IN RE SECTION 301 CASES: WHAT DOES THE SUPER STATUTE REALLY SAY?

Woongchan Yum[*]

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[*] *Woongchan Yum is a J.D. Candidate at the University of Houston Law Center, Class of 2025, and a Law Clerk at Roberts & Kehagiaras LLP. He has a strong interest in international trade law and the ever-evolving landscape of global trade policies.* *He is deeply grateful to his family and friends for their unwavering support. Special thanks to Cameron Roberts, Jay Acayan, Josh Beker, and Harold Jackson for introducing him to Section 301 and providing invaluable guidance throughout law school, as well as to the entire team at Roberts & Kehagiaras LLP for their mentorship and support.*

I. INTRODUCTION

Due to the Trump Administration's imposition of Section 301 duties on Chinese-origin goods, it comes as no surprise that U.S.-based importers have been consistently challenging the legality of these duties due to the substantial impact they have on their businesses.[1] The ruling by the United States Court of International Trade (CIT), which upheld the legality of Section 301 duties for Lists 3 and 4A, should be overturned due to various violations of the Administrative Procedures Act (APA).

This paper argues that the court's decision upholding the additional tariffs imposed on goods of Chinese origin under Section 301 should be reversed. The first section of this article will provide an explanation of the background of Section 301 investigations. The second section will discuss the procedural history of *In re Section 301 Cases*. The third section will delve into the current status of the case, focusing on the plaintiffs' opening brief, the Government's response, the plaintiffs' reply, and the implications of a recent Supreme Court decision. The final section of this article will scrutinize the arguments presented by both sides and highlight the errors made by the CIT in their decision on the Section 301 cases, while also proposing reforms to address the statutory loopholes.

II. SECTION 301 INVESTIGATIONS

On August 14, 2017, President Trump issued a memorandum instructing the U.S. Trade Representative (USTR) to initiate an investigation into China's actions related to transfers of intellectual property.[2] USTR published a report summarizing China's conduct and its impact on U.S. commerce.[3] As a result, the President issued a memorandum directing USTR to "take all appropriate action" pursuant to Section 301 "to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce," and to "consider whether such action should include increased tariffs on goods from China."[4]

In order to pressure China to change these practices, the United States imposed additional tariffs, up to 25%, on certain U.S. imports

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1. *See generally* Amended Complaint, HMTX Indus. LLC v. United States, No. 20-CV-00177 (CIT Sept. 21, 2020), ECF No. 12.

2. Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39,007 (Aug. 17, 2017).

3. OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018).

4. Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13,099, 13,100 (Mar. 27, 2018).

from China.[5] These tariffs were categorized into four separate lists, namely Lists 1, 2, 3, and 4A, and were imposed in four different tranches throughout 2018 by the Trump Administration.[6]

First, on April 6, 2018, USTR proposed tariffs on approximately $50 billion worth of Chinese products.[7] USTR later published final lists of products subject to additional duties, referred to as "List 1" and "List 2," which cover distinct categories of commodities.[8] List 1 was enacted with List 2 following, imposing a 25% tariff on approximately $34 and $16 billion worth of imports, respectively.[9]

Building on Lists 1 and 2, the USTR targeted an additional $200 billion in goods for potential tariffs to pressure China to change its trade practices.[10] This "List 3" began with a 10% tariff, which was later raised to 25% as of May 10, 2019.[11] Subsequently, USTR announced its intent to impose additional duties on products covered by "List 4."[12] List 4 was published on August 20, 2019, with separate effective dates for List 4A and List 4B.[13]

In September 2020, three flooring companies, HMTX Industries LLC (HMTX), Halstead New England Corporation (Halstead), and Metroflor Corporation (Metroflor), submitted a case to the CIT which led to thousands of copycat cases submitted by numerous importers in the United States.[14] The case, later given "test case" status, along with the subsequent cases, have been styled as *In re Section 301 Cases* by the court, under which the parties must file all relevant documents.[15]

Here, the plaintiff importers challenged List 3 and List 4A.[16] The plaintiffs argued that USTR exceeded its authority pursuant to the Trade Act of 1974 (Trade Act) when it imposed the duties on the Chinese-

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5. Andres B. Schwarzenberg, *Section 301 Tariff Exclusions on U.S. Imports from China*, Cong. Rsch, Serv., (May 13, 2024), https://crsreports.congress.gov/product/pdf/IF/IF11582.

6. *Id.*

7. Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906 (Apr. 6, 2018).

8. Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40,823 (Aug. 16, 2018).

9. *Id.*

10. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20,459 (May 9, 2019).

11. *Id.*; Notice of Modification of Action Pursuant to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974 (Sept. 21, 2018).

12. Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 22,564 (May 17, 2019).

13. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304 (Aug. 20, 2019).

14. Amended Complaint, *supra* note 1 at 26.

15. Std. Procedural Order No. 21-01 (U.S. Ct. Int'l Trade. Feb. 10, 2021), ECF No. 1.

16. Amended Complaint, *supra* note 1 at 1-2.

origin goods.[17] Specifically, the importers argue the duties listed under List 3 and List 4A violated the APA.[18] They argued that USTR failed to provide adequate time, procedures for public notice and comment, and responses to the thousands of comments received.[19]

The court considered: 1) whether the plaintiffs' claims are reviewable; 2) whether USTR exceeded its modification authority under Section 307 of the Trade Act; 3) whether the introduction of List 3 and List 4A is exempt from the procedural requirements of the APA based on the foreign affairs exception; and 4) whether USTR provided sufficient and rational responses to comments, without acting in an arbitrary or capricious manner.[20] Before delving into these issues, it is crucial to grasp the procedural background of the *In re Section 301 Cases*.

