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Rough Seas Ahead

An Overview of the Section 301 Investigation Into China's Maritime and Shipbuilding Sectors

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The Office of the US Trade Representative (USTR) announced on February 21, 2025, the initiation of the second phase of its ongoing Section 301 investigation into China's acts, policies and practices relating to the maritime, logistics and shipbuilding sectors. This second stage of the investigation (known as the remedies phase) will consider a list of potential actions, fees or measures designed to counteract China's targeted dominance of the shipbuilding and maritime transportation industries.

In conjunction with the announcement of this second phase of the investigation, USTR published a Federal Register notice setting out a very aggressive schedule for this final phase of the investigation, and detailing a series of proposed actions. The USTR's proposed actions raise myriad issues, including as to the legality of some of the actions. Virtually all of the proposed fees or restrictions on services will present unprecedented challenges to the global shipping industry, and threaten to harm not just the targeted Chinese industries, but also shipping interests around the world, as well as companies and individual consumers in the US.

This client alert will provide background on this Section 301 investigation, provide a quick overview and assessment on some of the proposed remedies, highlight some of the novel issues USTR will confront, and assess some possible implications of the Section 301 remedies for existing contracts of various kinds.

I. Background on the Section 301 Investigation Into China's Maritime, Logistics and Shipbuilding Sectors

Section 301 of the Trade Act of 1974 (19 U.S.C. §§2411-2420) (Section 301) grants USTR the authority to investigate and pursue trade retaliation against countries that engage in unfair trade practices. If the USTR determines that an "act, policy, or practice of a foreign country" "is unjustifiable and burdens or restricts United States commerce" then the USTR is required to take action under the statute. Retaliatory actions might include (1) imposition of duties or other trade restrictions, (2) withdrawal or suspension of trade agreement concessions, or (3) entry into a binding agreement with the foreign government to either eliminate the conduct in question or to compensate the US through trade benefits.

This particular investigation started following the March 12, 2024, filing of a formal petition by five labor unions involved in shipbuilding and related trades, alleging that China's policies and practices in the maritime, logistics and shipbuilding sectors had substantially restricted and damaged the US shipbuilding sector and the entire US maritime industry. (We published an alert at the time, which provides further information.) The petition further alleged that this had adversely impacted the entire US economy and posed a threat to the US not just commercially, but also in relation to its national defense interests.

USTR initiated the investigation on April 17, 2024, received written submissions, held a hearing, and published a comprehensive report on January 16, 2025. That report, which brought phase one of the investigation to a close, found that China had targeted the maritime, logistics and shipbuilding sectors for dominance, that this targeting was preventing US shipbuilding from growing, and that it had created "economic security risks from dependence and vulnerabilities in sectors critical to the functioning of the US economy." The report concluded that China's policies and practices were unreasonable and a burden to US commerce, opening the door to remedial action under Section 301. We are now entering phase two, the "remedies phase," during which USTR must decide on the specific remedial measures to be taken.

II. Proposed Trade Remedies

During phase one of its investigation, and as described in its January 16, 2025, report, USTR concluded that China had engaged in unreasonable and burdensome trade practices in the maritime, logistics and shipbuilding sectors. In its Federal Register notice initiating the remedies phase, USTR has proposed a series of retaliatory, remedial measures. USTR has scheduled a public hearing on the proposed actions for March 24, 2025, in the main hearing room at the US International Trade Commission, has set a deadline of March 10, 2025, to submit written requests to appear at the hearing, and established a deadline for submission of comments of March 24, 2025, the same date as the hearing. Following the hearing, and once it reviews the comments, USTR will finalize and impose specific remedies in line with the requirements of Section 301(c).

USTR's proposed actions or remedies are outlined in the above-referenced Federal Register notice, which is entitled "Proposed Action in Section 301 Investigation of China's Targeting of the Maritime, Logistics and Shipbuilding Sectors for Dominance." A number of the proposed remedies are discussed below.

