Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Section 301 Tariffs on Goods from China: International and Domestic Legal Challenges

Updated July 22, 2021

In August 2017, the Office of the U.S. Trade Representative (USTR) initiated an investigation, under Section 301 of the Trade Act of 1974, into several allegedly unreasonable or discriminatory trade practices carried out by the People's Republic of China (China). On March 22, 2018, the Trump Administration issued a report finding that several of these practices were unreasonable or discriminatory and burdened U.S. commerce. Following this announcement, the Administration imposed additional tariffs on a variety of imported goods from China. These tariffs, imposed in four stages between 2018 and 2019, have been challenged by China and numerous U.S.-based importers in international and domestic legal fora. Although these legal challenges involve the Section 301 investigation and tariff actions initiated by the Trump Administration, the Biden Administration has thus far signaled its intent to leave the tariffs in place, and the related legal disputes remain ongoing. This Sidebar analyzes the litigation at the World Trade Organization (WTO) and before the U.S. Court of International Trade (CIT).

Background

On August 24, 2017, USTR announced an investigation into "whether acts, policies, and practices of the Government of China related to technology transfer, intellectual property (IP), and innovation are actionable" under authorities delegated to the President in Sections 301 through 310 of the Trade Act of 1974 (often referred to as "Section 301"). On March 22, 2018, USTR issued a report finding that four such Chinese practices or policies justified action under Section 301: (1) forced technology transfer requirements; (2) cyber-enabled actions to acquire U.S. IP and trade secrets illegally; (3) discriminatory and nonmarket licensing practices; and (4) state-funded strategic acquisition of U.S. assets. (For more information on the Section 301 report and subsequent actions, see this CRS Report and In Focus.)

After USTR issued its report on the outcome of its Section 301 investigation, it determined that imposing tariffs on approximately $50 billion worth of U.S. imports from China was an appropriate response. The USTR also initiated a dispute at the WTO about China's technology licensing practices, although it was suspended while the United States and China negotiated the "Phase One" trade agreement; since then, authority for the WTO panel lapsed. On June 20, 2018, USTR issued a list of products covered by the first round of tariffs (List 1), with an annual trade value of approximately $34 billion. The Notice of the action indicated the U.S. Government "reviewed the extent to which the tariff subheadings . . . include products

Congressional Research Service

https://crsreports.congress.gov

LSB10553

containing industrially significant technology" to tailor the tariffs to those products affected by the practices identified during the Section 301 investigation. USTR issued a second list of products (List 2), covering approximately $16 billion worth of imports, on August 16, 2018. The Notice of the second action indicated this amount was identified to "maintain the effectiveness" of the Section 301 action, which USTR previously determined should cover $50 billion in annual trade value. In response, China announced that it would impose additional tariffs on $50 billion worth of goods from the United States to counter what China viewed as U.S. action that "severely violated China's legitimate rights in the WTO."

Following these events, President Trump ordered USTR to modify the Section 301 action and impose additional tariffs on another $200 billion worth of products from China—bringing the total value of goods subject to tariffs to $250 billion. The President stated the $50 billion action was insufficient because China "refuses to change its practices—and indeed recently imposed new tariffs" on goods from the United States. On September 21, 2018, USTR issued List 3, which set the additional tariffs at 10% with projected increases to 25% on January 1, 2019. China responded by imposing additional tariffs on $60 billion worth of U.S. goods. The United States delayed the projected tariff increases to 25% until May 10, 2019, after which China increased the tariff levels on $60 billion worth of goods from the United States. In May 2019, the USTR proposed to modify further the $250 billion action against China. It announced on August 17, 2019, that the action "was insufficient to obtain the elimination of China's unfair and harmful policies" and expanded it to cover an additional $300 billion in annual trade value (List 4). In response, China announced new tariffs on $75 billion worth of products from the United States.

During this period, China initiated several WTO disputes against the United States, with each dispute challenging different tariff lists. In addition, thousands of U.S.-based importers filed lawsuits with the CIT, challenging Lists 3 and 4; the CIT has sought to assess the legal viability of these disputes by using several claims as "test cases."

Disputes at the World Trade Organization

China initiated three disputes at the WTO that challenge the four tariff lists: DS543 challenges List 1 and List 3, including the increase of tariffs on List 3 from 10% to 25%; DS565 challenges List 2; and DS587 challenges all four lists. Thus far, only DS543 has gone beyond consultations (i.e., private negotiations between China and the United States). A WTO panel issued a report in that case, finding the United States breached its WTO obligations when it imposed tariffs under Lists 1 and 3.