III. PROCEDURAL HISTORY OF IN RE SECTION 301 CASES

A. 2022 China Section 301 Litigation

In April 2022, the CIT issued a decision regarding this case and the legality of import duties imposed on Chinese-origin goods under Section 301 of the Trade Act.[21] The court found that while the imposition of these duties did not violate the Trade Act, USTR failed to abide by APA requirements when it imposed the duties.[22] The court remanded the agency's decision to impose duties and denied the plaintiffs' request that the duties be lifted in the meantime.[23]

Here, the court examined whether the plaintiffs' claims were subject to review under the political question doctrine.[24] The government argued that the President's involvement made the claims non-reviewable under the APA, while the plaintiffs argued that USTR's actions were reviewable.[25] The court rejected the government's argument and concluded that the claims involved USTR actions, making them reviewable.[26] Furthermore, the court held the political question doctrine did not apply to the claims related to statutory interpretation and compliance with the APA.[27]

Next, the court applied the standard of review set forth in the APA in cases falling under its jurisdiction.[28] The government argued for a

17. Amended Complaint, *supra* note 1 at 25.
18. *Id.* at 2.
19. *Id.*
20. *In re* Section 301 Cases, 570 F. Supp. 3d 1306 (U.S. Ct. Int'l Trade 2022).
21. *Id.*
22. *Id.* at 1340, 1346.
23. *Id.* at 1316.
24. *Id.* at 1326.
25. *Id.* at 1323.
26. *Id.* at 1323-25.
27. *Id.* at 1326-28.
28. *Id.* at 1328-29; *see generally* 28 U.S.C.A. § 2640(e).

heightened standard of review, giving substantial deference to USTR decisions due to foreign relations' concerns.[29] However, the court held that statutory language was clear, and no deference was required.[30] Nevertheless, the court determined that USTR did not exceed its authority under Section 307 of the Trade Act when implementing Lists 3 and 4A, as these actions were linked to the original investigation's findings.[31]

The court also considered whether List 3 and List 4A were exempt from APA procedural requirements under the foreign affairs exception.[32] The APA exempts rulemaking from notice and comment procedures when the agency action involves a foreign affairs function of the United States.[33] "The purpose of the exemption [is] to allow more cautious and sensitive consideration of those matters which 'so affect relations with other [g]overnments. . . .'"[34] The foreign affairs exemption is triggered when the imposition of APA procedural requirements would have "definitely undesirable international consequences."[35]

The government argued that the "promulgation of List 3 and List 4A falls under the foreign affairs exception to the APA because [the Lists] 'were part of the negotiation of an international trade agreement'" and interconnected to the President's political agenda pertaining to international relations.[36] On the other hand, plaintiffs argued promulgation of List 3 and List 4A would not qualify for the foreign affairs exception as the public rulemaking process would fail to result in "'definitively undesirable international consequences.'"[37] Ultimately, the court found that the exemption did not apply because USTR conducted public rulemaking and no undesirable international consequences resulted from the rulemaking.[38] Therefore, the procedural requirements of the APA applied.[39]

Under the APA, agencies must incorporate a concise general statement of the basis and purpose of their actions.[40] Additionally, their response to comments must demonstrate a consideration of relevant factors and offer a "rational connection between the facts and the

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29. *In re* Section 301 Cases, 570 F. Supp. 3d at 1328.
30. *Id.* at 1329.
31. *Id.* at 1334-35.
32. *Id*. at 1335.
33. 5 U.S.C. § 553(a)(1).
34. Am. Ass'n of Exps. & Imps. v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (citation omitted).
35. *Id.*
36. *In re* Section 301 Cases, 570 F. Supp. 3d at 1335 (quoting Am. Ass'n of Exps. & Imps. v. United States, 751 F.2d 1239, 1249 (Fed Cir. 1985)).
37. *Id.* (citation omitted).
38. *Id.*
39. *Id.*
40. 5 U.S.C. § 553(c).

choices made".[41] Under the APA, the court "shall . . . hold unlawful and set aside [any] agency action, findings, and conclusions found to be . . . arbitrary, capricious, [or] an abuse of discretion . . . ."[42]

Here, the court held that "USTR failed to respond adequately to comments."[43] USTR's explanation did not provide a rational connection between the facts and the choices made.[44] USTR's failure to address the overwhelming opposition to the imposition of List 3 and List 4A and to explain the reasons for omitting certain tariff headings and products raised significant concerns.[45] The court further explained that the agency's response was conclusory and did not explain the basis for its determinations.[46] Therefore, USTR failed to sufficiently respond to comments in a reasoned manner, thereby violating the APA's requirement for "a concise general statement of . . . basis and purpose" and a "consideration of relevant factors."[47]

Ultimately, the court held that although USTR had the authority to impose the tariffs on Chinese-origin goods, USTR failed to abide by the APA's requirement to respond adequately to public comments during the notice and comment rulemaking process.[48] The court remanded the agency's decision to impose duties for further explanation of USTR's rationale for imposing the List 3 and 4A tariffs, and reason for placing or removing products from the lists.[49] However, the court denied the plaintiffs' request that the duties be lifted in the meantime.[50]

B. 2023 China Section 301 Litigation

Shortly after the court remanded the agency's decision to impose duties on List 3 and 4A tariffs for further reconsideration and an explanation of their rationale, USTR submitted a 90-page document explaining its rationale for imposing tariffs on List 3 and List 4A.[51] Upon remand, USTR (1) identified the documents underlying its response to comments; (2) provided additional explanation supporting the removal

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41. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156 (1962)).

42. 5 U.S.C. § 706(2).