USTR Proposed Actions or Remedies

1. **Service fee on Chinese maritime transport operators** – Chinese shipping lines and operators would be required to pay up to a US$1 million lumpsum or up to US$1,000 per net ton of the vessel's capacity any time a vessel arrives at a US port. It appears that this fee will apply to any vessel owned or operated by a Chinese "operator" – presumably any Chinese shipping company, Chinese vessel owner, Chinese fleet operator or Chinese charterer, regardless of the flag of the vessel or country of the shipyard in which the vessel was built.

2. **Service fee on maritime transport operators with fleets comprised of Chinese-built vessels** – USTR has also proposed a fee on any Chinese-built vessel that arrives at a US port, regardless of the nationality or tax domicile of the company that "operates" the vessel. This fee would presumably be applied to shipping lines and vessel operators from Germany, France, Switzerland, Greece, Japan, Korea, Singapore, etc., upon the entry into a US port of a Chinese-built vessel.

   The fee would be charged at a rate of up to US$1.5 million, based on the percentage of Chinese-built vessels in that operator's fleet. USTR proposes fees of up to US$1 million per vessel entrance to a US port for operators with 50% or more of their fleet comprised of Chinese-built vessels, up to $750,000 per vessel entrance for operators with 25% or more of their fleet comprised of Chinese-built vessels, and up to $500,000 per vessel entrance for operators with greater than 0% and less than 25% of their fleet comprised of Chinese-built vessels. It is unclear how these percentages would be determined or applied given the complexities of how fleets are often owned and operated, involving the use of Special Purpose Vehicles (SPVs) and mixtures of owned and chartered-in vessels.

3. **Service fee on maritime transport operators with prospective orders for Chinese vessels** – USTR also proposes an additional fee of up to US$1 million per vessel entrance to a US port for vessel operators with pending, prospective orders for Chinese-built vessels to be delivered into the operator's fleet in the coming 24 months. The same lack of clarity mentioned above also applies here in terms of how this would be determined.

4. **USTR proposes a number of other provisions or measures** – These include remissions of fees to operators with US-built vessels in their fleet, and a provision to encourage or require given percentages of US products, per calendar year, that must be exported using US-flagged vessels by US operators. This particular provision on use of US vessels proposes to incrementally increase the percentage every 2, 3, and 7 years from the date the remedies come into action, such that by year 7 years following the date of action, at least 15% of US goods, per year, will be restricted to export on US-flagged vessels by US operators. USTR has not yet clarified whether this percentage will be on a volume or value basis, or whether it is commodity-specific or based on aggregated US exports.

5. **Other actions** – Other proposed remedies include investigation of alleged anticompetitive practices on the part of Chinese shipping companies, restricting National Transportation and Logistics Public Information Platform (LOGINK) access to US shipping data or banning US ports from using LOGINK software.

III. Other Issues

The USTR notice presents a number of novel or unique issues with regard to the proposed remedies, and we highlight just a few of them below.

1. **The term "operator"** – The first issue is the repeated use of the term "operator," which is not defined in the notice and was not previously discussed or commented on in the context of this Section 301 investigation. The term "operator" is left intentionally ambiguous by the USTR officials who drafted the Federal Register notice. In the context of the global ocean transportation industry, a vessel "operator" might be an Owner, a Disponent Owner, a Charterer (Bare Boat, Time or Voyage Charterer) or even a Ship Management Company. This issue alone has created significant confusion and consternation in global shipping circles over the past week. This is certain to be an issue that attracts significant commentary during the USTR public comment period in the coming week.