In DS543, although the parties raised several procedural issues before the WTO panel, the main substantive issues involved China's claims under Articles I, II(a), and II(b) of the General Agreement on Tariffs and Trade and the U.S. defense under Article XX(a). Article I reflects the general "most-favoured-nation" (MFN) principle, which requires WTO members to provide nondiscriminatory treatment to "like products" of all other WTO members with respect to customs duties and certain other charges. Article II(a) reflects a more specific application of the MFN principle, obliging WTO members to provide nondiscriminatory treatment to all other members with regard to the commitments they make on, among other things, maximum tariffs applied to goods. These commitments are reflected in documents referred to as "schedules of concessions." Article II(b) prohibits WTO members from imposing higher tariff rates on goods than those listed in their schedules of concessions. Article XX allows WTO members to impose WTO-inconsistent measures if they are taken to further legitimate public policy goals and satisfy certain conditions. Article XX(a) allows certain measures that are "necessary to protect public morals."

China argued that the U.S. tariffs violated Article I because the action imposed higher tariffs on goods from China than were imposed on goods from other nations. Further, China claimed the Section 301 tariffs violated Articles II(a) and (b) because the tariffs exceeded the maximum tariff levels set out in the U.S. Schedule of Concessions and applied only to China. The United States did not dispute that the Section 301 tariffs were inconsistent with these provisions. Instead, the United States sought to justify the measures under Article XX(a), contending they were necessary to protect public morals. Specifically, the United States explained the practices identified in the Section 301 report (e.g., misappropriation of U.S. IP) violated U.S. public morals. The tariffs were imposed to combat the continuation of these practices.

The WTO panel found that China made a *prima facie* case that the tariffs were inconsistent with Article I because they "apply only to products from China" and thereby do not provide the same treatment to Chinese products as to all other WTO members' products. It also concluded that the Section 301 tariffs were *prima facie* inconsistent with Articles II(a) and (b) because they "applied in excess of the rates to which the United States bound itself in its Schedule [of Concessions] and accord imports from China 'less favourable treatment' than that provided in the United States' Schedule."

Turning to the United States' public morals defense, the panel first found the "'standards of right and wrong' invoked by the United States . . . could, at least at a conceptual level, be covered by the term 'public morals.'" However, the United States had not, in the panel's view, demonstrated the tariffs were "necessary" to protect public morals, and therefore the tariffs were not justified under Article XX(a). The panel concluded the Section 301 tariffs were inconsistent with the United States' WTO obligations and recommended the United States "bring its measures into conformity."

On October 26, 2020, the United States announced its decision to appeal the DS543 panel report. As the Appellate Body currently lacks a quorum of members, and therefore cannot hear appeals, there is no immediate way to resolve the dispute within the WTO. Thus, at least in the near term, there will be no final recommendation from the WTO's Dispute Settlement Body on whether the United States must remove the Section 301 tariffs to conform with the WTO agreements. While the Appellate Body remains dormant, any resolution to the dispute will likely need to be negotiated by the United States and China outside of the WTO's dispute settlement framework.

Disputes Before the U.S. Court of International Trade

In addition to China's dispute settlement cases against the Section 301 tariffs at the WTO, thousands of private companies have challenged the tariffs in domestic court cases. In September 2020, HMTX Industries LLC, a U.S.-based importer of vinyl tile that paid duties under List 3, brought the first of these lawsuits to the CIT. The company, as well as several of its affiliates, challenged the List 3 tariffs, and later amended its complaint to challenge List 4A. Subsequently, approximately 3,600 importers of various goods from China filed similar challenges to the Lists 3 and 4A tariffs as well as List 4B, seeking a refund of duties paid. Collectively, these lawsuits represent the first domestic court challenges to Section 301 tariffs. Not only is this legal challenge unprecedented, but the number of cases is as well. The CIT generally receives a few hundred cases per year; the Section 301 cases, in conjunction with other 2020 filings, increased its caseload by 1,546% from 2019 to 2020.

Since the cases were filed, the CIT has taken several procedural steps reflecting the scope and potentially significant legal implications of these challenges. First, the court assigned all cases to a three-judge panel and created a single "master case" titled *In re Section 301 Cases*, under which the parties must file all relevant documents. Second, the court decided to manage the disputes by selecting a representative sample of claims, which would be used to assess the legal challenges' viability and potentially suggest how the court should address the remaining cases. While the test case is considered, all other cases are stayed.

The plaintiffs in the *HMTX* case, whose claims served as a model for many subsequent claims, were selected by the CIT to serve as the test case. In their amended complaint, they lodge the following claims: (1) the USTR violated procedural requirements for imposing Section 301 tariffs; and (2) the Agency exceeded its statutory authority when imposing the tariffs.