43. *In re* Section 301 Cases, 570 F. Supp. 3d at 1338.

44. *Id.* at 1338-41.

45. *Id.*

46. *Id.* at 1338.

47. *Id* (quoting 5. U.S.C. § 553(c); *Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S.Ct. 2865).

48. *Id.* at 1343-44.

49. *Id.* at 1349.

50. Maureen E. Thorson, *Trade Court Issues Much-Awaited Decision on Section 301 Duties: Where Does It Go From Here?*, WILEY REIN LLP (Apr. 4, 2022), https://www.wiley.law/alert-Trade-Court-Issues-Much-Awaited-Decision-on-Section-301-Duties-Where-Does-It-Go-From-Here.

51. Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation, Pursuant to Ct. Remand Order (Remand Results), *In Re* Section 301 Cases, No. 1-21-CV-00052-3PJP301 (C.I.T. Apr. 1, 2023), ECF No. 467.

or retention of certain tariff subheadings from List 3 and List 4A; (3) addressed comments concerning the level of duties to be imposed and the aggregate level of trade subject to the duties; and (4) addressed comments concerning potential harm to the domestic economy, the legality and efficacy of the tariffs, and suggested alternative measures.[52]

After reviewing the remand results, a three-judge panel of the CIT upheld USTR's imposition of List 3 and List 4A duties under the Trade Act.[53] USTR provided additional explanations for its decision to impose the duties and clarified its reasoning during the underlying agency action.[54] The importers challenged this additional rationale, claiming it was a *post hoc* rationalization.[55] However, the court rejected these arguments and upheld USTR's response to public comments regarding presidential direction, harm to the U.S. economy, the effectiveness of the tariffs, and alternative tariff options.[56] Notably, the court clarified that it cannot reevaluate evidence or express opinions on USTR or the President's policy choices, including how to address China's unfair trade practices.[57]

Here, the plaintiff's arguments centered around two issues: (1) whether USTR's additional explanation was a *post hoc* rationalization and (2) whether the Remand Results of USTR met APA requirements in response to comments.[58] The court held that the explanations provided by USTR were not impermissible *post hoc* justifications and that the APA did not require as detailed an explanation of the agency's decision-making process as argued by the trade community.[59] Instead, the court held that USTR only needed to demonstrate awareness of the comments and engage in reasoned decision-making.[60] The court explained that it will " 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'"[61]

First, the court examined whether USTR's response to comments was impermissibly *post hoc*.[62] The APA requires agencies to incorporate a concise statement of basis and purpose in the adopted rules.[63] An agency must respond in a reasoned manner to those comments that

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52. *See id.*
53. *In re* Section 301 Cases, 628 F. Supp. 3d at 1238, 1250.
54. *Id.* at 1244–45.
55. *Id.* at 1241.
56. *Id.* at 1247-50.
57. *Id.* at 1248.
58. *Id.* at 1243, 1246–47.
59. *Id.*
60. *See id.* at 1243.
61. *Id.* at 1246; Nat'l Mining Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 549 (D.C. Cir. 1997) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (citation omitted).
62. *In re* Section 301 Cases, 628 F. Supp. 3d at 1241-45.
63. 5 U.S.C. § 553(c).

raise significant problems.[64] Significant comments are those that raise points relevant to the agency's decision and would require a change in the proposed rule if adopted.[65]

The court previously held that USTR's statements of basis and purpose indicated why the agency deemed China's conduct actionable but did not adequately explain the relationship between significant comments and the President's direction.[66] Accordingly, the court ordered a remand for USTR to respond to the comments it had already received.[67]

The U.S. Court of Appeals for the D.C. Circuit held that an agency may provide an "amplified articulation" of a prior "conclusory" rationale.[68] Pursuant to the D.C. Circuit's ruling, a three-judge panel of the CIT held that "USTR's Remand Results provide an 'amplified articulation' of the grounds for its actions" without introducing new determinative reasons.[69]

Additionally, in *Regents*, the Supreme Court held that when the grounds invoked by an agency "are inadequate, a court may remand for the agency to do one of two things."[70] Option one permits the agency to provide "a fuller explanation of the agency's reasoning *at the time of the agency action*."[71] Option one has important limitations, such that "[w]hen an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason. . .but may not provide new ones."[72] While other courts have questioned the formulation of the rule against *post hoc* rationalization, here, the court found that USTR's response falls within the limits of option one provided by the *Regents* decision.[73]

The court found that USTR's response addressed significant concerns and explained its decisions within the context of China's conduct and the President's direction.[74] The court also found that there is no need for USTR to conduct new notice-and-comment rulemakings.[75] Thus, USTR's response to comments does not constitute impermissible *post hoc* rationalization as USTR's Remand Results provide a fuller

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64. City of Waukesha v. EPA, 320 F.3d 228, 257 (D.C. Cir. 2003).

65. City of Portland v. EPA, 507 F.3d 706, 715 (D.C. Cir. 2007).

66. *In re* Section 301 Cases, 570 F. Supp. 3d at 1340–41.

67. *Id.* at 1349.

68. Alpharma, Inc. v. Leavitt, 460 F.3d 1, 5-6 (D.C. Cir. 2006) (first quoting Local 814, Int'l Bhd. Of Teamsters v. NLRB, 546 F.2d 989, 992 (D.C. Cir. 1976); and then quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484 (2d Cir. 1995)).

69. *In re Section 301 Cases*, 628 F. Supp. 3d at 1244.

70. Dep't of Homeland Security Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 591 U.S. 1, 201907 (2020) (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990)).

71. *Id.*

72. *Id.* at 21 (quoting Camp v. Pitts, 411 U.S. 138, 149 (1973)).