2. The authors of this alert believe that USTR has left the definition of "operator" intentionally ambiguous, because any one of several parties could end up being responsible for payment of the port entry fees, and the operator who pays the fees will likely be any one of the possible parties listed above, depending upon who assumes responsibility for the vessel entering the port or berth in the US. "Operator" in this context will be akin to an "Importer of Record" under customs law – the person or legal entity responsible for ensuring that the goods comply with all customs and legal requirements, and responsible for paying the import duties and taxes. This may be affected by which party is named on the "Document of Compliance" and/or "Certificate of Financial Responsibility" (the latter of which is usually a requirement for entering into the US). In the context of vessels, the operator will be responsible for complying with port call notification and registration upon arrival, and with paying any required fees, duties and taxes.

3. **Hong Kong owners and operators** – A number of companies or vessel operators have asked whether Hong Kong will be treated as part of China for Section 301 purposes and for purposes of the enumerated remedies.

   Over the last four years, US trade policy has been moving strongly in the direction of treating Hong Kong as indistinguishable from China more generally. On July 14, 2020, during his first administration, President Trump issued Executive Order (EO) 13936, providing that the US would no longer treat Hong Kong as a separate economy from China, and requiring the US "suspend or eliminate different and preferential treatment for Hong Kong." That EO has had several trade-related impacts. For example, goods made in Hong Kong have to be marked as Chinese origin. Further, Hong Kong and China are treated synonymously for antidumping and countervailing duties, and export control purposes.

   However, US Customs & Border Protection has, until very recently, taken the position that the additional duties imposed under Section 301 only apply to goods from China, and not Hong Kong. The most recent Section 301 FAQs from December 2024 state that "imported goods that are legitimately the product of Hong Kong … are not subject to the additional Section 301 duties." This position appears at odds with the earlier EO and obviously has a bearing on the application of the proposed remedies from this Section 301 investigation to owners or operators in Hong Kong.

The answer to this question may actually lie in a policy memorandum and order issued by President Trump just this past week, titled the America First Investment Policy. That February 21, 2025, document, goes out of its way to expressly define "PRC" as including Hong Kong (see Definitions at Section 4). This is another issue that will almost certainly be briefed during the USTR comment period.

4. **Taiwan owners and operators** – Given the number of major shipping lines in Taiwan, we have also received questions on whether Taiwan might be treated as part of China for Section 301 purposes and for purposes of the enumerated remedies. Although the US and Taiwan no longer maintain official diplomatic relations, the countries share an unofficial relationship and the US maintains strategic ambiguity in support of the "one China policy." Taiwan is treated as separate from China with regard to export controls, and antidumping and countervailing duties. Thus, it is virtually certain that Taiwan will be treated as a separate country for the purposes of Section 301 as well.

IV. Implications for Existing Contracts

The proposed remedies would, if implemented, clearly have significant implications for existing contracts, as well as for the drafting of contracts in the future. We provide some high-level thoughts on these below.

1. **Financing** – The bankability of financings that relate to Chinese owners and operators, as well as Chinese-built vessels, could be impacted.

    a. In particular, under Chinese sale and leaseback financings, which are widespread and popular (particularly where there is a Chinese nexus), the vessel operator sells the vessel to a financing lessor under a sale and purchase agreement and the financing lessor leases the vessel to the vessel operator under a bareboat charter. The financing lessor is the registered owner of the vessel and, notwithstanding that it is acting in a capacity of a financier and would not be involved in the day-to-day operations of the vessel, it could be deemed as a vessel "Operator" (as referred to in paragraph III(1) above) in the context of this Section 301 investigation.

    b. While it is likely the financing lessor would be protected by the indemnities given by the lessee in its favor under the bareboat charter, the financier might remain prima facie liable for making the relevant payments to the US authorities and only have a contractual claim by the financier against the lessee under the bareboat charter.

    c. Given the multiple streams of penalties that the USTR notice outlines (see paragraph II above), such Chinese sale and leaseback financings may become less attractive for vessel operators, particularly non-Chinese vessel operators, who would seek to reduce Chinese exposure and could turn to other types of financings. For the purposes of illustration, a non-Chinese vessel operator, in respect of a Chinese-built vessel, may be subject to penalties under paragraph II(2) above if the vessel were financed by a Chinese and/or non-Chinese financier under a traditional debt finance but would be subject to penalties under paragraphs II(1) and II(2) above if the vessel were financed by a Chinese financial lessor under a sale and leaseback financing.

