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Trade Court Finds USTR Had Authority to Impose Lists 3, 4A Tariffs

The Office of the U.S. Trade Representative "properly exercised its authority" under the Section 307 modification provisions of the 1974 Trade Act when it ordered the imposition of the lists 3 and 4A Section 301 tariffs on Chinese imports, the Court of International Trade ruled in an April 1 opinion. Test-case plaintiffs HMTX Industries and Jasco Products, plus the more than 3,600 complaints that followed, sought to vacate the tariffs on grounds that lists 3 and 4A were unlawful without USTR launching a new Section 301 investigation.

The opinion was a partial loss for both sides, as the court remanded the matter to USTR after ruling against the government that the agency failed to adequately respond to comments submitted in advance of the tariffs, as it was required to do under the Administrative Procedure Act. But the court's three-judge panel ruled the tariffs may remain in place while the agency reconsiders its action pertaining to these comments. USTR has until June 30 to respond to the remand order.

Plaintiffs had argued in Feb. 1 oral argument that vacating the tariffs was the only proper remedy if the court found USTR acted improperly under the APA. DOJ said remand would be the only proper remedy, and the court agreed. The court did rule against the government in deciding that the APA's foreign affairs exemption did not apply in the case.

HMTX and Jasco argued that lists 3 and 4A actions were based on retaliatory Chinese actions, separate and apart from the allegedly unfair Chinese trade practices documented in USTR's March 2018 Section 301 report. The government countered that the retaliatory Chinese tariffs that sparked lists 3 and 4A were "not separate and distinct from" the investigated acts and were instead "directly related" to the acts, policies and practices that were the subject of the original investigation.

The court came down squarely on the government's side, saying that "the link between the subject of the original section 301 action and China's retaliation is plain on its face." Plaintiffs' arguments that China's retaliatory conduct cannot be part of the original action because that conduct post-dates the initial investigation and determination "are not persuasive," it said.

Section 307 modifications "are based on activity increasing (or decreasing) the burden on U.S. commerce after the initial determination," the court said. "Plaintiffs' argument thus turns on whether the USTR found that China's retaliatory conduct caused an increased burden on U.S. commerce from the acts, policies, and practices that constituted the subject of the action," it said. Because the court concludes "that it did, Plaintiffs' timing-based argument must fail," it said.

The court agreed with the plaintiffs that USTR "failed to respond adequately" to the thousands of comments it received in the lists 3 and 4A rulemakings. USTR was required under the APA "to address comments regarding any duties to be imposed, the aggregate level of trade subject to the proposed duties, and the products covered by the modifications, all in light of section 301's statutory purpose to eliminate the burden on U.S. commerce from China's unfair acts," it said.

USTR's "statements of basis and purpose" indicate why the agency "deemed China's ongoing and retaliatory conduct actionable," the court said, but those statements "fail to apprise the court how the USTR came to its decision to act and the manner in which it chose to act," it said.

Having requested comments on a range of issues, USTR "had a duty to respond to the comments" in a manner that enables the court to understand why the agency reacted to them as it did, the decision said. "USTR could have explained its rationale with respect to the comments in light of the specific Presidential directives it was given. What the USTR could not do was fail to provide a response to the comments it solicited when providing the rationale for its final determinations."

In deciding a remedy for USTR's APA violations, "the court declines to find that the doctrine of waiver precludes

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remand here," the decision said. Though USTR's "failure to explain its rationale in the context of the comments it received leaves room for doubt as to the legality of its chosen courses of action," the ruling said, the court "weighs heavily the disruptive consequences of (potentially interim) vacatur," or vacating the tariffs, plus the possibility that vacatur would be overturned on appeal.

The court ordered that lists 3 and 4A be remanded to USTR "for reconsideration or further explanation consistent with this opinion," and that USTR file its remand results on or before June 30. A joint status report from the plaintiffs and DOJ will be due 14 days after the remand results are filed, along with a proposed schedule "for the further disposition of this litigation."