73. *In re* Section 301 Cases, 628 F. Supp. 3d at 1243-45.

74. *Id.* at 1245.

75. *Id.*

explanation of its reasoning within the limits of option one provided by the *Regents* decision.[76]

However, the court erred in upholding the case based on a remand determination offering conclusory and *post hoc* responses that ultimately rested on the President's say-so rather than consideration of all the relevant statutory factors.

C. Court's Error in Upholding the Case

First, the court mistakenly concluded that USTR's response to comments was not impermissibly *post hoc*. USTR was permitted to defend Lists 3 and 4A only on the basis of contemporaneous reasoning found in the administrative record.[77] However, when implementing Lists 3 and 4A, USTR failed to properly address critical public comments on key issues, such as tariff levels, possible alternatives, and the broader rationale behind the tariffs. There is no evidence in the administrative record or elsewhere showing that USTR meaningfully engaged with these substantial concerns at the time the lists were developed. Allowing *post hoc* explanations to stand opens the door for USTR and other agencies to bypass important public input, only to justify their actions retroactively without consequence. Such *post hoc* justifications fail to meet the requirements of the APA.

Second, the court erred in concluding that USTR's Remand Results in response to comments satisfy the requirements of the APA. USTR must respond to comments in a manner that allows the court to understand the agency's reasoning behind its actions, and the agency's response to comments must meet a standard that should enable the court to see the major policy issues discussed and the agency's justification for its reaction.[78]

The plaintiffs argued that USTR's reliance on Presidential direction and its failure to adequately explain why it agreed with the President's direction is legally insufficient.[79] They also argued that USTR's response to concerns raised in the comments is inadequate and conclusory.[80] However, the Government asserted that USTR adequately explained the role of Presidential direction and considered the potential economic harm in its decision-making.[81]

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76. *In re* Section 301 Cases, 628 F. Supp. 3d at 1242-45.

77. *See Regents*, 591 U.S. at 20–24 ("It is a 'foundational principle of administrative law'" that "[a]n agency must defend its actions based on the reasons it gave when it acted," not "belated justifications." (quoting Mich. v. Env't Prot. Agency, 576 U.S. 743, 758 (2015)).

78. *See Nat'l Mining Ass'n*, 116 F.3d at 549; *see also In re* Section 301 Cases, 570 F. Supp. 3d at 1338.

79. *In re* Section 301 Cases, 628 F. Supp. 3d at 1245.

80. *Id.*

81. *Id.*

In the instant case, the court examined USTR's response to comments on three specific aspects: 1) Presidential direction, 2) harm to the U.S. economy, and 3) alternatives to the tariffs. Regarding Presidential direction, the court found that USTR adhered to the President's direction but also exercised its own judgment in constructing the final lists of duties.[82] The court determined that USTR's explanation of the relationship between comments and Presidential direction was sufficient.[83] Next, regarding the harm to the U.S. economy, the court held that USTR balanced commenters' concerns with the need to respond to China's actions.[84] USTR explained its considerations and efforts to mitigate harm to U.S. consumers.[85] The court concluded that USTR's response adequately addressed the concerns raised in the comments.[86] Lastly, the court acknowledged that USTR adequately explained its disinclination to consider each alternative because "USTR did not seek comments generally on how to respond to China's acts, policies and practices, but instead requested comments on 'any aspect of the proposed supplemental action,' and provided comment topics relevant to such action."[87]

Based on this analysis, the court held that USTR's response to comments met the requirements of the APA and USTR complied with the court's remand order.[88] The court held that USTR fulfilled its duty to respond to comments and that its actions were appropriate within the context of the statutory factors and the specific direction from the President.[89] Accordingly, the court upheld the Remand Results of USTR.[90]

However, the court compounded its error by accepting USTR's conclusory and *post hoc* justifications, which fall short of the requirements set by the APA. On remand, USTR defended its weak response to public comments by pointing to the President's directive to impose tariffs on $300 billion worth of Chinese goods.[91] It claimed "limited flexibility" in removing additional tariff subheadings,

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82. *In re* Section 301 Cases, 628 F. Supp. 3d at 1246-49.

83. *Id.* at 1247.

84. *Id.* at 1247-48.

85. *Id.*

86. *Id.*

87. *Id.* at 1250 (quoting Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301, 83 Fed. Reg. at 33,609 (July 17, 2018)); *see Nat'l Mining Ass'n*, 116 F.3d at 549 (finding adequate an agency's brief dismissal of certain proposed safety standards as "beyond the scope of the rulemaking" based on the court's understanding "that the agency was choosing to impose some standards without addressing 'everything that could be thought to pose any sort of problem'") (citation omitted).

88. *In re* Section 301 Cases, 628 F. Supp. 3d at 1250.

89. *Id.* at 1247-48.

90. *Id.* at 1251.

91. Remand Results, *supra* note 51, at 73.

completely sidestepping the key concerns raised during the public comment process.[92]

This rationale falls short. Congress entrusted USTR—not the President—with the authority to adjust Section 301 actions, making USTR accountable under the APA. Despite inviting public comments on numerous issues, USTR treated the President's instructions as conclusive, offering no explanation for this stance and failing to cite any supporting evidence from the record. By assuming that USTR exercised independent judgment in determining whether to implement the tariffs, at what rates, and in what amounts, the court fundamentally erred in concluding that USTR had resolved its APA violations on remand.

