

Trade Court Issues Much-Awaited Decision on Section 301 Duties: Where Does It Go From Here?

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On April 1, 2022, the U.S. Court of International Trade (CIT) issued a decision in a major litigation regarding the legality of certain import duties imposed on Chinese-origin goods under Section 301 of the Trade Act of 1974. The Court found that while the imposition of these duties did not violate the Trade Act, the Office of the U.S. Trade Representative (USTR) failed to abide by Administrative Procedure Act (APA) requirements when it imposed the duties. The court accordingly remanded the agency's decision imposing the duties for further explanation and consideration, while simultaneously denying the plaintiffs' request that the duties be lifted in the meantime. This remand, coupled with proposed legislation regarding "exclusion" processes under 301, and an approaching statutory deadline for re-authorization of the tariffs, raises important questions regarding the future of the tariffs.

Section 301 authorizes investigations into unfair trade practices by foreign countries, as well as action to encourage those countries to abandon or mitigate those practices. For its part, the APA provides rules that are generally applicable to agency action, including requirements that agencies provide notice to potentially affected parties of intended agency action and an opportunity to comment on that action, and that agency actions be explained in light of the comments filed.

In 2017, at the direction of then-President Trump, USTR began an investigation into China's trade practices under Section 301 and issued a report in early 2018 concluding that a number of different Chinese practices unfairly burdened U.S. commerce. Subject to the

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President's direction, USTR imposed Section 301 tariffs ranging from 7.5% - 25% on four successive rounds of Chinese products between July 6, 2018 and September 1, 2019.

These duties went largely unchallenged until late in 2020, when importers of flooring tiles filed a suit at the CIT arguing that the third and fourth rounds of tariffs violated the plain terms of the Section 301 statute, because (1) the tariffs were imposed beyond the time permitted by the statute for the Government to take action with relation to USTR's investigation and report, and (2) did not satisfy the statutory requirements for modifications to pre-existing actions. The importers also alleged that USTR violated the APA when it imposed the third and fourth rounds of tariffs by failing to provide sufficient opportunity for affected importers to comment on USTR's proposals to impose the tariffs, and by failing to properly explain its consideration of the comments it received on the proposals. As of the date of the court's opinion, this initial suit had spawned nearly 4,000 identical challenges from other importers.

In its opinion, the CIT:

- Rejected the Government's arguments that the plaintiffs' challenges were non-justiciable, either because the tariffs represented "unreviewable presidential action" or a "political question" beyond the scope of judicial review;
- Rejected the plaintiffs' claim that the third and fourth rounds of tariffs were untimely and that USTR exceeded its statutory authority to "modify" existing 301-related actions when it imposed the third and fourth rounds of tariffs;
- Rejected the Government's contention that the APA's notice-and-comment requirements did not apply to the third and fourth rounds of tariffs pursuant to the "foreign affairs exception."
- Rejected the plaintiffs' claim that USTR failed to provide potentially affected importers with sufficient notice and opportunity to comment on the agency's proposed imposition of the third and fourth rounds of tariffs;
- Agreed with the plaintiffs' claim that USTR failed to adequately respond to significant issues raised by the comments filed with respect to the agency's proposed imposition of the third and fourth rounds of tariffs, in violation of Section 553(c) of the APA;
- Rejected plaintiffs' argument that the third and fourth rounds of duties should be lifted pending further explanation by USTR of its consideration of the comments filed; and
- Granted the Government's motion to supplement the administrative record to include certain documents dated prior to the imposition of the third and fourth rounds of tariffs, but denying the motion as to a report post-dating the third round of tariffs.

The CIT's decision directs USTR to file remand results by June 30, 2022, reconsidering or further explaining its imposition of the third and fourth rounds of tariffs in light of the significant issues raised in the comments filed with the agency. The decision does not compel the agency to make any changes to the tariffs, though it permits the agency to make changes if it desires. Rather, it requires the agency only to adduce sufficient explanation of its consideration of the comments to show that it has complied with its duties under the APA.

Since the Section 301 tariffs were first imposed, they have been controversial. Importers and other companies affected by the tariffs have complained that they harm U.S. companies without resulting in meaningful changes to targeted Chinese practices. Apparently in recognition of the potential for tariffs on particular products to harm U.S. interests, the Trump Administration created processes by which affected parties could petition for time-limited, product-specific exclusions from the tariffs. The vast majority of these exclusions expired by December 31, 2020. However, the Biden Administration has extended certain exclusions applicable to goods needed for the United States' response to COVID-19, and recently reinstated 352 previously-expired exclusions pursuant to a comment process opened last fall.

In the meantime, members of Congress have pressed USTR to take additional action to allow for product exclusions. In 2021, the United States Innovation and Competition Act (USICA), a bill addressing U.S. competition with China, passed the Senate with language that would reinstate expired Section 301 exclusions, allow refunds of certain previously-paid duties, and require new exclusion processes. The House did not take up USICA, instead choosing to develop its own China competition legislation, the America COMPETES Act. But while the Senate passed the House bill on March 28, 2022, it did so through an amendment that replaces the House bill with USICA, including USICA's Section 301-related language. The two chambers will now need to conference regarding the final version of the bill.

Also of note, the four-year anniversary of the first round of Section 301 tariffs, which were imposed on July 6, 2018, is fast approaching. According to Section 301, duties imposed under the statute are subject to a "review of necessity" every four years, so long as a representative of a domestic industry that benefits from the duties file a written request that the duties be continued within the last 60 days of the relevant four-year period. In the absence of such a request, the statute requires the duties to terminate.

Since the Trump Administration exited office, the Section 301 duties have largely been in a holding pattern. But between the court's remand order, potential legislation, and the impending four-year anniversary of the first round of tariffs, the Biden Administration has important decisions to make regarding its administration of the tariffs on a going-forward basis. For now, the Administration is keeping its cards close to its vest. While USTR Katherine Tai testified at length regarding the Administration's Trade Agenda before the House Ways and Means Committee and Senate Finance Committees from March 30-31, she didn't drop hints as to what may be forthcoming, instead, responding to congress members' questions regarding Section 301 with offers to continue the dialogue offline.

Wiley has a robust International Trade practice and extensive experience helping clients navigate trade enforcement and Section 301 product exclusion matters. For more information about these issues, please contact the attorney listed on the alert.