

# Trump's Trade Policy Options Under U.S. Law – What Can He Do?

*Did you know it is easier for a President to start a war than to  
change import tariffs?*

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# Background

- Under the U.S. Constitution, authority to “lay and collect duties” and “regulate commerce” is granted to Congress.
- Congress can delegate its authority to the Executive branch; in the absence of such delegation, the President’s authority to act on these matters is limited.
- Whether or not President-Elect Trump will have legal authority to fulfill his primary promises regarding international trade will depend, in large part, on whether Congress has delegated such authority to him.

# Imposition of Additional Duties

## WHAT HE SAID:

- In his 2011 book, *Time to Get Tough*, he proposed a 20 percent tax on imported goods.

<http://www.politifact.com/truth-o-meter/article/2016/jun/21/donald-trump-has-floated-big-tariffs-what-could-im/>

- Donald J. Trump said he would favor a 45 percent tariff on Chinese exports to the United States.

<http://webcache.googleusercontent.com/search?q=cache:QSTBI3HsfRMJ:www.nytimes.com/politics/first-draft/2016/01/07/donald-trump-says-he-favors-big-tariffs-on-chinese-exports/+&cd=1&hl=en&ct=clnk&gl=us>

- Every car and every part manufactured in this plant that comes across the border [from Mexico], we're going to charge you a 35% tax, and that tax is going to be paid simultaneously with the transaction.

<https://www.politiplatform.com/trump/jobs+economy/1014>

# Imposition of Additional Duties

## CAN HE DO IT?

- Probably, but with limits. Authority is found in International Emergency Economic Powers Act, under the reasoning applied in *United States v. Yoshida, Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).
- In 1971, President Nixon by Proclamation declared an emergency due to trade payment imbalance, and imposed a 10% duty surcharge on imported merchandise with regular duty rates higher than zero.
- An importer challenged the surcharge as beyond scope of Presidential authority. The Court of Customs and Patent Appeals upheld the surcharge based on powers granted by the Trading with the Enemy Act, which provided:

# Imposition of Additional Duties

- that the President may, during “any” period of national emergency declared by him, through “any” agency he designates, or “otherwise,” and under “any” rules he prescribes, by means of instructions, licenses, “or otherwise,” “regulate,” “prevent” or “prohibit” the importation of “any” property in which “any” foreign country or a national thereof has “any” interest, and that the President may, in the manner provided, take “other and further measures,” not inconsistent with the statute, for the “enforcement” of the Act.
- Despite the statutory title, there was no need for the affected foreign countries to be “enemies”; declaration of an “emergency” was sufficient.
- The term “otherwise” was broad enough to encompass tariffs, so the action taken was within the authority delegated by Congress.

# Imposition of Additional Duties

- TWEA was amended in 1977 to eliminate the reference to “national emergency” and apply only “during the time of war.” This change legislatively overturns the narrow outcome in *Yoshida*, but the reasoning seems valid under IEEPA, which states:
  - **(a) Any authority granted to the President by section 1702 of this title may be exercised 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. (50 U.S.C. § 1701(a)).**
  - **(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—**

# Imposition of Additional Duties

- **(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; . . . (50 U.S.C. § 1701(b)(1)(B)).**
- IEEPA has nearly identical language to that construed in *Yoshida*.

# Imposition of Additional Duties

- Limitations recognized in *Yoshida*:
  - Duty rates can't be higher than Column 2 non-MFN rates
  - No increase on zero duty rate items
  - Action taken must bear a reasonable relation to the power delegated and to the emergency giving rise to the action.
- Application to individual countries (China, Mexico) and specific industries that moved production from U.S. appears permissible if the required "emergency" is declared.

# Imposition of Additional Duties

- U.S. law (19 U.S.C. § 2132(a)) also authorizes the President to impose an import surcharge and/or quantitative restrictions to address balance of payments deficits.
- The statute imposes the following restrictions:
  - The surcharge is limited to 15%,
  - It must be applied on nondiscriminatory basis,
  - It is limited to 150 days, extendable by Act of Congress.

# Imposition of Additional Duties (NAFTA)

- While Article 302 of NAFTA prohibits duty increases on originating goods, the North American Free Trade Agreement Implementation Act subordinates the Agreement's requirements to inconsistent U.S. law.
- The Implementation Act (section 201(b)(1)(D)) also allows imposition of “such additional duties as the President determines to be necessary or appropriate”, subject only to “consultation and layover requirements”.
- Therefore, the prohibition in NAFTA would likely not prevent imposition of IEEPA remedies.

# Renegotiate or Terminate NAFTA?

## WHAT HE SAID:

**“I'm going to tell our NAFTA partners that I intend to immediately renegotiate the terms of that agreement to get a better deal for our workers . . . If they do not agree to a renegotiation, then I will submit notice under Article 2205 of the NAFTA agreement that America intends to withdraw from the deal.”**

<http://thehill.com/policy/finance/285189-trump-says-he-will-renegotiate-or-withdraw-from-nafta-without-changes>

# Renegotiate or Terminate NAFTA?

## CAN HE DO IT?:

- Renegotiation: Yes. NAFTA Article 2202 explicitly provides for “any modification of or addition to” it upon agreement of the three countries. The Implementation Act provides broad authority for the President to effect NAFTA provisions under U.S. law.
- Termination: Yes. NAFTA Article 2205 permits withdrawal by any signatory country upon providing six months’ notice. NAFTA is subject to section 1125(a) of the Trade Act of 1974 (19 U.S.C. § 2135(a)), which authorizes termination of or withdrawal from trade agreements.