IV. CURRENT STATUS OF THE CASE

A. Plaintiffs' Opening Brief

After the court affirmed the legality of Lists 3 and 4A, the plaintiffs filed an opening brief at the United States Courts of Appeals for the Federal Circuit, seeking to have the court reverse the CIT's March 17, 2023 decision, which upheld USTR's imposition of List 3 and 4A duties under Section 301 of the Trade Act.[93] In their opening brief, the plaintiffs argue two critical questions: 1) whether USTR exceeded its authority under Section 307 of the Trade Act by imposing the List 3 and 4A tariff actions, and 2) whether USTR's justification in the Remand Results cured its failure to adequately consider and respond to opposing comments.[94]

First, the plaintiffs argue that USTR exceeded its modification authority under the Trade Act, *inter alia*, Section 307(a)(1)(B) and 307(a)(1)(C).[95] Pursuant to Section 307(a)(1)(B), USTR overstepped its authority by acting in response to retaliation from China instead of addressing China's intellectual property practices that triggered the original action.[96] Merely having a "link" or "connection" to the subject of the original Section 301 investigation is insufficient to warrant such actions.[97] Additionally, USTR exceeded its authority under Section 307(a)(1)(C).[98] The textual construction of this statute indicates that Congress authorized its use solely for the purpose of lowering or terminating duties when changed circumstances render the original action "no longer appropriate."[99] Past practice, legislative history, and

92. Remand Results, *supra* note 51, at 73.

93. Opening Brief of Plaintiffs-Appellants HMTX Indus., Halstead New Eng. Corp., Metroflor Corp., and Jasco Prods. Co., HMTX Indus. LLC v. United States, No. 23-1891, (Fed. Cir. July 17, 2023.).

94. *See id.* at 32, 66.

95. *Id.* at 32, 34, 44.

96. *Id.* at 28.

97. *Id.* at 38.

98. *Id.* at 42.

99. *Id.* at 43-44 (quoting 19 U.S.C. § 2417(a)(1)(C)).

the doctrine of constitutional avoidance further support this interpretation.[100] Alternatively, the "major questions" doctrine confirms that Lists 3 and 4A exceed USTR's authority because the authority was not directly delegated by Congress.[101]

Second, the plaintiffs assert that, by failing to consider and respond to comments adequately, USTR's violation of the APA provides an independent basis to vacate Lists 3 and 4A.[102] They argue that, initially, the CIT correctly held that USTR failed to respond to comments in the Final List 3 and 4 notices.[103] However, it erred by ordering remand without vacatur.[104] Instead, the court should have vacated the Lists because USTR acted in an arbitrary and capricious manner.[105] Furthermore, the CIT erred by sustaining the Remand Results because USTR failed to cure its APA violations on remand.[106] Instead, USTR merely provided *post hoc*, conclusory, and otherwise insufficient rationales.[107] Accordingly, the plaintiffs argue that USTR's imposition of tariffs on Chinese goods was *ultra vires* and procedurally flawed.[108] The plaintiffs seek a reversal of the CIT's decision and the vacating of the Lists.[109]

B. Government's Response Brief

In response, on December 21, 2023, the Government filed its response brief, addressing the plaintiffs' challenge to the increased tariffs on Chinese imports under the Trade Act.[110]

First, the Government maintains that the President and USTR properly exercised their modification authority under the Trade Act.[111] Under Section 307(a)(1)(B), the President and USTR acted within their statutory authority to modify existing tariffs because China's policies included not only the initial acts that were the main subject of the Section 301 investigation, but also subsequent defensive measures, including China's retaliatory tariffs.[112] The Government claims that the plaintiffs misunderstood the scope of the original tariff action and investigation.[113] Even if a statutory requirement existed for the

100. Opening Brief of Plaintiffs-Appellants, *supra* note 93, at 29.
101. *Id.* at 59-60.
102. *Id.* at 60.
103. *Id.* at 60-63.
104. *Id.* at 63-64.
105. *Id.* at 64; *see* 5 U.S.C. § 706(2)(a).
106. Opening Brief of Plaintiffs-Appellants, *supra* note 93, at 66.
107. *Id.*
108. *Id.* at 28.
109. *Id.* at 77.
110. Brief for Defendants–Appellees, HMTX Industries LLC v. United States, No. 23-1891, (Fed. Cir. Dec. 21, 2023).
111. *Id.* at 19.
112. *Id.* at 30.
113. *Id.* at 16.

investigated "form" of unfair trade practices, it is met in this case because USTR's investigation encompassed China's broader conduct, including its retaliatory tactics.[114] Therefore, even under the plaintiffs' interpretation of Section 307(a)(1)(B), their challenge is unfounded, as USTR would need a new investigation for any subsequent "defensive" conduct, despite its connection to the already-investigated policies.[115]

Additionally, Section 307(a)(1)(C) independently authorizes the challenged tariff modifications because the current action is "no longer appropriate."[116] The government invokes this provision in light of China's refusal to amend its policies despite the existing Section 301 action, and the ongoing practices subjected to Section 301 were increasingly harmful.[117] The plaintiffs' interpretation of Section 307(a)(1)(c) to mean "*decrease* or terminate" a tariff action contradicts basic statutory interpretation principles and the Trade Act's purpose and history.[118] It would also create impractical delays in responding to changing diplomatic situations.[119] "The ordinary meaning of the term 'modify' includes 'to make a basic or important change in.'"[120] The Government argues that the major questions doctrine does not apply here.[121] Imposing tariffs on foreign goods is a clear power under the Trade Act and the dispute is merely about the procedural aspects (Sections 301 vs. 307) rather than an expansion of agency authority.[122]

