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Lawsuit filed on Section 301 tariffs - U.S. importers push back

On Sept. 10, 2020, three vinyl tile importers filed a lawsuit, *HMTX Industries LLC, et. al. v. United States of America, et. al.*, in the Court of International Trade (CIT) challenging the authority the U.S. Trade Representative (USTR) had to implement Section 301 tariffs on specific lists of targeted imports from China, demanding refunds of tariffs paid thus far, and requesting the CIT to set aside the List 3 and List 4A tariffs as *ultra vires*. The complaint is the first formal piece of litigation filed against the current administration's use of Section 301 tariffs for products of Chinese origin. Since then, there has been a flood of complaints filed by importers in the CIT advancing substantially the same claims. As of Sept. 21, 2020, over 3,000 complaints have been filed by U.S. importers, and we expect substantially more have been and will be filed in the days since then and in the future.

Background

Section 301 of the Trade Act of 1974 authorizes the USTR to impose duties to combat certain "unreasonable" or "discriminatory" trade acts by a foreign government that have harmed U.S. commerce. Under such authority, the USTR formally initiated an investigation into China's intellectual property practices on Aug. 18, 2017, and "started the U.S-China trade war" on the grounds that the Government of China had failed to protect intellectual property of U.S. companies when exporting Chinese products to the U.S. market. The USTR issued the so-called "List 1" Section 301 tariffs on June 20, 2018, which covered 818 tariff subheadings of products of Chinese origin with a total annual trade value into the U.S. of approximately $34 billion. Notice for "List 2" Section 301 tariffs was issued on Aug. 16, 2018, which covered 279 tariff subheadings of products of Chinese origin with a total annual trade value into the U.S. of around $16

billion. Subsequently, on Sept. 21, 2018, notice for "List 3" Section 301 tariffs was published, which covered 5,733 tariff subheadings of products of Chinese origin with an annual trade value into the U.S. of an estimated $200 billion. *83 Fed. Reg. 47,974*. Notice for "List 4" Section 301 tariffs was issued on May 17, 2019, covering 3,805 subheadings of products of Chinese origin with an annual trade value into the U.S. of about $300 billion. *85 Fed Reg. 43304*. In fact, the products included on List 4 cover essentially all products not covered by the prior notices, and most of those products were primarily consumer type goods.

What is the HMTX complaint about?

While the HMTX complaint did not challenge the lawfulness of the initial retaliatory tariff actions reflected in the implementation of List 1 and List 2, the HMTX complaint asserts that the USTR's subsequent rounds of tariff actions (i.e., List 3 and List 4A) against Chinese origin imports overstepped the USTR's authority and failed to comply with the requirements of the federal Administrative Procedures Act (APA).

The HMTX plaintiffs argue that Section 301 of the Trade Act was not intended as a tool to engage in an "open-ended trade war," as opposed to an initial response to China's intellectual property violations. Section 304 of the Trade Act requires the USTR to "determine what action, if any" to take on or before "12 months after the date on which the investigation is initiated." List 3 was published on Sept. 21, 2018, and List 4A was published on Aug. 20, 2019, both well after 12 months after the date of the initial investigation. Therefore, the complaint alleges that the USTR is time-barred because any duties would have to be imposed within the first twelve months of the initiation of the investigation (Aug. 18, 2017).

The HMTX plaintiffs also argue that, while the Section 301 mechanism allows the USTR to "modify or terminate" certain initial actions taken under Section 301, the provision does not allow the government to increase tariffs further after the initial actions are taken. Therefore, the HMTX plaintiffs claim that the List 3 and List 4A tariffs are *ultra vires* and should be set aside by the CIT.

To date, the USTR has not filed its response to the case, however, it is likely that the USTR will argue that Section 307 of the Trade Act gives it broad discretion to make any modification as it sees fit, including increasing existing tariffs and imposing additional tariffs.

Importers challenge USTR authority

The HMTX complaint is challenging the USTR's legal authority to promulgate and implement Section 301 tariffs under the Trade Act. Section 301 of the Trade Act expressly mandates that "[a]ny action taken . . . to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce." Based on the USTR's own investigation, it concluded that China's intellectual property theft has caused at least $50 billion of

damages to U.S. businesses per year. However, the USTR has imposed tariffs for an extra $500 billion goods--$200 billion for List 3 items and $300 billion for List 4A items--in addition to the List 1 ($34 billion) and List 2 ($16 billion) tariffs. The List 1 and List 2 levies (totaling $50 billion) are equivalent in value to the USTR's determination of the burden imposed by China's alleged unfair intellectual property practices on U.S. commerce. The additional $500 billion of new tariffs is far in excess of the USTR's determination of damages. From an historical context when List 3 and List 4A were imposed, those lists appear to be driven by retaliatory duties imposed by China, and it can be argued that such is not a valid reason to have added the $500 billion worth of additional tariffs on imports from China.

Additionally, Section 304 of the Trade Act requires the USTR to "determine what action, if any" to take on or before "12 months after the date on which the investigation is initiated." While Section 307 of the Trade Act authorizes the USTR to "modify or terminate" an action taken pursuant to Section 301(b) of the Trade Act when the burden imposed on U.S. commerce from the foreign country's investigated unfair acts, policies or practices increases or decreases, arguments can be made that the USTR did not "modify or terminate" any existing actions. Rather, the importers argue, that USTR took new and additional actions in imposing the List 3 and List 4A tariffs, which is outside the statutory authority granted to the USTR. *19 U.S.C. §2417(a)(1)(B)*.