# Sanctions Against Exchange Rate Manipulators

## WHAT HE SAID:

**“Instruct the Treasury Secretary to label China a currency manipulator.”**

<https://www.donaldjtrump.com/policies/trade>

# Sanctions Against Exchange Rate Manipulators

## CAN HE DO IT?

- Yes. Under section 301 of the Trade Act of 1974, 19 U.S.C. § 2411(a), the Trade Representative may investigate and take action against foreign government activity inconsistent with trade agreements or that “is unjustifiable and burdens or restricts United States commerce.”
- USTR’s previously rejection of section 301 petitions against alleged Chinese exchange rate manipulation stemmed from political concerns, not lack of legal authority. The Trump campaign’s statements indicate that he believes USTR is empowered to address this issue.

# Sanctions Against Exchange Rate Manipulators

- Available remedies include negotiations to end the practice, filing dispute resolution cases in the World Trade Organization and unilateral imposition of duties.
- Additionally, section 701 of the Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C. § 4421, requires the Treasury Department to monitor exchange rate interventions, and permits imposition of sanctions against foreign governments (for example, exclusion from U.S. government procurement contracts and ineligibility for *Overseas Private Investment Corporation* financing.)
- Treasury report (April 2016) documents Chinese exchange rate practices.

# What Can Other Countries Do?

- Increased tariff rates would constitute violations of U.S. obligations under the General Agreement on Tariffs and Trade and NAFTA, as well as any other bilateral trade agreements to which the United States is a party.
- GATT Article II.1(a) (“bound tariffs”) prohibits signatories from increasing their tariff rates above those to which they have committed. Increased U.S. tariffs would violate this principle.
- GATT Article I.1 (“most favored nation”) prohibits signatories from imposing differential tariff rates on different World Trade Organization countries. Tariff increases limited to imports from specific countries would violate this principle.

# What Can Other Countries Do?

- The requirements of trade agreements do not supersede U.S. law, so a domestic court challenge to WTO violations is unlikely to succeed.
- Other WTO members may resort to the Dispute Settlement Body to seek a determination that the additional tariffs are violative.
- Extended process, may result in “retaliation” against violating country through increased tariffs on its exports or other measures.
- *Other countries’ laws may permit unilateral retaliation.*

# Removal of Sanctions Against Russia

## WHAT HE SAID:

**“Donald Trump said Wednesday that, if he is elected president, he would consider recognizing Crimea as Russian territory and lifting the sanctions against Russia.”**

<http://www.politico.com/story/2016/07/trump-crimea-sanctions-russia-226292>

# Removal of Sanctions Against Russia

## CAN HE DO IT?

- Yes. The sanctions (financial, sectoral, trade and individual) were imposed under Executive Orders 13660, 13661, 13662 and 13685, issued pursuant to IEEPA. They were not imposed by Congress.
- The President may terminate the national emergency invoked to justify the EOs.

# Rescission of Permitted Trade with Cuba

## WHAT HE SAID:

**“If Cuba is unwilling to make a better deal for the Cuban people, the Cuban/American people and the U.S. as a whole, I will terminate deal” Trump tweeted Monday morning.**

<http://www.politico.com/story/2016/11/trump-cuba-relations-threat-231869>

# Rescission of Permitted Trade with Cuba

## CAN HE DO IT?

- Yes. The relaxation of sanctions and export control restrictions stemmed from an Obama Administration change in policy toward Cuba. There were no changes in the underlying statutes (TWEA, Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091, Cuban Democracy Act of 1992 (CDA), 22 U.S.C. §§ 6001-6010)).
- The Treasury and Commerce Departments' implementing regulatory revisions can be reversed, in whole or in part, at the President's direction.

# Reinstatement of Sanctions Against Iran

## WHAT HE SAID:

**"My number one priority is to dismantle the disastrous deal with Iran."**

[https://ballotpedia.org/2016\\_presidential\\_candidates\\_on\\_the\\_Iran\\_nuclear\\_deal](https://ballotpedia.org/2016_presidential_candidates_on_the_Iran_nuclear_deal)

# Reinstatement of Sanctions Against Iran

## CAN HE DO IT?

- Yes. The Joint Comprehensive Plan of Action does not have provisions for signatories to terminate or withdraw from it.
- On the other hand, there is no JCPOA prohibition from doing so.
- To effectuate the JCPOA, President Obama used discretionary authority granted by statute to waive the sanctions that had been imposed on third-country trade with Iran.
- With the exception of the Iran Sanctions Act of 1996, which expires December 31, 2016, the statutory authorities to impose the sanctions lifted by the JCPOA remain in effect.

# Domestic Production

## WHAT HE SAID:

**“Reform policies with . . . an America-First trade policy.”**

<https://www.donaldjtrump.com/policies/economy>

# Domestic Production

## WHAT CAN U.S. COMPANIES DO?

- Foreign-trade zones and subzones provide tariff benefits for domestic production using imported materials.
- Buy American Act for certain Defense Department procurements require domestic production, but permit use of foreign materials.
- Buy America for Federal Transit Administration-funded mass transit projects require domestic production, but permit use of foreign materials.

# Contact Information



If you have any questions about the webinar materials, please do not hesitate to contact me.

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