Second, the Government counters that the APA's foreign-affairs exemption applies and USTR complied with the APA on remand.[123] "USTR's implementation of the tariffs directed by the President complied with all applicable procedural requirements under Section 307, and the modification actions were not subject to the APA's rulemaking requirements, which do not apply where a 'foreign affairs function' is 'involved.'"[124] This exemption is directly relevant here due to the decision to impose tariffs in response to harm from a foreign country, a core aspect of foreign affairs.[125] Even if the APA's rulemaking requirements were applicable, USTR has met these requirements by addressing comments on remand.[126] USTR provided detailed

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114. Brief for Defendants–Appellees, *supra* note 110, at 34.
115. *Id.* at 35.
116. *Id.*
117. *Id.* at 37.
118. *Id.* at 17.
119. *Id.* at 40.
120. *Id.* at 38(quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993)); *see also* Solar Energy Indus. Ass'n v. United States, 86 F.4th 885, 896 (Fed. Cir. 2023) ("explaining that the Supreme Court has used a 'non-directionally restricted definition of "modify"'").
121. Brief for Defendants–Appellees, *supra* note 110, at 17.
122. *Id.* at 17-18.
123. *Id.* at 50–51.
124. *Id.* at 18 (quoting 5 U.S.C. § 533(a)(1)).
125. Brief for Defendants–Appellees, *supra* note 110, at 18.
126. *Id.*

explanations of how the disputed Lists were constructed and the role of the President's directives in modifying tariffs.[127] The trial court's decision to remand for further explanation, without vacating the Lists, was within the discretion typically granted to lower courts.[128]

Moreover, the plaintiffs' challenge of the trial court's decision to remand to USTR to address comments without vacating the tariff modifications indicates a misunderstanding of the range of remedies and discretion available to reviewing courts.[129] The plaintiffs overlook the court's established precedent that "'[a]n inadequately supported rule . . . need not necessarily be vacated'" but can "remain in effect" while the agency elaborates on its reasoning during a remand.[130] The trial court also correctly observed that vacating would disrupt ongoing negotiations with China due to the complex, dynamic nature of these discussions, justifying remand without vacatur.[131] "USTR could provide a more 'expansive' explanation of its previously stated reasons without offering 'new determinative reasons for its actions.'"[132] The plaintiffs' error lies in their misunderstanding of the *Regents* ruling, which clarifies that an agency is not barred from offering an "amplified articulation" of its observations, even if initially "conclusory."[133] Therefore, as acknowledged by the trial court, USTR was free to use *Regents*' first approach for remedying an inadequate articulation of its decision grounds as "long as its responses to unaddressed comments on remand did not introduce a new rationale . . . ."[134] "[R]emand for amplified responses to comments has been the consistent judicial remand practice post-*Regents*."[135]

USTR's explanations were not *post hoc*, as they were based on the original decision's record, including hearing transcripts, Federal Register notices, and press statements.[136] These explanations demonstrate USTR's contemporaneous engagement with significant issues identified by the court and supports the justifications in its Federal Register notices.[137] Accordingly, in contrast to the plaintiff's arguments, the Government maintains that the President and USTR acted within their statutory authority, and the foreign-affairs exemption

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127. Brief for Defendants–Appellees, *supra* note 110, at 18.

128. *Id.*

129. *Id.* at 62.

130. *Id.* (quoting Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs., 260 F.3d 1365, 1380 (Fed. Cir. 2001)) (citation omitted).

131. Brief for the Defendants-Appellees, *supra* note 110, at 62-63.

132. *Id.* at 13 (quoting Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S.Ct. 1891 (2020)).

133. Brief for the Defendants-Appellees, *supra* note 110, at 56 (citation omitted).

134. *Id.* at 56-57.

135. *Id.* at 57; *see, e.g.*, Bloomberg L.P. v. SEC, 45 F.4th 462, 477 (D.C. Cir. 2022); Env't Health Tr. v. FCC, 9 F.4th 893, 909, 914 (D.C. Cir. 2021).

136. Brief for the Defendants-Appellees, *supra* note 110, at 57.

137. *Id.*

of the APA applies.[138] The Government argues that USTR adequately responded to public comments and provided sufficient rationale for the modifications, urging the Court to affirm the trial court's judgment.[139]

C. Plaintiffs' Reply Brief and Implications of Loper Bright

In their reply brief filed on February 12, 2024, the plaintiffs reiterated their argument that USTR exceeded its authority under Section 307 of the Trade Act by imposing sweeping tariff increases in Lists 3 and 4A.[140] The plaintiffs argue that USTR overstepped its authority under Section 307 of the Trade Act when it implemented Lists 3 and 4A, significantly escalating tariffs in an ongoing trade dispute with China.[141] The plaintiffs contend that Section 307 permits only modest adjustments to existing tariff measures and does not permit the sweeping increases imposed by USTR, which led to a seven-fold tariff escalation.[142] The plaintiffs further maintain that both the statutory language and recent precedents confirm that "modification" does not allow for such drastic changes.[143]

The plaintiffs also assert that USTR's actions are subject to judicial review under the APA.[144] They argue that USTR's attempt to shield its actions from review by framing them as presidential directives is misplaced as USTR, not the President, took the final agency actions at issue.[145] The plaintiffs urge the court to reject USTR's claim that its statutory interpretations deserve deference, particularly given the significant economic and political consequences of its actions.[146] Under the major questions doctrine, it requires clear congressional authorization for such expansive actions, which USTR did not have.[147]

Additionally, the plaintiffs argue that USTR violated the APA by failing to adequately consider and respond to public comments before implementing Lists 3 and 4A.[148] They assert that USTR's responses to comments were impermissibly *post hoc* and that USTR did not provide a contemporaneous explanation for rejecting significant comments at the time the tariff actions were taken.[149] The plaintiffs maintain that this

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138. *Id.* at 17-18.