Are there any successful precedents challenging tariffs in front of the CIT?

The CIT, like other courts, generally gives deference to the government's actions, and historically, cases filed to overturn a president's actions altogether are usually unsuccessful. However, there are two recent cases in which the CIT has found that the president/USTR has exceeded its authority in imposing Section 232 and Section 201 tariffs.

The first case is *Transpacific Steel LLC v. United States*, Slip Op. 19-142 (Ct. Int'l Trade Nov. 15, 2019). In Transpacific, the plaintiffs challenged the USTR's decision in August 2018 to increase Section 232 duties on imports of steel products from Turkey from 25% to 50%. The CIT upheld the plaintiff's claim, finding both that the tariff increase was contrary to the statute, and also that the decision to single out Turkey violated the U.S. Constitution's equal protection guarantees. As to the plaintiffs' procedural argument, the CIT found that, while Section 232 of the Trade Act does grant the President/USTR broad authority to fashion relief to address threats to national security, that authority must be exercised within the timelines provided by statute. In the view of the CIT, "[t]he procedural safeguards in Section 232 do not merely roadmap action; they are constraints on power." These constraints are critical, in the view of the CIT, to protect Section 232 from a challenge of unconstitutional delegation of authority by Congress. As to the plaintiffs' equal protection claim, the CIT concluded that the Government had failed to offer evidence justifying its decision to single out Turkey for punitive treatment from among the other

countries exporting steel to the U.S. Thus, the CIT concluded that the USTR failed a rational basis test. *Transpacific* represents the first judicial opinion to cast doubt on the lawfulness of recent actions taken by the President under Section 232.

The second case is *Invenergy Renewables LLC v. United States*, No. 19-00192 43 2020, Ct. Intl. Trade LEXIS 76 (Ct. Intl. Trade May 27, 2020), where the CIT issued a preliminary injunction prohibiting the USTR from eliminating a product exclusion from the relief granted under Section 201 with respect to bifacial solar panels. In *Invenergy Renewables*, the plaintiffs challenged the USTR's decision to withdraw an exclusion from Section 201 duties, arguing that this exclusion had been included after a notice-and-comment rulemaking process, but that the withdrawal of this exclusion four months later was effected with no such procedure. The CIT granted a temporary restraining order, and then later a preliminary injunction, to prevent the withdrawal of this exclusion. The CIT clearly stated that there are limits on the government's authority, and that the government must, at a minimum, provide notice and comment periods and further must make reasonable decisions before it can reverse course and apply duties to products that were previously excluded. When such a process is ignored, courts can step in and provide protection for importers and other entities that reasonably relied on the tariff exclusion.

While both cases address unique situations specific to the plaintiffs in those cases, and while broad conclusions can hardly be drawn from only two procedural decisions, those cases at least suggest that the CIT is open to challenges to the specific manner in which these tariff statutes are administered, even if the court is unwilling to overturn the executive branch's authority entirely. The direct and clear statements in those cases limiting the government's authority establish important, albeit preliminary, precedents that aspects of these trade proceedings are governed by the APA and lay the groundwork for future challenges to similar government actions.

Statute of limitations

28 U.S.C. §2636(i) requires any action filed under 28 U.S.C. §1581(i)(1)(B) "be commenced within two years after the cause of action first accrues." A challenge to the USTR's actions would be filed under 28 U.S.C. §1581(i)(1)(B), which governs the U.S.'s imposition of tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue.

It is debatable as to when the cause of action first accrued: When the final notice was first published? When the addition duties went effective? Or, when a company was first required to pay such tariffs when importing goods? List 3 tariffs were first published on Sept. 21, 2018, with the effective date of Sept. 21, 2018. List 4 tariffs were first published on Aug. 20, 2019, with the effective date of Sept. 1, 2019. The government will likely argue that the statute of limitations for List 3 products commenced when the notice of action was first published in the Federal Register

on Sept. 21, 2018, and the statute of limitations for List 4 products commenced when the notice of action was first published in the Federal Register on Aug. 20, 2019. However, plaintiffs interested in filing claims could claim that the statute of limitations does not start to accrue until each time they actually paid the tariffs. While this issue is not black or white, interested companies should file as early as possible to preserve any legal rights that they, as importers, may have.

Should I join the lawsuit?

To the extent that companies import products from China and were hurt by having to pay additional tariffs, companies may consider filing a suit making claims substantially similar to the HTMX complaint, with the intention of asking the CIT to consolidate the lawsuit with the lead HTMX complaint or to be stayed while the HTMX proceeding is pending. Accordingly, companies could consider filing a "me-too" lawsuit to benefit from the relief in case the HTMX complaint succeeds. In the event that the HTMX complaint succeeds, companies who missed the opportunity to file may not be able to get a refund of all the tariffs paid. Because there are tight statute of limitations restraints, companies should act quickly if they are interested in evaluating their legal options.

For more information, contact Yuanyou Yang or any member of Porter Wright's International Business & Trade practice group.