(*In Re Section 301 Cases*, Slip Op. 22-32, CIT #21-00052, dated 04/01/22, Judges Mark Barnett, Claire Kelly and Jennifer Choe-Groves. Attorneys: Pratik Shah of Akin Gump for plaintiffs HMTX and Jasco; Justin Miller for defendant U.S. government) **— *Paul Gluckman***

US, UK Reach Resolution on Section 232 Steel Tariffs

The U.S. and U.K. reached an agreement that will drop Section 232 tariffs on steel and aluminum imports from the U.K. Under the deal, the U.S. will allow "historically-based sustainable volumes" of U.K. steel and aluminum goods to enter the country, the Commerce Department said, adding that it will lift the tariffs June 1. The U.S. will also require any U.K. steel company owned by a Chinese entity to undergo a financial audit "to assess influence" from the Chinese government.

USTR Supports AD/CVD Rewrite, Dismisses Removing Tariffs to Ease Inflation

U.S. Trade Representative Katherine Tai endorsed the Level the Playing Act during a four-hour hearing in front of the House Ways and Means Committee after one of its House sponsors noted the House and the Senate are about to go to conference, and the proposal to rewrite antidumping duty and countervailing duty laws is going to be on the table.

Tai said that trade remedy laws mostly date back to the 1970s and 1980s. "The nature of that competition has changed and evolved. We urgently need to take on this task of updating our tool box, expanding it and making it more effective."

This is not the first time Tai has said the administration supports the bill. She also said that at a steel company event last November (see ITT 11/02/2021), but at that time, neither chamber had passed the bill.

House co-sponsor Rep. Terri Sewell, D-Ala., as she explained why the AD/CVD laws need to be revised, told Tai that dumping "devastated the steel industry in my and other districts."

In Tai's opening statement, she said discussions with China about how it is following through on its phase one agreement were "unduly difficult," and in her prepared remarks, she said it became clear that China is only going to "comply with those trade obligations that fit its own interests. This is a familiar pattern with the PRC—from their actions at the [World Trade Organization (WTO)] and in various bilateral high-level dialogues. The United States has repeatedly sought and obtained commitments from China, only to find that follow-through or real change remains elusive."

The prepared remarks also said that "while we continue to keep the door open to conversations with China, including on its Phase One commitments, we also need to acknowledge the Agreement's limitations, and turn the page on the old playbook with China, which focused on changing its behavior. Instead, our strategy must expand beyond only pressing China for change and include vigorously defending our values and economic interests from the negative impacts of the PRC's unfair economic policies and practices.

"We have seen what happened in the steel and solar industries when existing mechanisms were too slow or ill-suited to effectively address the distortions wrought by China's targeting of those sectors. In the meantime, we know that the PRC is targeting critical industrial and high-tech sectors, like electric vehicles, batteries, semiconductors and others.

"To ensure that our industries remain competitive, we must develop new domestic tools targeted at defending our economic interests, and make strategic investments in our economy."

When Rep. Ron Kind, D-Wis., a pro-free-trade advocate asked her about overuse of the Section 232 tool, and his ef-

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forts to reign in executive discretion for “national security” tariffs, Tai instead argued that steel and aluminum overcapacity does imperil America’s national security.

"A lot of people feel well, those are industries of the past,” she said, referring to steel and aluminum production, and say, “Let those go,” she said. “The fact of the matter is, I think that our chase for efficiency over the past several decades has really compromised our security, and our sense of security."

The largest tariff action in the U.S., the Section 301 tariffs on more than $350 billion worth of Chinese imports, was the subject of questions from both Democrats and Republicans. Rep. Adrian Smith, R-Neb., the top Republican on the Trade Subcommittee, said in his opening statement that “if the goal is not to hurt American companies while holding China accountable, why has the Administration only offered a very narrow exclusion process from Section 301 tariffs, with minimal retroactivity?"

Exclusion refunds are available back to Oct. 12, 2021, leaving about 10 months’ worth of tariffs intact for importers whose exclusions expired at the end of 2020.

Smith said that all Republicans on the committee, and he believes many Democrats, as well, want all businesses that import goods subject to Section 301 tariffs to be able to apply for exclusions.

