYING AND LOVE THE TARIFFS

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Robert Shapiro, Partner, Thompson Coburn LLP

Ronald Peppe, General Counsel & VP Human Resources, Canam Steel Corporation

Margie Shapiro, CEO, Samuel Shapiro & Company

ELEMENTS OF THE TRADE WAR

- Investment controls*
- Trade agreement negotiation and re-negotiation
- Protection of certain U.S. industries
- Offensive effort to change the policies of trading partners
- Traditional trade actions

INVESTMENT CONTROLS

- Committee on Foreign Investment in the United States (CFIUS) is authorized to review foreign investment to determine whether the investment threatens to impair the national security of the U.S.
 - President may block the transaction or force it to be unwound
 - Notification to CFIUS is voluntary

INVESTMENT CONTROLS

- Foreign Investment Risk Review Modernization Act (FIRRMA)
 - Personally Identifying Information
 - Real Estate
 - “Critical technologies”

TRADE AGREEMENTS

- Withdrawal from the Trans-Pacific Partnership
- Renegotiation of the North American Free Trade Agreement
 - Now the USMCA (U.S., Mexico, Canada Agreement)
 - See Side Agreement re Section 232 on Autos
- Renegotiation of the Korean Free Trade Agreement
- Possible agreements with EU, UK, and Japan
- Look for other Free Trade Agreements

PROTECTION OF CERTAIN U.S. INDUSTRIES

- Section 201 – “Escape Clause” – **Section 201 (Escape Clause), Trade Act of 1974 (19 U.S.C. § 2251)** – A special measure imposed to counter the effect of goods being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury
 - Solar panels
 - Washing machines

SECTION 232 – NATIONAL SECURITY

- Section 232, Trade Expansion Act of 1962 (19 U.S.C. § 1862) – Measures imposed if a product “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security”

Steel	Uranium*
Aluminum	Titanium Sponge
Automobiles	

*Report to be issued this week

SECTION 232 - STEEL & ALUMINUM TARIFFS

- Imports of steel and aluminum determined to threaten to impair U.S. national security
- 25% additional duties on imports of steel
- 10% additional duties on imports of aluminum
- The tariffs became effective *March 23, 2018*
- *Products covered regardless of country*
 - *Some countries avoided additional duties by negotiating quotas*
- Requests for exclusion

SECTION 232 *AUTOMOBILES & AUTO PARTS*

- On *May 23, 2018*, Secretary of Commerce Wilbur Ross announced a new investigation under Section 232 into automobiles (SUVs, vans, and light trucks) and auto parts
- Key dates
 - Hearing took place July 19-20, 2018
 - Report issued to President on February 17, 2019
 - President has 90 days to determine action

SECTION 232 CHALLENGES

- WTO Dispute Settlement Body may review national security actions?
 - “It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a member's GATT and WTO obligations to a mere expression of the unilateral will of that member,” DSB WT/DS512/R, April 5, 2019

SECTION 232 CHALLENGES

- Section 232 is not an unconstitutional delegation of legislative authority. *American Institute for International Steel v. United States*, Ct. Int'l Trade Slip Op. 19-37 (March 25, 2019)

AN ATTEMPT TO FORCE CHANGE

Section 301, Trade Act of 1974 (19 U.S.C. § 2411) – Measure imposed if the rights of the United States under a trade agreement are being denied or an act, policy, or practice of a foreign country denies benefits to the United States or unjustifiably burdens or restricts U.S. Commerce

- USTR found that China has policies, practices, or actions that are unreasonable or discriminatory and are harming U.S. intellectual property rights, innovation, or technology development
- Duties are being imposed in an effort to force China to change these policies, practices, or actions
- U.S. business is “collateral damage”

SECTION 301 LISTS

- **List 1:** \$34 Billion in Chinese Imports
 - 25% duties effective July 6, 2018
- **List 2:** \$16 Billion in Chinese Imports
 - 25% duties effective August 23, 2018
- **List 3:** \$200 Billion in Chinese Imports
 - 10% duties effective September 24, 2018
 - Increase to 25% on January 1, 2019 (suspended indefinitely)
- **List 4:** Threatened – \$257 Billion in Chinese imports (suspended indefinitely)

232 VS 301

Section 232

- Based on finding of national security risk
- One-time implementation
- Product based
- Ongoing adversarial exclusion process
- Exclusion relates back to the date that the exclusion request is posted
- Currently subject to both national and international challenge
- No duty drawback

Section 301

- Based on finding of violation by trading partner
- Ongoing implementation
- Country based
- Sequential open one-time exclusion processes
- Exclusion relates back to the imposition of the duties
- Currently subject to limited international challenge
- Duty drawback permitted

