

Court of International Trade Issues Preliminary Injunction in Unprecedented Section 301 Litigation

July 7, 2021

Yesterday, in the unprecedented “*In re* Section 301 Cases” litigation, the U.S. Court of International Trade (CIT) **entered a preliminary injunction** that suspends the liquidation of plaintiffs’ unliquidated entries from China that are subject to Section 301 duties under so-called “List 3” and “List 4A.” Because this decision will affect the entries from China for the more than 6,500 plaintiffs who have already filed suit, as well as other businesses that may be considering entering the case, Akin Gump stands ready to answer questions about the impact of the CIT’s opinion.

Background

In August 2017, the Office of the U.S. Trade Representative (USTR) launched an investigation into China’s intellectual property practices. USTR announced its findings in March 2018 and initially imposed proportionate measures to address China’s unfair trade practices. But when China retaliated with tit-for-tat import tariffs, USTR launched a trade war that ultimately subjected the vast majority of imports from China to additional duties. In September 2018 and August 2019, USTR issued two lists—one known as List 3 and another known as List 4A—that together subjected more than \$300 billion in imports from China to additional duties ranging from 7.5 percent to 25 percent.

In September 2020, Akin Gump filed a lawsuit on behalf of four plaintiffs alleging that Lists 3 and 4A exceed USTR’s authority under the Trade Act and otherwise violate the Administrative Procedure Act. Since that time, the CIT has received more than 3,800 follow-on challenges involving more than 6,500 plaintiffs. Due to the unprecedented nature of this litigation, the CIT assigned all of the lawsuits to a three-judge panel, with the first-filed Akin Gump lawsuit serving as the lead case.

In April 2021, after months of silence, the U.S. government announced—in a break from binding precedent and its own recent practice—that it believed the CIT lacked authority to order refunds for List 3 or List 4A duties paid after liquidation *even if plaintiffs prevail on the merits*. To protect their ability to seek refunds over such duties, plaintiffs filed a motion for a preliminary injunction as to the suspension of liquidation.

Contact Information

For questions about the Section 301 litigation led by Akin Gump, the CIT’s opinion, and its potential impact on your business, please contact any of the following lawyers.

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The Opinion

On July 6, 2021, after briefing and oral argument, the three-judge CIT issued a divided opinion granting plaintiffs' request for a preliminary injunction that suspends the liquidation of unliquidated entries subject to List 3 and List 4A duties.

Writing for herself and Judge Choe-Groves, Judge Kelly agreed with plaintiffs that they had satisfied the factors for a preliminary injunction: plaintiffs would suffer irreparable harm in the absence of interim relief in light of the uncertainty created by the government's position on refunds; plaintiffs had demonstrated "sufficiently serious and substantial questions" on the merits; and the equities and public interest weigh in plaintiffs' favor. Chief Judge Barnett dissented, but his disagreement with the majority was limited: in his view, there was no likelihood of irreparable harm because, pursuant to the governing statutes and Federal Circuit precedent, the CIT plainly has the authority to order refunds for both liquidated and unliquidated entries (as plaintiffs contend), despite the government's newfound position to the contrary.

The CIT has now temporarily restrained liquidation of any entries for the next 28 days and ordered the U.S. government to establish a repository through which plaintiffs who have filed a lawsuit may identify any unliquidated entries affected by the List 3 and List 4A duties. For all such identified entries, the U.S. government must either stipulate to the availability of refunds or suspend liquidation, so as to guarantee the availability of refunds for duties paid should plaintiffs prevail on the merits.

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