SQUIRE PATTON BOGGS

US Trade Representative Announces Section 301 Investigation in Chinese Shipbuilding and Maritime Transportation

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On March 12, 2024, the Office of the US Trade Representative (USTR) announced that it had received a petition from five national labor unions requesting action under Section 301 of the Trade Act of 1974, as amended (Trade Act), to address the People's Republic of China's (PRC) acts, policies and practices in the critical maritime, logistics and shipbuilding sectors.

The petitioners allege in this new petition that the PRC has engaged in "non-market" policies through which it has "seized market share, suppressed prices and created a worldwide network of ports and logistics infrastructure that threaten to discriminate against US ships and shipping companies, disrupt supply chains and undermine vital national security interests." To "obtain the elimination of China's practices" and "rebuild a vibrant domestic shipbuilding industry," the petitioners request the following remedies:

1. A port fee on Chinese-built ships that dock at a US port
2. The creation of a Shipbuilding Revitalization Fund with proceeds from the port fee to support investments in the domestic shipbuilding industry's capacity, supply chains and workforce
3. Actions to support stronger demand for US-built vessels
4. Actions to address China's drive to dominate port and logistics infrastructure platforms and equipment
5. Negotiations with other major shipbuilding countries to address any concerns about their own government support programs and to coordinate measures to address China's unfair practices

Section 301 of the Trade Act authorizes USTR to take a broad array of actions to respond to unfair foreign trade practices that are ultimately determined – after an investigation – to burden or restrict US commerce. USTR may self-initiate a Section 301 investigation or initiate it in response to a petition. A petition may be filed by any interested person, and upon receipt, USTR must review the petition and make a determination within 45 days on whether to initiate an investigation. If an investigation is launched, USTR must decide whether to take responsive Section 301 action within 12 months. Section 301 permits USTR to take all "appropriate and feasible action" to remedy the trade harm, including the imposition of duties and other import restrictions, such as fees.

Section 301 generally fell into disuse after the launch of the World Trade Organization (WTO) and its dispute settlement mechanism – but that dynamic has changed in recent years, with President Trump's initiation of six new 301 investigations, including a Section 301 investigation on Chinese intellectual property rights (IPR) practices that resulted in the imposition of tariffs on approximately US$370 billion worth of Chinese imports into the US.

The normal remedy at the end of a Section 301 investigation is the imposition of some form of tariff (customs duty) on goods being imported from the target country. The problem with addressing alleged trade practices (e.g., subsidies) involving shipbuilding or maritime transportation and logistics services is that a vessel is only paying a port call at a US port of entry, and the vessel itself is never imported or never actually "enters" the US for purposes of imposition of duties. As such, this new Section 301 petition is seeking the imposition of an extraordinary and unprecedented retaliatory tariff in the form of a port fee that would be assessed on any Chinese-built vessel entering a US port. The petitioners have proposed port fees of US$1 million per port-call as one of the possible Section 301 remedies.

As noted above, USTR is required to review and respond to the petition within 45 days of receipt, but it is not required to launch the investigation. However, given the president's strong pro-union leanings, and the fact that the unions almost certainly consulted with USTR prior to finalizing and filing the petition, we expect that USTR will agree to initiate the investigation.

This Section 301 petition is not the first effort by the US domestic shipbuilding industry to use this provision of US trade law to address shipbuilding subsidies. In June 1989, the Shipbuilders Council of America (SCA) petitioned USTR under Section 301 to address alleged subsidies by West Germany, Japan, Korea and Norway. The SCA ultimately withdrew that petition weeks after filing it. That effort was followed in the 1990s by a multilateral effort to end shipbuilding subsidies worldwide through an Organization for Economic Cooperation and Development (OECD) negotiation and agreement that was ultimately not ratified by the US. Subsequent efforts by the OECD to address subsidization of shipyards in 2002 and 2010 were similarly abandoned, but the OECD continues to track subsidy developments.

This new Section 301 petition is unprecedented in terms of the scope of alleged conduct it purports to ask USTR to investigate. It starts by alleging that virtually all Chinese economic policies are designed to support Chinese shipbuilding, and that all forms of Chinese economic planning are "unreasonable, unfair, inequitable and discriminatory."

The petition alleges inappropriate and unlawful subsidies and government support without providing the same level of evidentiary support normally required in a countervailing duty petition that would be filed with the US Department of Commerce and US International Trade Commission. The petition also alleges competition law/antitrust violations, intellectual property theft, injurious pricing (dumping), manipulation of freight rates, port access and operations and capacity allocations. This is not simply the same, old allegations regarding shipbuilding subsidies.

The potential impact of this new Section 301 investigation is unprecedented. China is the world's leading shipbuilder. Chinese-built vessels are involved in the transportation, both inbound and outbound, of products that are essential to the US economy – from agricultural products, petroleum and energy products to passenger vehicles, fruits and vegetables and consumer goods. Imposition of some of the remedies requested in the petition would potentially disrupt the US economy and further tax global supply chains.

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