CLIENT ALERTS & INSIGHTS

Reciprocal Tariff Supreme Court Review - Looking Ahead to Trump Administration Alternatives to Impose Tariffs

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The US Supreme Court announced that it will review the President's authority to implement tariffs under the International Economic Emergency Powers Act (IEEPA) on an expedited basis. The Court of International Trade (CIT) determined the President exceeded his authority under IEEPA when implementing the President's reciprocal and fentanyl-based tariff programs earlier this year. This decision was upheld last month by the US Court of Appeals for the Federal Circuit (the Appellate Court). Our team discussed the CIT decision HERE. This client bulletin summarizes the status and impact of the ongoing litigation and explores the high-impact alternate mechanisms for the President to implement tariffs in the event that IEEPA falls as a basis for current tariff programs.

Status of Litigation - The CIT determined and the appellate court upheld that the White House exceeded authority under IEEPA when implementing the reciprocal and fentanyl-based tariffs this year. Essentially the Courts determined that IEEPA does not specially delegate Presidential authority to implement sweeping and dynamic tariffs on the facts of this purported emergency due to trade imbalance. While IEEPA and its predecessor have been used by other Administrations for emergency imposition of trade restrictions no President has previously used IEEPA to impose sweeping global tariffs in this manner responsive to trade deficits. Stay of injunctive relief was granted and remains effective through the Supreme Court appeal.

Tariff Status Quo, For Now - Tariff burden on domestic importers under the reciprocal programs and the China, Canada, and Mexico fentanyl-based programs will remain status quo until resolution by the Supreme Court. If the Court overturns the findings of the CIT and Appellate Court, and finds the tariffs lawful, then the tariffs will likely continue to apply as they do now. If the Court upholds the findings of the lower Courts then the manner and means of any refunds, including procedural and documentary requirements, will be the key question. This possibility has been informally acknowledged by Administration officials. The Administration has also expressed that it will not be deterred in utilizing tariffs to achieve its revenue collection, trading relationship, and domestic industry goals. If the IEEPA programs are overturned then alternate methods remain available to implement tariffs. Some of these methods are familiar and some are new potential avenues the Trump Administration may explore.

Alternate Tariff Mechanisms - Since the Administration's use of tariffs as a tool is not likely to change, visibility to the types of tariff programs that the White House may implement in response to

a Supreme Court loss is helpful to the thinking of domestic importers bearing current duty costs. The statutory frameworks for alternate measures are more formalistic in their approach and, in most instances, are likely to be targeted around particular sectors, commodities, or countries rather than the broad-based application attempted under IEEPA. We outline the legal basis and highest-impact alternative mechanisms for the President to implement tariffs in the following paragraphs.

Statutory Authority. The President may implement tariffs under the statutory authorities of the Trade Expansion Act of 1962 (the Trade Expansion Act), the Trade Act of 1974 (the Trade Act), and the US Tariff Act of 1930 (the Tariff Act). These mechanisms are procedurally more cumbersome than the freewheeling implementation of the reciprocal and fentanyl-based tariffs under IEEPA, but the procedures do reduce risk of judicial invalidation. In general, tariffs implemented using these statutory methods must be based on a threat to national security, unfair foreign trading practices or restrictions, or harm to domestic industry. The President can require government agencies to investigate actual or potential harm from these matters. The agencies must make an affirmative finding authorizing the President to implement related tariffs.

Section 232 Tariffs - Threats to National Security. The President has previously used Section 232 of the Tariff Act for steel and aluminum tariffs based on a finding of harm by the Department of Commerce (Commerce). The President can also order a new Commerce investigation into national security threats involving other commodities based on foreign imports and US production capacity for those high-need, critical items. Implementation of tariffs requires an affirmative finding by Commerce after its 270-day investigation into domestic production capacity and infrastructure. This year the President ordered a number of Section 232 investigations, including into pharmaceuticals, semiconductors, certain heavy and medium-duty trucks, lumber, and more. These investigations are ongoing with decisions expected near the end of this year. You can read about those investigations HERE.

Section 301 Tariffs - Foreign Trade Restrictions. The President has also previously implemented and expanded tariffs under Section 301 of the Trade Act, including applicable to China in tranches and subsequent exclusions. Those programs on imports from China were maintained and even expanded by the Biden Administration. It is possible that the US Trade Representative will conduct new investigations into harm based on unjustifiable trade restrictions or other foreign practices, including IP theft, against US interests. These investigations may take up to a year. You can read about the most recent Section 301 tariffs that took effect early this year HERE.

Anti-dumping and Countervailing Duties - Facing Unfair Trade Practices. The President has also directed Commerce and the International Trade Administration to initiate new "AD/CV Duty" investigations this year. The agencies will investigate harm on specific US industries and product groups due to potential "dumping" imports of certain goods into the US from other countries and potential government subsidy support for the production of goods imported to the US. If dumping and countervailing duties practices are found and are harmful then the agencies will recommend and implement additional duties based on the dumping or subsidy margin. These investigations may take up to or over a year.

Other Possible Alternate Statutory Basis - Sections 338, 122, 203. Additional alternate measures may be available to the Administration. Section 338 of the Tariff Act could be invoked for discriminatory trade practices. In 2017, the Trump 45 Administration threatened to take action against Canada

under this statute for alleged US lumber discrimination but instead negotiated a settlement. If invoked then the President may implement responsive duties of up to 50% *ad valorem*, restrict shipping routes, and ban imports entirely if discrimination continues in his discretion. Section 122 of the Trade Act allows the President to unilaterally apply temporary sweeping tariffs or up to 15% import quotas for 150 days in response to a currency crisis where imports depreciate the US dollar. This authority is rarely ever used but it may become a viable alternative for the fast and protectionist Trump Administration if there is dramatic fluctuation in the value of the US dollar. Section 203 of the Trade Act may be available if the International Trade Commission independently investigates and reports import harm on US industry as a result of imports from other nations. This mechanism would require an independent initiative by the ITC and may be prevented by Congress.

Global Supply Chains Prepare for Change - As litigation over the IEEPA-based tariffs develops it is helpful for US importers to remember that reciprocal and fentanyl-based tariff programs are far from the only tools deployed by the Trump Administration, and certainly not the only tools available. Over the course of this year the Trump 47 Administration has launched or modified tariff programs under various legal authorities just as it did in the prior Trump 45 Administration. The Supreme Court's decision on the IEEPA authorities will be critical in how the Administration proceeds in implementing its policies, although the trendline of utilizing tariff measures will continue. Opportunities for public comment on new programs, and possibly participation in exclusion processes, may be available if alternatives to the IEEPA tariffs receive greater reliance following a Supreme Court Decision. Import supply chains, and those reliant on import goods, must remain vigilant in the face of change to manage as best as possible significant increases in landed cost and the serious risks associated with allegations of duty evasion.

The Benesch team is monitoring developments closely while helping clients remain nimble and adaptive in this evolving environment. Benesch client alerts and legal publications are available for you to receive by signing up HERE.

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