Rep. Jackie Walorski, R-Ind., asked Tai if there would be a broader exclusion process offered. Tai said in October, when she talked about trade and China, she announced “that we are considering and will continue to consider additional processes as they are warranted, and that continues to be true today."

Rep. Judy Chu, D-Calif., told Tai that her constituents were disappointed that retroactivity for renewed exclusions only goes back to Oct. 12, 2021, and that she heard from CBP that they would be able to handle retroactivity that goes back further.

Tai, when asked repeatedly why Oct. 12 was the limit, did not respond directly but said she would follow up. In a background call last year, a senior USTR official told *International Trade Today* that date was picked because allowing refunds back to the time of expiration would require some refunds post-liquidation, and she said that was an administrative challenge (see ITT 10/12/2021). By setting the October date, all companies would get the same treatment.

Chu said companies that received exclusions again told her they are concerned about whether they will have to pay the tariffs next year.

"I’m very sympathetic about how difficult it is to plan these days in the American economy,” Tai replied. “I can’t prejudge what will happen, the decisions we will make."

A number of members questioned how the USTR can convince other countries to grant better market access to agricultural exports that currently face either tariff or non-tariff barriers if the U.S. is not offering any better market access itself. The Indo-Pacific Economic Framework, the administration has said, will be a binding agreement that will cover some elements traditionally covered by trade agreements, such as science-based agricultural regulations, but will not lower American tariffs.

Rep. Suzan DelBene, D-Wash., a free-trade advocate, said that the IPEF could open markets in Asia for Washington state exporters. “That said, we need to make sure we’re putting enough on the table to accomplish these goals,” she said, and asked why the U.S. ruled out offering market access incentives during negotiations.

Smith, too, asked if the administration could promote deep economic engagement with countries without lowering tariffs or creating preferential rules of origin for their exports.

Tai said it’s true tariff reductions are not on the table, but she said the U.S. will be offering “economically significant outcomes” to the negotiating partners. To Smith, she argued that getting retaliatory tariffs dropped in Europe, that lowered tariffs on $7 billion worth of agricultural exports, “is quite a bit of market access right there for you."

To DelBene, she alluded to the political problems the Trans-Pacific Partnership faced. The TPP was a traditional free trade agreement with the same countries the IPEF is targeting, and President Donald Trump exited the TPP immediately after taking office. The other countries, led by Japan, brought the agreement into force. She said critics of

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globalization have argued it's leading to "offshoring and the erosion of our jobs and our industries."

Still, Tai was not as negative about free trade agreements as she had sounded the week before, when she dismissed them as a 20th-century tool. Even after she said there are ways to secure market access without comprehensive trade agreements, and pointed to agricultural access agreements secured with India, Vietnam and the Philippines through dialogues, she added: "That's not to say those types of exercises don't have their place," referring to FTAs.

Several members from both parties pointed to tariffs as contributors to inflation that is hurting consumers who are paying more for necessities, such as housing, food and consumer goods that are necessities.

Rep. Stephanie Murphy, D-Fla., pointed to a study that said removing Section 301 tariffs could reduce inflation by 1.3 percentage points. A Democrat and a Republican both argued that softwood lumber antidumping and countervailing duties on Canadian exports are driving up the cost of new houses and apartments. And several Republicans said they're concerned that trade remedies on imported fertilizer could drive global food insecurity or domestic food inflation.

The Office of the U.S. Trade Representative cannot undo Commerce-imposed AD/CVD on fertilizer, but it did negotiate an agreement in the past on softwood lumber that allowed for higher import quotas when lumber prices reached certain levels.

Tai dismissed bringing back that kind of flexible tariff-rate-quota deal. She said, "Our trade remedy laws are working as they should." She added that while she is open to negotiating a softwood lumber settlement, it could only happen if Canada comes to the table "with the willingness to address the underlying issues."

And on Section 301 tariffs, she said, she "would be very, very concerned about taking steps to be reactive to today's challenges … that would undermine our longer- term strategic approaches" to preserve America's competitiveness. However, Tai acknowledged during the hearing that the tariffs were not serving as leverage to get China to change its market-distorting interventions.