EXAMPLES OF RETALIATION

- **European Union**

- Types of goods: bourbon, corn, Harley-Davidson Motorcycles, clothing

- **Mexico**

- Types of goods: pork, different types of produce, and dairy, including cheese

- **Canada**

- Types of goods: steel and steel products, aluminum products, household appliances and goods, food products, furniture, and other goods

- **China**

- Types of goods: agricultural products, chemicals, paper, natural gas, mechanical equipment, trucks
- Other retaliatory actions: regulatory slow downs

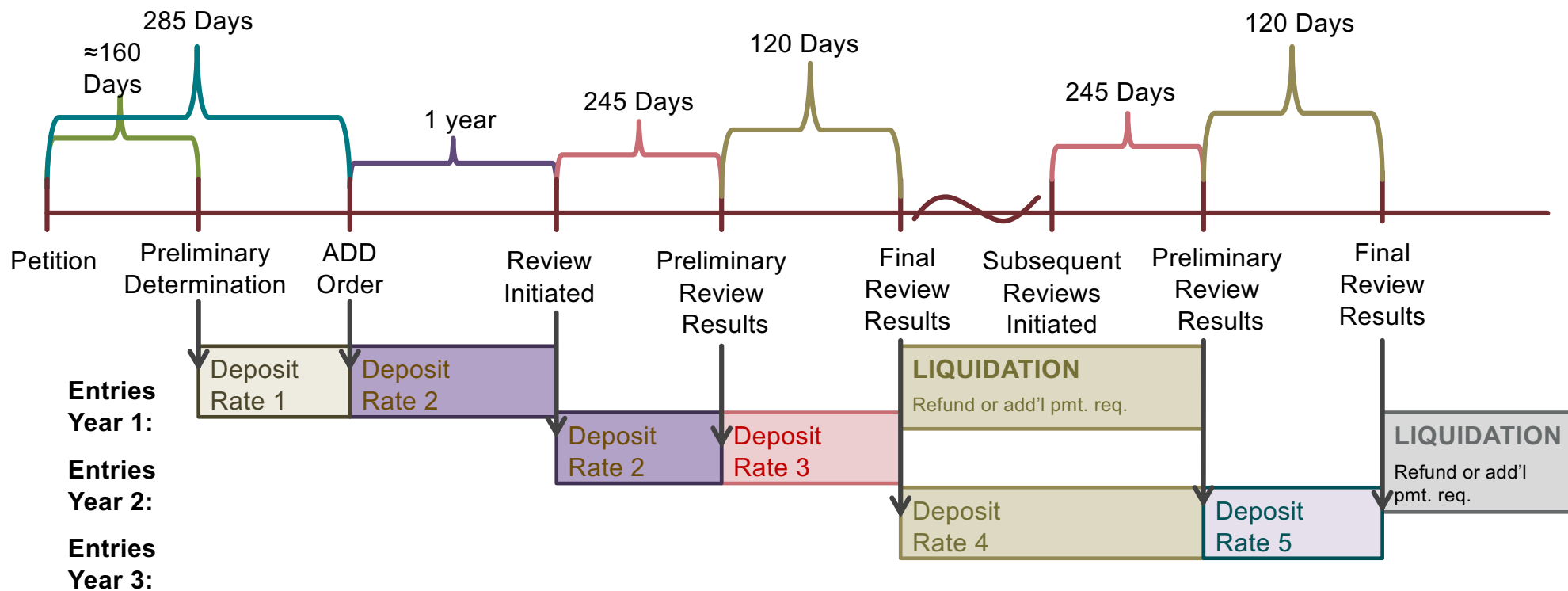
WHAT IS ANTIDUMPING DUTY?

- Under Title VII of the Tariff Act of 1930 – A special duty assessed when:
 - Goods are being sold to the U.S. at a price (“Export Price”) that is less than the price that the same goods are sold in the country of origin (“Normal Value”) – (such sales are said to be at **less than fair value**); and
 - Such sale causes, or threatens, a **material injury** to the domestic industry producing a like product

WHAT IS COUNTERVAILING DUTY?

- Under Title VII of the Tariff Act of 1930 -- A special duty assessed when
 - Goods are subject to a **bounty, grant or subsidy** paid to the supplier; and
 - The sale of the products in the United States causes, or threatens, a **material injury** to the domestic industry producing a like product

ADD/CVD TIMELINE – GENERALLY





AVOIDING DUTIES

ACTIONS TO AVOID DUTIES

- Participate in investigations
- Increase domestic inventory
- Review classification of imported goods
- Product redesign to avoid duties (changing classification)
- Consider alternative sourcing (changing origin)
- Modification to valuation methodologies
- Duty deferral and recovery programs
- Request product exclusions (limited to Section 232)

