

Court Ruling Questions Tariff Process, But Procedural Flaws Remain in Place

A U.S. Court of International Trade ruling raises questions about procedural ambiguity in the application of tariffs against China.

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Last week, the U.S. Court of International Trade (CIT) reviewed determinations made by the Office of the United States Trade Representative (USTR) on imposing and amending tariffs on China under Section 301 of the Trade Act of 1974, and found flaws in USTR's approach. CIT remanded the case back to USTR to provide a better justification for the actions.

Section 301 gives USTR, at the direction of the president, broad authority to respond to unfair trade practices, including violations of trade agreements, or “an act, policy, or practice of a foreign country” that “is unreasonable or discriminatory and burdens or restricts United States commerce.” After an investigation under Section 301, the Trump administration imposed tariffs on imports from China through five separate tariff actions, gradually escalating the coverage in four different lists of products. The Government Accountability Office (GAO) found that roughly \$460 billion of U.S. imports from China were subject to Section 301 tariffs from July 2018 to December 2020. The Biden administration has kept most of the tariffs in place.

At issue in the CIT ruling were lists 3 and 4a, which exceeded the estimate of harm laid out in the 301 report, and were also modified from the original tariff action to address

retaliation from China. While the CIT refrained from vacating the tariffs altogether, its ruling sheds light on the procedural ambiguity in Section 301 and raises serious questions about the process by which certain products were *excluded* from the tariffs. It also serves as a reminder of the urgent need to reform Section 301 to prevent future abuses of executive power in trade.

Since taking office, the Biden administration has maintained the status quo on Section 301, and the process by which products could be excluded from tariffs was restarted upon urging from Congress. On March 23, 2022, USTR announced that it would reinstate a previous determination that allows certain products to be excluded from the Section 301 tariffs put in place against China by the Trump administration. The exclusion process was restarted in October of last year, when USTR invited comments on the 549 previously granted exclusions. Of these, 352 have again been granted pursuant to a recent decision by the Biden administration. These exclusions will be extended until the end of this year and then reevaluated.

USTR considered several factors in assessing requests for exclusions, as described in a recent Federal Register Notice:

- Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Any changes in the global supply chain since September 2018 with respect to the particular product or any other relevant industry developments.
- The efforts, if any, the importers or U.S. purchasers have undertaken since September 2018 to source the product from the United States or third countries.
- Domestic capacity for producing the product in the United States.

On its face, this all sounds perfectly reasonable. However, when you dig into the details, **it becomes clear that the *entire exclusion process* has been an arbitrary exercise of executive power.** In fact, the exclusion process reveals a serious procedural flaw in Section 301 because the law does not even provide for such a process. As a report by the Congressional Research Service explains, “Title III of the Trade Act of 1974 does not outline a formal process for exclusions or require the USTR to establish one. The determination to do so appears to be solely at the USTR’s discretion.” In fact, the process was established by U.S. Trade Representative Katherine Tai’s predecessor, Robert Lighthizer, as a way to address concerns about the economic harms posed by the tariffs to U.S. businesses and consumers. In the history of Section 301’s use, this was the first time that an exclusion process was established.

This novel invention was elaborated in a July 11, 2018 Federal Register Notice issued by USTR, which gave the agency the sole authority to evaluate exclusion requests “on a case-by-case basis, taking into account whether the exclusion would undermine the objective of the Section 301 investigation.” From the beginning, the process was plagued with problems. The first major issue was the delay in granting exclusions, which then U.S. Trade Representative Lighthizer argued was due to a lack of capacity at USTR, when he was pressed by Senator Chuck Grassley (R-IA) in the summer of 2019 about the exclusion requests that were “still pending from the first tranche of duties” put in place the previous year.

The second major problem was a lack of transparency. The GAO examined a random sample of exclusion requests and extension comments submitted between July 2018 and August 2020 and found that of the “53,000 exclusion requests, covering 4,485 different product categories across the four lists,” USTR denied 87 percent, and also refused to extend a further 75 percent of the tariff exclusions it had previously granted. In addition, the GAO noted a lack of sufficient documentation of internal procedures for how USTR arrived at its decisions to grant exclusions, citing a number of

inconsistencies in the reviews performed. The report went on to say that “USTR did not publish a reason for its decision on extensions.” It is the lack of reasoning presented in the exclusions process that led the CIT to remand the determinations back to USTR.

The fundamental problem here is that Section 301 grants USTR both broad and unchecked discretion in implementing actions under the law. At a Senate Finance Committee hearing last week, Senator Tom Carper (D-DE) remarked, “I remain concerned about the impact of existing tariffs on businesses in my state and across our country” and asked Tai whether she was “considering more comprehensive Section 301 tariff exclusions” and how “these tariffs fit into the Biden administration’s broader China strategy.” In her response, Tai said, “Tariffs do have a role” and that “I committed in my speech on the Biden administration’s China trade policy last October that we would start the first exclusions process, that we did...and we would consider more exclusions as warranted.”

There are two issues with this response. First, Tai did not explain *why* tariffs have a role in the administration’s China policy, given their economic consequences for Americans. Evidence points to the fact that these tariffs have hurt the U.S economy. Economist Kara M. Reynolds estimates the cost of the Section 301 tariffs on the average U.S. household to be “at least” \$145 a year. Reynolds further observes that “these tariffs are indeed regressive, with the lowest income consumers paying on average 1 percent of their after-tax income on the Section 301 tariffs compared to only 0.21 percent of the after-tax income of the highest income consumers.” The imposition of these tariffs seems to be at odds with a trade policy that Tai often claims is “worker centric.”

Second, in noting that she would consider additional exclusions, Tai is embracing a procedure that was invented by her predecessor and has been shown to lack transparency. The Constitution gives “exclusive and plenary” authority over regulating commerce with foreign nations to Congress, not the executive branch. And while Congress has delegated some of that authority to the president over the years, it can still take action to reform Section 301 and close the procedural loopholes that have allowed the executive branch to take advantage of the broad discretion this statute provides. **The CIT ruling, while helpful as far as it goes, illustrates the limited role courts can play in overturning executive trade actions, as it in essence merely asks USTR to provide a better explanation for its actions. This should be a matter of concern regardless of which party occupies the White House. Congress should take action to reform Section 301, and push the administration to lift existing 301 tariffs.**