    In addition, it could also severely limit the options for vessel operators in respect of sale and leaseback financings. Since the proposed service fees could also be calculated and be correlated to (i) the percentage of Chinese-built vessels in an operator's fleet; and/or (ii) the number of pending, prospective orders for Chinese-built vessels to be delivered into the operator's fleet in the coming 24 months (see paragraphs II(2) and II(3) above), if a Chinese financing lessor is already exposed to many other sale and leaseback financings (and, therefore, already ultimately owns many vessels in a fleet), it may make that particular Chinese financing lessor less attractive for potential vessel operators.

2. **Charterparties** – Charterparties take many different forms and, even where standard forms are used, those forms are often heavily amended and subject to a great many rider clauses. It follows that some caution is required when making general statements about the impact the proposals would have on existing charterparties.

    With that said, it is notable that most of the main forms of time charterparty agreements (NYPE 46, NYPE 2015, Shelltime 4, ShellLNGTime 2, etc.) contain express provisions that would likely be relevant. In particular, these forms typically include "port charges" and similar things among the list of items that charterers are to provide and pay for. Assuming the proposed "service fees" are to be regarded as port charges, it seems likely that charterers would be responsible for the additional cost (which could well be the outcome under other terms of the charter even absent such provisions).

    The above does not exclude the possibility that owners may find themselves compelled to pay the "service fees" in the first instance – as discussed above, the USTR proposals appear to be deliberately vague as to who is liable to pay these fees. That could leave owners in the uncomfortable position of having substantial unsecured claims against charterers to recover these fees.

    The position is less clear under voyage charterparties. For example, the GENCON 94 form provides that owners "*…shall pay all dues, charges and taxes customarily levied on the Vessel, howsoever the amount thereof may be assessed.*" It could well be argued that the proposed fees/charges fall within this.

    The situation is arguably more complex still under the Asbatankvoy form. That provides for owners "*to pay all dues and other charges on the Vessel*," but places responsibility on charterers for "*any unusual taxes, assessments and governmental charges which are not presently in effect but which may be imposed in the future on the Vessel… .*"

    It may be that the issue is unlikely to arise under voyage charters, given their (typically) shorter duration. However, it is quite possible that parties could enter into a voyage charter on terms they have used previously, without giving any thought to this issue, and then be taken by surprise when it arises. Voyage charter forms can also be used in longer-term arrangements that could be impacted, such as Consecutive Voyage Charters (CVCs) or Contracts of Affreightment (COAs).

3. **Shipbuilding contracts** – Given the proposed service fees being imposed on any Chinese-built vessel that arrives at a US port, we expect these newly imposed Section 301 fees and measures to have an impact on the Chinese shipbuilding industry in the medium to long term, with vessel operators having to factor in the service fees as part of the operating costs of having China-built vessels. Indeed, that is precisely the objective of these Section 301 remedies.

As regards existing shipbuilding contracts, unless there are express provisions providing grounds for vessel operators to terminate or revise/renegotiate the contracts – for example, where there is a change in policy or regulation that would have a material adverse effect on the vessel operators – then there is unlikely to be much recourse under the shipbuilding contracts themselves. In that scenario, it seems likely that vessel operators would have to honor the existing shipbuilding contracts and then rely on charterparties in the future to seek to allocate the cost of the service fees between owners and charterers. This may raise its own issues in circumstances where charterparties have already been entered into for vessels under construction.

As regards new shipbuilding orders, vessel operators will no doubt want to factor the anticipated impact of these developments into their assessment of the value of Chinese-built vessels and, thus, the price they are prepared to pay for the construction of such vessels.

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