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## New CIT Lawsuit Challenges Section 301 Tariffs on List 3, List 4 A Goods

A lawsuit recently filed in the United States Court of International Trade challenges the legality of retaliatory tariffs imposed by the President on Chinese goods appearing on Lists 3 and 4 A of the announced retaliatory measures. This lawsuit may provide a basis for interested importers to file their own claims to recover Section 301 assessments on List 3 and 4 A goods.

In *HTMX, Inc. v. United States*, Court No. 20-00177, a Georgia-based importer of vinyl tiles asserts that the Section 301 tariffs on List 3 and 4 A goods are unlawful, as done in excess of delegated authority, and in an untimely fashion.

With regard to the *ultra vires* claim, the Complaint alleges that the USTR's Section 301 report identified Chinese intellectual property rights (IPR) practices as harming United States exports, and found that the exports warranted retaliation against $50 billion Chinese goods. This $50 billion in retaliation was imposed in the List 1 ($34 billion) and List 2 ($16 billion) assessments.

However, List 3 assessments made against $200 billion in Chinese goods, were not related to China's IPR practices. Rather, they were imposed in retaliation for China placing tariffs on United States-origin goods – a subject which was never covered in USTR's Section 301 report. List 4 A tariffs on up to $300 billion worth of Chinese goods were imposed after the United States complaint that China was not purchasing sufficient quantities of United States goods.

In both instances, the Complaint alleges, the actions were *ultra vires* since USTR did not prepare a report regarding the Chinese practices which were being retaliated against. Moreover, these impositions are beyond the President's power to "modify or rescind" properly-issued Section 301 measures in accordance with Section 307 of the Trade Act.

The Complaint also alleges that both the List 3 and List 4 A actions are untimely under the statute, since taken more than twelve months after issuance of USTR's Section 301 report.

We have reviewed the Complaint and believe its contentions have merit. A favorable decision in this case could pave the way for the plaintiff to receive refunds of List 3 and List 4 A tariffs imposed on its products.

**Protecting Your Company's Right to Duty Recoveries**

The safest way for an importer to protect its own right to recover Section 301 tariffs imposed on List 3 and 4 goods is to file its own action in the United States Court of International Trade, seeking such recoveries. The Court entertains these actions under its 28 U.S.C. Section 1582 (i) "Residual" Jurisdiction. These actions must be filed within two years after the importer's cause of action accrues.

Some sources have reported that an action must be filed no later than September 20, 2020. Whether that is true or not is debatable, but our firm can file such claims by that deadline if we receive authorization to do so.

An importer is generally aggrieved, for prudential standing purposes in a court, when it suffers "injury in fact" from a challenged action. This would be the date the importer is assessed with the challenged duties (either at the time goods are entered, or at liquidation of an entry). This suggests that importer may be able to file after September 20, 2020, to protect their right to recoveries in whole or in part.

In our judgment, an importer could also raise a claim for refunds of Section 301 duties by filing a protest against the assessment of such duties in liquidation of an entry. If a court holds the Section 301 impositions unlawful, we would expect Customs to grant the protests and refund duties. [However, Customs will not grant refunds unless a Court strikes down the Section 301 measures; the agency has no authority to hold USTR's actions unlawful].

As a general rule, importers should file their actions sooner rather than later.

For more information regarding this new opportunity to recover tariffs, please feel free to contact a Neville Peterson professional.