

**June 7, 2021**

## DOJ: President/USTR Had Discretionary Power to Levy List 3, 4A Tariffs

The Department of Justice motioned the Court of International Trade, late June 1<sup>st</sup>, to dismiss the HMTX-Jasco sample case in the section 301 litigation for, “failure to state a claim upon which relief may be granted.” HMTX-Jasco cannot establish that the Office of the U.S. Trade Representative exceed its “statutory authority” under the 1974 Trade Act, when it increased pressure on China with list 3 and 4A on their imports. There was also no violation of the Administrative Procedure Act “as they were not arbitrary and capricious,” the government’s 77-page filing in docket 1:21-cv-52 said.

Since China showed “increasingly and discriminatory trade practices,” the implementation of lists 3 and 4A was “wholly discretionary and thus non-justiciable” under the Trade Act, DOJ said. China’s adopting of retaliatory measures in response to the U.S imposition of lists 1 and 2 revealed that those actions by the U.S. were insufficient, and modification of the action to implement list 3 and 4A, was statutorily “appropriate and authorized,” it said.

Judicial review is “unavailable” in this case because the President and the USTR’s implementation of that decision was “entirely discretionary” and would require the court to “move beyond the areas of judicial expertise,” DOJ’s motion said.

Contrary to the HMTX-Jasco allegations that the lists 3 and 4A tariff rulemakings were sloppy and lacked transparency in violation of the APA, USTR “complied with all relevant APA requirements,” DOJ said. USTR “provided a sufficient opportunity for comment,” and considered “all relevant factors” in deciding to impose the duties, it said. The agency “was not required to find any increased burden on U.S. commerce” as a basis for implementing lists 3 and 4A, it said.

Akin Gump lawyers for HMTX and Jasco declined to comment. The court’s April 13<sup>th</sup> scheduling order gives them until August 2<sup>nd</sup> to respond. Their September 21 HMTX-Jasco complaint argued that the Trade Act does not authorize the defendant’s “to litigate a vast trade war for however long, and by whatever means, they choose.”

As more information develops on the subject, we will be sure to keep you informed.

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