139. *Id.* at 62-63.

140. Reply Brief of Plaintiffs-Appellants HMTX Indus., Halstead New Eng. Corp., Metroflor Corp., and Jasco Prods. Co., HMTX Industries LLC v. United States, No. 23-1891, (Fed. Cir.).

141. *Id.* at 1.

142. *Id.*

143. *Id.*

144. *Id.* at 3-4; *see also* 5 U.S.C. § 704 ("final agency action" subject to judicial review); 28 U.S.C. § 2640(e) ("In any civil action not [otherwise] specified in this section, the Court of International Trade shall review the matter as provided in" the APA.).

145. Reply Brief Plaintiffs-Appellants, *supra* note 140, at 2.

146. *Id.* at 11.

147. *Id.*

148. *Id.* at 33.

149. *Id.* at 34.

failure should result in the vacatur of Lists 3 and 4A and request that the court reverse the CIT's judgment in favor of USTR.[150]

In their conclusion, the plaintiffs ask the Federal Circuit to vacate the tariff actions in Lists 3 and 4A, arguing that USTR overstepped its statutory authority, violated the APA, and failed to comply with the procedural requirements necessary to justify its actions.[151] They emphasize that judicial scrutiny is crucial in this case as USTR's actions have had far-reaching economic and diplomatic impacts that Congress did not authorize.[152]

A significant recent development in this case is the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which is central to the plaintiffs' argument.[153] On June 28, 2024, the Supreme Court handed down its decision in *Loper Bright*, striking down the 40-year-old concept of "*Chevron* deference," which had long allowed federal agencies to interpret ambiguous statutes as long as their interpretations were reasonable.[154] The plaintiffs argue that this ruling is critical because it confirms that USTR's statutory constructions should not receive deference.[155] They assert that deferring to USTR's interpretation of Section 307 of the Trade Act would improperly allow the agency to overstep its statutory authority in violation of the APA.[156] The plaintiffs argue that, based on the *Loper Bright* decision, granting judicial deference to USTR's interpretations would undermine the judiciary's essential role in resolving key legal questions and interpreting statutory provisions, particularly those that define the limits of agency authority.[157] The plaintiffs see this ruling as a critical shift in their favor because it demands closer judicial scrutiny of USTR's actions rather than allowing the agency to operate with broad interpretive leeway.[158]

The Government, on the other hand, argues that the Supreme Court's decision in *Loper Bright*, which ended *Chevron* deference, "is not pertinent" to the current case concerning the validity of the Lists 3 and

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150. Reply Brief Plaintiffs-Appellants, *supra* note 140, at 33-36.

151. *Id.* at 1-2.

152. *Id.* at 2.

153. *See* Plaintiffs-Appellants' F.R.A.P. 28(j) Notice of Supplemental Authority, HMTX Industries LLC v. United States, No. 23-1891 (Fed. Cir. 2024); *see also* Jacob Kopnick, *Section 301 Plaintiffs Say Loper Bright Crucial for Resolution of Case*, TRADE L. DAILY (Aug. 1, 2024), https://tradelawdaily.com/news/2024/08/01/Section-301-Plaintiffs-Say-Loper-Bright-Crucial-for-Resolution-of-Case-2407310025.

154. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); *see also* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

155. Plaintiffs-Appellants' F.R.A.P. 28(j) Notice of Supplemental Authority at 2, HMTX Industries LLC v. United States, No. 23-1891 (Fed. Cir.).

156. *Id.*

157. *Id.*

158. *Id.*

4A.[159] Nevertheless, even if *Loper Bright* has little to no effect on the *In re Section 301 cases*, despite the Government's defense, the CIT erred in upholding Lists 3 and 4A.

V. PROPOSED REFORMS REGARDING THE CIT'S ERRORS

A. How the CIT Erred in Section 301 Cases

The initial ruling by the CIT correctly determined that USTR had failed to fulfill its statutory and fundamental duties under the APA.[160] This failure occurred when USTR hastily imposed tariffs without addressing a single comment from American consumers and businesses.[161] The CIT erred in not vacating these unlawfully imposed tariffs and instead granting USTR a second opportunity to meet its legal obligations.[162] However, on remand, the agency once again fell short of meeting the core requirements of the APA.[163]

Rather than addressing the significant concerns raised regarding the imposition of tariffs on nearly all imports from China, USTR changed its approach and essentially argued that it was compelled to act by the President.[164] The CIT accepted this novel excuse, but, pressure from a President does not absolve an agency from its other statutory obligations.[165] As the CIT explained in its initial order, the President's discretion is just one factor that the agency is required to consider.[166] It should not be dispositive to the agency's decision-making obligations as outlined in the APA.[167]

The APA demands that USTR provide justification for the imposition of tariffs on lists 3 and 4A.[168] The agency has had multiple opportunities to do so but continues to ignore all comments, concerns,

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159. Response to Plaintiffs-Appellants' 28(j) Notice of Supplemental Authority at 1, HMTX Industries LLC v. United States, No. 23-1891 (Fed. Cir.) ("In any event, the Court of International Trade held that the statute *unambiguously* authorized the challenged modification.").

160. *See generally In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022).

161. *Id.* at 1338-43.

162. *Id.* at 1348 ("Thus . . . Plaintiffs' additional procedural arguments do not provide any further basis to remand or vacate USTR's determinations.").

163. Opening Brief of Plaintiffs-Appellants, *supra* note 93, at 5 ("On remand, however, USTR's *post hoc* and conclusory responses to the most significant comments failed to cure its violation.").