Rep. Don Beyer, D-Va., said his constituents are upset that about 100,000 people in Ethiopia have lost their jobs because that country was removed from the African Growth and Opportunity Act benefits program because of violence in Tigray, and those workers had nothing to do with the conflict. He noted that there is now a ceasefire, and asked if the administration had considered initiating a review to return Ethiopia to AGOA.

Tai said Ethiopia is clear on the benchmarks that would warrant return, and the administration has not yet seriously considered revisiting the decision. **— *Mara Lee***

Trade Agenda Talks of Confronting China's Distortions

China's lack of worker rights, weak environmental standards "and anticompetitive subsidies are the hallmarks of China's artificial comparative advantage. It is an advantage that puts others out of business and violates any notion of fair competition," the annual trade policy agenda from the Office of the U.S. Trade Representative said, and the administration is looking to advance fair competition "through all available avenues," including coordinating with other countries, using existing trade agreements, or new tools, it said.

"We are clear-eyed about China's doubling down on its harmful trade and economic abuses. We are also mindful that rash response measures can create vulnerabilities of their own. The Biden Administration's approach to China is and will continue to be deliberative, with a focus on the long term," the document said.

While the "rash response measures" could refer to the Section 301 tariffs on Chinese goods that weren't originally conceived in the USTR report, or Section 232 tariffs aimed at Chinese overcapacity, the agenda does not identify what the administration saw as rash. But the agenda says that as the administration implements the Uyghur Forced Labor Prevention Act "we are mindful of the effects that trade actions can have on American businesses and workers. USTR has restarted a targeted tariff exclusions process to ensure that our economic interests are being served, and we will keep open the option of further tariff exclusions processes as warranted. The Biden Administration understands that durable coexistence requires engagement as well as accountability."

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It did say that reaching the agreement with Europe to replace Section 232 tariffs with TRQs created momentum to advance fair competition.

The agenda said that the domestic investments enacted in the first year of the administration "allow the United States to engage and compete with China from a position of strength. In addition, we are taking steps to build supply chain resilience that will protect American workers and consumers from the harms wrought by China's trade and economic abuses. We are also considering all existing tools—and will potentially seek new ones as needed—to combat the harms of China's state-led, non-market practices." It said that when a too-high percentage of certain products is made in China as a result of China's subsidization, it undermines supply chain resilience and reduces "innovation and choice that fair competition would produce."

While the China challenge is prominent in the report, the agenda did talk about tariff reductions and trade facilitation it has pursued in other arenas.

It said that on March 17, 2021, the amount of U.S. beef imported into Japan surpassed the annual safeguard volume established in the Japan mini trade deal, and there was a tariff of 38.5% on U.S. beef for a month as a result. The report said that the U.S. and Japan tried throughout 2021 "to reach agreement on a higher safeguard trigger quantity."

It noted that the U.S. has been working to improve the transparency and effectiveness of regulatory and customs practices at its CAFTA trading partners, "which has resulted in facilitating customs procedures and trade as well as Guatemala's publication in January 2021 of a single Customs schedule, resolving a longstanding tariff classification challenge and removing an obstacle to U.S. preferential access in Guatemala."

The agenda said that the USTR will lead efforts to craft a trade arrangement under the Indo-Pacific Economic framework "that includes provisions on: high-standard labor commitments; environmental sustainability; cooperation in the digital economy; sustainable food systems and science-based agricultural regulation; transparency and good regulatory practices; competition policy; and, trade facilitation. The specific content of the trade arrangement will be developed through extensive consultation with trading partners, a broad base of stakeholders, and Congress."

The agenda noted that reviews of countries' eligibility under the Generalized System of Preferences were paused since the program lapsed at the end of 2020, but since imports still identified GSP goods in the hopes of refunds, it saw that the imports claimed under GSP reached $18.7 billion in 2021, up 10% from 2020, but still more than $2 billion less than was claimed in 2019. Imports under GSP were less than 0.7% of imports. The top categories under GSP last year were bags, rubber gloves, gold necklaces, mattresses and precious metal jewelry, and the top five source countries were, in order, Indonesia, Thailand, Cambodia, Brazil and the Philippines. ***— Mara Lee***

Ocean Shipping Reform Act Passes Senate

The Ocean Shipping Reform Act, which aims to end unreasonable detention and demurrage and make ocean carriers accept more exports, passed the Senate by a voice vote on March 31.

