

Administration Files Remand Results in Litigation Over Section 301 Tariffs

August 2, 2022

On August 1, 2022, the Office of the U.S. Trade Representative (USTR) filed remand results with the U.S. Court of International Trade (CIT) in a major litigation over the lawfulness of import duties levied on Chinese goods under Section 301 of the Trade Act of 1974.

Section 301 authorizes USTR to take action to encourage foreign countries to abandon or mitigate unfair trade practices affecting U.S. commerce. In 2017, at the direction of then-President Trump, USTR began an investigation into China's trade practices, and ultimately concluded that a variety of Chinese practices unfairly burdened U.S. commerce. Subject to the 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.

Since late 2020, thousands of importer plaintiffs have filed suit at the CIT, alleging that USTR imposed the third and fourth rounds of Section 301 duties beyond the time period permitted by the statute, and without satisfying the statutory requirements for modifying the first and second tariff actions. The CIT rejected these arguments in an opinion issued this past April. However, the court agreed with the importers' separate claim that USTR violated the Administrative Procedure Act by failing to explain its evaluation of comments filed in response to USTR's initial proposals to impose the third and fourth rounds of tariffs.

The court particularly pointed to the fact that, in imposing the tariffs, USTR did not explain:

- Why it removed certain products from the proposed lists of goods to be covered, or why it determined to impose tariffs on

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certain goods that multiple commenters argued should not be subject to tariffs;

- Its evaluation of comments regarding the rate at which duties should be imposed; and
- Its consideration of comments regarding the potential impact of duties on the U.S. economy.

The CIT ordered USTR to provide the required explanations, without identifying any new reasons for imposing the tariffs. The court's order did not compel USTR to make any adjustments to the tariffs, but was broad enough to permit the agency to make changes if it desired to do so.

In the 90-page remand results, USTR has not announced any changes to the third or fourth rounds of tariffs. Instead, it has provided an additional explanation of:

- The decision to remove certain rare earths/critical minerals, seafood products, antiquities and art, consumer electronics, health and safety products, and chemicals and chemical inputs from the initially-proposed scope of the third rounds of tariffs;
- The agency's reasons for declining to remove other goods from the scope of the third round of tariffs, or to add additional steel and consumer goods to the list of products covered by the third round of tariffs;
- The decision to remove certain goods (such as religious texts or U.S.-caught seafood processed in China) from the scope of the initially-proposed fourth round of tariffs, and the removal of certain other goods for national security reasons, health and safety reasons, or because the goods were critical to U.S. port operations;
- The agency's position that it was not possible to exclude the vast majority of products that commenters argued should not be subject to duties given then-President Trump's directive that USTR identify \$300 billion in annual trade to be subject to the fourth round of tariffs;
- USTR's consideration of comments regarding the duty rate at which tariffs should be imposed and the aggregate level of trade to be covered, in light of presidential directives;
- The agency's assessment of comments on the potential economic effects of the tariffs, the legality and efficacy of the modifications, and potential alternatives to imposing tariffs.

The CIT has not yet set a schedule for parties to the litigation to comment on the remand results. However, it is likely that the importer plaintiffs will argue that USTR's explanation fails to address the CIT's concerns and that the court should order the tariffs to be lifted. Whether the court will agree is yet to be seen.

While USTR made no changes to the third or fourth rounds of tariffs in the remand results, it is possible that the Administration will make future changes to the tariffs through separate processes. For example, USTR is currently in the initial stages of a statutory four-year review of the tariffs. Likewise, the Administration appears to be considering whether to lift tariffs on certain consumer products to combat inflation, as well as whether to create new processes by which importers can request time-limited exclusions from duties on specific goods.

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.