TARIFF ENGINEERING

- *Ford Motor Company v. United States*, 254 F. Supp. 3d 1297 (Ct. Int'l Trade, 2017)
 - Trucks 25% duty
 - Cars 2.5% duty
- Vehicles imported with second row of seats
- After importation
 - Remove seats
 - Fill footwells
 - Remove rear windows

COUNTRY OF ORIGIN

- The country of manufacture, production or growth of any article of foreign origin entering the United States
19 C.F.R. 134.1(b)
- Different rules of origin are used for different purposes

	General Rule	CA or MX	Textile & Apparel
Entry Declaration	Substantial Transformation	NAFTA Marking Rules	Textile & Apparel Rules
Marking	Substantial Transformation	NAFTA Marking Rules	Textile & Apparel Rules
Free Trade Agreements	Preferential Rules Under FTA	Preferential Rules Under NAFTA	Preferential Rules Under FTA
Government Procurement	Substantial Transformation	Substantial Transformation	Substantial Transformation
Trade Remedies	Substantial Transformation	Substantial Transformation	Substantial Transformation

“SUBSTANTIAL TRANSFORMATION”

- *A manufacturing operation changes **the name, character, or use** of the imported items and results in **a new and different article of commerce***
 - Do the components have a pre-determined end-use prior to transformation?
 - Do the imported items remain identifiable after the manufacturing operation?
 - Do the imported items impart the essential character to the end item?
 - Was the assembly process sufficiently complex as to constitute a substantial transformation?
- Fact-intensive review of **whether individual parts “lose their separate identities and become integral parts of a new article”**
- Determination made on an *individual product/case-by-case basis*

HQ H300226 (SEPTEMBER 13, 2018)

- Three main components of a motor (stator/rear housing assembly, rotor or armature assembly, and end cap assembly) were assembled into a finished motor in Mexico
- NAFTA Marking Rules of Origin declare that the motor must be marked “Made in Mexico”
- Substantial transformation not found where foreign subassemblies with a “pre-determined end use” did not undergo a change in use during a post-import assembly process

NAFTA MARKING RULES AND SECTION 301

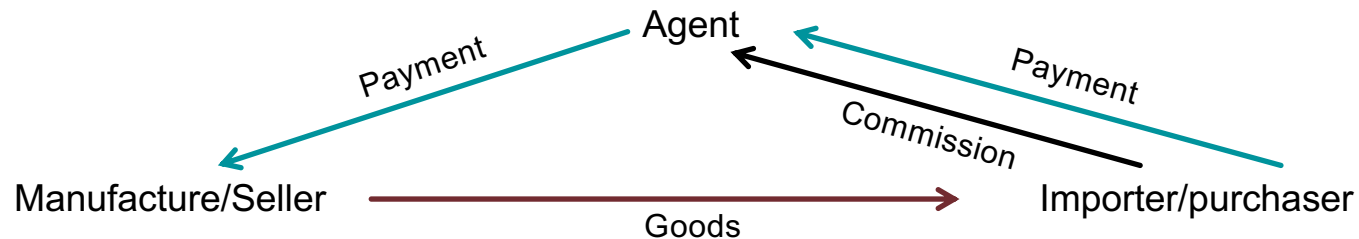
- NAFTA marking rules are for specific purposes
- CBP Position – The ***substantial transformation*** analysis must be applied to determine country of origin for purposes of Section 301
 - A product may be required to be marked “Made in Mexico” and still be subject to Section 301 duties

See 19 C.F.R. § 102.0; HQ H300226, dated September 13, 2018; HQ 563205, dated June 28, 2006; see also *Belcrest Linens v. United States*, 741 F.2d 1368, 1370-71 (Fed. Cir. 1984)

METHODS OF VALUATION

- Transaction value
- Transaction value of identical and similar merchandise
- Deductive value
- Computed value
- Other values, if above values cannot be determined or used

BUYING AGENT COMMISSIONS



- Are there costs that can be shifted from the manufacturer to the buying agent?
- Contractual agreement with buying agent
- Test against normal commercial practices
- Check relationship with manufacturer

FIRST SALE



- Review all documentation
 - Prove that first sale was for export to the United States
 - Is there any possibility for the first purchaser to sell to another destination?
 - Prove that first sale was a bona fide sale
 - Is manufacturer related to first buyer?
- Are there two sales? Does each party take title to the goods?

DUTY RECOVERY AND DEFERRAL

- Duty Drawback
 - Limited for goods to Mexico and Canada
 - Not available for 232 duties
- Foreign Trade Zones
 - No tariff inversions – Goods subject to 232 or 301 duties must be entered in “privileged foreign” status

THANK YOU



Robert Shapiro, Partner

Thompson Coburn LLP

rshapiro@thompsoncoburn.com

202.585.6926