The Senate and House versions of the bill are different, with some agricultural trade groups saying the House bill is more proscriptive. But one of the sponsors of the House bill has said they will find a compromise and get it done (see ITT 03/21/2022).

In the Senate bill, the Federal Maritime Commission is instructed to issue a final rule "further defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries ... regarding the assessment of demurrage or detention charges."

It is also instructed to issue a rulemaking within six months "defining unreasonable refusal to deal or negotiate with respect to vessel space," language that is aimed to reduce the number of declined export shipments.

Importers and exporters hailed the bills; the trade group that represents ocean carriers says that it is problematic and will not solve port congestion.

Senate Majority Leader Chuck Schumer, D-N.Y., said on the Senate floor that he hopes the bill will become law soon.

"This bill will make it harder for ocean carriers to unreasonably refuse American goods at our ports, while strengthening the Federal Maritime Commission's ability to step in

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and prevent harmful practices by carriers," he said. "This bipartisan shipping bill is exactly the sort of thing that the Senate should focus on: it's cost-cutting, it's bipartisan, and it will directly give relief to small businesses and consumers alike." — ***Mara Lee***

FMC Extends Deadline for Detention, Demurrage Billing Rule

The Federal Maritime Commission this week extended the public comment deadline for its pre-rule on new demurrage and detention billing requirements (see ITT 02/07/2022 and ITT 02/14/2022) by 30 days. Comments were originally due March 17, but industry will now have until April 16 to submit feedback. More than 30 trade groups had asked FMC earlier this month to extend the deadline (see ITT 03/07/2022).

FDA Creates New Import Alert for Imported Foods Contaminated by Filth

FDA created a new import alert March 4 for imported foods contaminated with filth. Import Alert 99-46, titled "Detention Without Physical Examination of Imported Human Foods due to Filth," will apply to specific firms and products adulterated due to filth. "Countrywide Detention Without Physical Examination (DWPE) recommendations due to filth are covered in other applicable import alerts (IA)," FDA said.

"The FDA has found various food products that appear to be adulterated because they contain filth (including but not limited to insect, rodent, other animal filth, and/or mold)," the agency said. Under the new import alert, "divisions may detain, without physical examination, the indicated products from the firms identified on the Red List of this Import Alert." No products have yet been listed as of press time.

Specific products from an individual firm may be added to the red list of the import alert if there have been at least three detentions in a recent six-month period or less, and the detentions represent at least 25% of the total shipments of that product examined "in the applicable time period as known to the recommending district or unit," FDA said.

Once listed, owners of shipments detained under the import alert can seek release of an individual shipment by providing evidence that the shipment does not contain filth, including by way of private laboratory analysis. "Following receipt and review of analytical results, the FDA may, at its discretion, collect and analyze audit samples before rendering a final decision on the admissibility of the article," FDA said.

To get a product removed from the import alert, the relevant company must provide information "to adequately demonstrate that the firm has resolved the conditions that gave rise to the appearance of the violation," FDA said. Per normal agency procedure, "a minimum of five (5) consecutive non-violative commercial shipments should be offered for import before the Agency may consider that the appearance of the violation has been removed."

EPA Proposing Updates to Composite Wood Products Formaldehyde Standards

The Environmental Protection Agency is proposing to update its formaldehyde standards for composite wood products. The agency's proposed rule would update mentions in the regulations of several voluntary industry standards, as well as modify requirements for third-party certifiers conducting inspections under the standards, including by providing more flexibility for remote inspections. The EPA is also proposing "technical corrections and conforming changes including updating standards within the definitions section, clarifying language as it relates to production, and creating greater flexibilities for the third-party certification process," it said. Comments are due April 28.

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