164. Reply Brief of Plaintiffs-Appellants, *supra* note 140, at 5 ("Defendants insist that the ultimate tariff decisions 'were the President's, because once directed by the President, USTR did not have discretion to act otherwise.'").

165. Opening Brief of Plaintiffs-Appellants, *supra* note 93, at 63 ("Although USTR had 'noted' the President's direction, it 'did not treat that direction as dispositive' . . . 'USTR's invocation of the President's direction does not obviate USTR's obligation to respond to significant issues raised in the comments.'") (citation omitted).

166. *Id.*

167. *Id.*

168. *See* Jim Conrad, *Section 301 Final Lists 3 & 4A Update*, TRADEWIN BLOG (June 4, 2023, 1:25 PM), https://blog.tradewin.net/section-301-final-lists-3-and-4a-update ("[T]he court remanded the matter for the USTR to comply with the APA requirement for a reasoned response to comments submitted during the List 3 and List 4A rulemaking proceedings.").

and alternative options. This blatant disregard for the law cannot be allowed to persist.

B. Proposed Legislative Changes

The most effective strategy demands the immediate repeal of Section 301, given its outdated trade policy methods, conflict with World Trade Organization (WTO) rules, potential for misuse, and the existence of other legal avenues to address unfair global trade practices. At minimum, it is essential to restrict USTR's ability to determine what constitutes an unfair foreign trade practice. The statute should clearly list the types of foreign trade policies that may trigger unilateral Section 301 actions and mandate USTR to identify specifically the foreign laws, regulations, and practices being addressed. Once these targeted policies are eliminated, the action should cease immediately.

Further, Congress should refine the language for implementing and altering unilateral Section 301 actions, mandating that any changes are directly linked to the injustices identified in the original investigation and not due to external factors like foreign government retaliation. This aims to prevent USTR from arbitrarily modifying tariffs or other measures without a new Section 301 investigation. As noted above, this modification authority is currently the subject of pending litigation.[169]

The legal framework must be amended to eliminate procedural loopholes, guarantee due process for those impacted by Section 301 actions, necessitate an International Trade Commission assessment of the action's economic implications before implementation, and set up a clear and open exclusion process. Ultimately, repealing Section 301 or, alternatively, correcting its significant flaws is crucial to prevent executive overreach and restore Congressional control over international commerce. This would enhance the global perception of the U.S. commitment to a liberal international order and deter future administrations from taking similarly detrimental actions.

C. Economic Implications of Upholding the Case and Benefits of Proposed Reforms

The Trump administration's use of Section 301 authority underscores critical issues in U.S. trade policy, notably the departure from WTO rules and the risk of executive overreach, leading to significant economic and geopolitical consequences.[170] This approach

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169. Opening Brief of Plaintiffs-Appellants, *supra* note 93, at 32-55.

170. *See* Mary Amiti, Stephen J. Redding, and David E. Weinstein, *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 J. ECON. PERSP. 187 no. 4 (2019) at 192, 195; *see also* Mary Amiti, Stephen J. Redding, and David E. Weinstein, *Who's Paying for the US Tariffs? A Longer-Term Perspective* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26610, 2020) ("Quite surprisingly . . . these U.S. tariffs have been completely passed on to U.S. firms and consumers.").

imposes heavy costs on American consumers, companies, and workers without effectively penalizing the intended foreign entities.[171]

Evidence amassed over three years post-implementation of Section 301 tariffs against Chinese products clearly shows these measures were counterproductive impacting U.S. stakeholders as much as, if not more than, the targeted foreign parties.[172] Economic studies consistently demonstrate that the financial burden of these tariffs fell predominantly on American importers and consumers, with minimal price adjustments from Chinese suppliers.[173] The cumulative financial impact on U.S. importing firms reached significant figures, exacerbating manufacturing costs, diminishing industrial output, and curtailing employment within the sector.[174] Additionally, increased import costs from tariffs negatively affected U.S. exports.[175]

VI. CONCLUSION

The prevailing belief in Washington, D.C. was that the broad and vague trade powers granted to the executive by Section 301 were justified due to the president's national perspective and diverse advisory cabinet. These powers and positions would safeguard against narrow protectionist tendencies and ensure consideration of the national interest. However, the misuse of Section 301 powers under President Trump challenged this view, exposing the statute's deficiencies and its potential for severe economic and geopolitical repercussions.

To mitigate these adverse effects and align actions with the intended purpose of Section 301, it is essential to reform the law. Reinterpreting and amending the statute to more accurately embody its foundational intent can considerably mitigate economic detriment to the U.S. economy.

Immediate action is necessary to avoid higher costs in the future. This strategy ensures adherence to the essential tenet of the statute, focusing on understanding the true meaning behind "what does the super statute really say"?

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171. *Who's Paying for the US Tariffs? A Longer-Term Perspective, supra* note 170.

172. *Id.*

173. *Id.*

174. *See* Aaron Flaaen & Justin Pierce, *Disentangling the Effects of the 2018–2019 Tariffs on a Globally Connected U.S. Manufacturing Sector* (FED. RSRV. BD., Finance & Econ. Discussion Series Paper No. 2019-086(2019) ("[W]e find that tariff[s] . . . are associated with relative reductions in manufacturing," as a small and imprecisely estimated "boost from the import protection . . . is more than offset by larger drags" from the repercussions of "retaliatory tariffs" and, especially, exposure to "rising input costs.").

175. *See* Kyle Handley, Fariha Kamal, and Ryan Monarch, *Rising Import Tariffs, Falling Export Growth: When Modern Supply Chains Meet Old-Style Protectionism* 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26611, 2020) ("[W]e provide empirical evidence that increases in U.S. import tariffs over 2018-2019 significantly dampened U.S. export growth.").