On procedural grounds, the plaintiffs argue that USTR imposed the Lists 3 and 4A tariffs more than a year after initiating the Section 301 investigation into China, thereby violating the statute's deadline for action. The plaintiffs also allege that USTR violated the Administrative Procedure Act by declining to give the affected importers sufficient time to submit comments on the proposed duties, and by failing to provide evidence for any "increased burden" resulting from the Chinese IP policies and practices reviewed during the Section 301 investigation. Further, the plaintiffs argue that USTR exceeded its authority under the Trade Act of 1974 when imposing the tariffs. Section 307(a)(1)(B) and (C) of the Trade Act permits the Agency to "modify or terminate" actions against foreign unfair trade practices when the "burden or restriction on United States commerce" imposed by the investigated country's practice has "increased or decreased" or when the action "is no longer appropriate." Plaintiffs contend this statutory provision limits the USTR to modifying actions only to address the unfair trade practices identified in the initial Section 301 investigation, and therefore prohibits the USTR from modifying the action for other reasons, such as to counteract China's retaliatory tariffs, which is the case here. The plaintiffs also argue that Section 307 does not authorize USTR to increase rates of duty, but only to "delay, taper, or terminate" them.

To date, the test case remains pending before the CIT. However, plaintiffs have prevailed on a motion for a preliminary injunction that prevents U.S. Customs and Border Protection (CBP) from liquidating imports subject to Lists 3 and 4A—in other words, from making final determinations of the amounts of customs duties owed by the importers. The court agreed with plaintiffs that failing to grant the motion would cause irreparable harm, as plaintiffs might not be able to recover Section 301 duties paid, even if those duties were later held unlawfully imposed. This order affects not just the test case, but applies to all cases challenging these Section 301 tariffs.

While the CIT has not yet ruled on the merits, in its ruling on plaintiffs' motion for a preliminary injunction the court stated that plaintiffs "raise sufficiently serious and substantial questions as to the proper interpretation" of the statute to merit injunctive relief. In particular, the court further stated that plaintiffs presented "at least a fair chance of success on the merits" with regard to each of their claims, although it did not address whether the USTR acted outside of the statutory time limit. Nonetheless, the CIT did not give a clear indication of whether plaintiffs would ultimately prevail on their claims. It is also unclear whether other domestic legal challenges to Trump Administration tariffs will inform how the CIT resolves challenges to the Section 301 tariffs, as they involve different statutory language and requirements. Statutory challenges to Trump Administration tariffs imposed using other authorities, including Section 201 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962, have met with limited success. While plaintiffs in two cases involving statutory challenges to Section 232 tariffs prevailed at the CIT, a recent decision from the U.S. Court of Appeals for the Federal Circuit reversed one of those decisions and may call into question the CIT's decision in the second. Taken collectively, these other cases may suggest that plaintiffs challenging the Section 301 tariffs face a difficult task of convincing the courts, particularly the Federal Circuit, that their narrower interpretations of the statutory provisions are correct.

Possible Legal Implications of the Section 301 Litigation

The United States is facing legal challenges to the Section 301 tariffs at both the international and domestic levels. At the international level, the WTO panel in DS543 found Lists 1 and 3 to be inconsistent with the United States' WTO obligations. However, because the United States appealed the WTO panel report and the Appellate Body is unable to hear appeals, the dispute likely will not be resolved within the WTO's dispute settlement framework. In other words, for the United States and China to reach a resolution, the issue may need to be negotiated outside of the WTO.

Because there is no final decision from the WTO's Dispute Settlement Body that Lists 1 and 3 are WTO-inconsistent, the United States might argue it is not under an international legal obligation to remove the tariffs. It has been suggested, however, that appealing a dispute under circumstances where the dispute cannot become final may give rise to a separate breach of the international obligation of good faith, and may entitle another WTO member to impose countermeasures (e.g., raise tariffs) to address the dispute. In either case, China may seek to use the panel report as leverage in negotiations. The two other disputes remain pending before the WTO, but China has not taken formal action beyond requesting consultations with the United States.

At the domestic level, the United States is facing numerous challenges to Lists 3 and 4 before the CIT. If the United States loses before the CIT (or on appeal), the Biden Administration may have to remove the tariffs. Such an action may address at least part of the WTO panel finding as to List 3, and could affect U.S.-China trade negotiations. Additionally, if at some point the WTO panel report on Lists 1 and 3 becomes final and China seeks to enforce the panel's findings, then any action the United States takes pursuant to a potential CIT order to remove the List 3 tariffs could also affect the WTO litigation.

Author Information

Nina M. Hart
Legislative Attorney

Brandon J. Murrill
Legislative Attorney

Disclaimer