GRMA Summit 2019

Strategies for Dealing with the Trade War

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Ms. Rifkin practices in the area of customs and international trade law, with a special emphasis on food, drugs, cosmetics, and medical devices. She is the senior lead attorney for Benjamin L. England’s growing Customs and Trade Practice. She regularly represents clients before U.S. Customs and Border Protection (CBP), the U.S. Department of Commerce (DOC), and the United States Trade Representative (USTR).

With over 15 years of experience in the customs and trade area, Ms. Rifkin provides guidance on all aspects of the import and export process, including tariff classification and valuation of imported merchandise, country of origin determinations, country of origin marking, NAFTA and other free trade agreements, Customs penalties, antidumping and countervailing duty proceedings, and intellectual property issues. She routinely assists clients with prior disclosures of violations, mitigation of liquidated damages and penalties, protests, requests for binding rulings, and antidumping and countervailing duty scope ruling requests.

Ms. Rifkin regularly litigates cases before the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit and has obtained a number of favorable decisions for her clients, including decisions overturning adverse classification determinations by CBP and adverse scope rulings issued by the DOC.
Agenda

• China Section 301 Tariffs
• EU Tariffs
• GSP Changes
• Retaliatory Tariffs
• Managing the Trade Wars
• Some Take-Aways
• Questions and Answers
CHINA TARIFFS
Section 301

• Section 301 of the Trade Act of 1974 provides the authority to President to impose special tariffs in addition to the regular tariffs in the HTS to counter “unfair” barriers to U.S. exports.

• The Section 301 tariffs are part of the U.S. response to China’s unfair trade practices related to “the forced transfer of American technology and intellectual property.”

• Tariffs have been imposed in 3 tranches commonly referred to as Lists 1, 2, and 3.

• President Trump just announced he will impose Section 301 tariffs on virtually all Chinese-origin goods not already covered by Lists 1, 2, and 3 (List 4 tariffs), starting September 1st.
Lists 1 & 2

List 1 – includes medicines, organic chemicals, some devices
  • consists of 818 tariff lines
  • valued at $34 billion worth of imports
  • 25% duties started on July 6, 2018

List 2 – includes devices, cosmetics, pharmaceutical necessities
  • consists of 284 tariff lines
  • covers approximately $16 billion worth of imports
  • 25% duties started on August 23, 2018
Lists 3 & 4

**List 3** – includes human and animal foods, ingredients, and seafood
- $200 billion worth of products
- Includes 5,745 tariff lines
- 10% tariffs Sept. 24, 2018 – May 9, 2019
- 25% tariff started May 10, 2019 (effective for all Chinese-origin goods exported from China on or after 12:01 a.m. May 10th, and entered into the U.S. after 12:01 a.m. June 16th)

**List 4** – proposed
- $300 billion worth of products
- Includes 3,805 tariff lines
- Includes imports of most Chinese-origin goods not already covered by Lists 1, 2, and 3, except for pharmaceuticals, select medical goods, rare earth materials and critical minerals
- Hearings and Comments process now complete
- On August 1st, President Trump announced that List 4 tariffs will be imposed at rate of 10%, starting September 1st
- Key point to remember for tariffs on all Lists – tariffs apply to Chinese-origin goods, not necessarily goods exported from China. We’ll talk about this shortly.
## Exclusions: Lists 1, 2 & 3

<table>
<thead>
<tr>
<th>List 1</th>
<th>List 2</th>
<th>List 3</th>
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<tbody>
<tr>
<td>Window to submit exclusion applications closed October 2018</td>
<td>Window to submit exclusion applications closed December 2018</td>
<td>Applications accepted by USTR June 30-Sept. 30, 2019</td>
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<td>10,827 applications were filed. As of July 26th, 2813 exclusions have been granted, and 1,389 are in CBP review for admissibility. 6,625 applications have been denied.</td>
<td>2,920 applications were filed. As of July 26th, 292 exclusions have been granted, and 1,307 are in CBP review for admissibility. 1,320 applications have been denied.</td>
<td>2,430 applications have been filed to date. Application process remains open for two more months.</td>
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<td>USTR performs initial reviews and, if tentatively approved, passes request to Customs to determine if the exclusion is practical and can be implemented consistently. Granted exclusions are applied retroactively to the date when the List 1 tariffs were first imposed, and prospectively for 1 year from the date of notice of exclusion approval.</td>
<td>USTR performs initial reviews and, if tentatively approved, passes request to Customs to determine if the exclusion is practical and can be implemented consistently. Granted exclusions are applied retroactively to the date when the List 2 tariffs were first imposed, and prospectively for 1 year from the date of notice of exclusion approval.</td>
<td>If granted, applied retroactively to Sept. 24, 2018 (when 10% duty was imposed). Exclusion would stay in place for 1 year from date granted.</td>
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List 4

Where is this headed?

• After meeting with President Xi on the sidelines of the G-20 Summit in June, President Trump announced List 4 tariffs would not be imposed “for now”

• President Trump announced on 8/1 that List 4 tariffs will go into effect at 10% rate on 9/1

• Unclear if there will be “grace period” for goods on the water

• USTR will likely issue official implementing notice shortly

• Unclear whether exclusion process will be available
U.S. – EU TARIFF ISSUES
The U.S. is proposing new import duties on goods, like olive oil, from the EU in connection with WTO dispute over airline subsidies.
Proposed EU Duties

✓ 28 Member States of the EU would be impacted
✓ USTR hearings held on preliminary list and written comments submitted in May

Preliminary List as of April 2019
- Aircraft and aircraft parts
- Seafood
- Yogurt
- Butter
- Cheeses
- Citrus fruit
- Olive oil
- Jams, fruit purees, & juices
- Water
- Wine and liquors
- Clothing and other textiles
- … $21 Billion worth of products

* July 1, 2019- USTR proposed an $4 billion worth of tariffs on and additional list of EU goods

* Hearings started on Monday for the new product list
CHANGES TO GSP
Generalized System of Preferences Program

USTR removed GSP benefits for India (largest GSP benefits recipient) and Turkey (5th largest)

- Turkey terminated because its economy developed sufficiently to grow out of the preferential status
  - $1.7b worth of goods
- India terminated because of continued trade conflicts, especially over dairy and medical device exports from US to India
  - $5.7b worth of goods
RETALIATORY TARIFFS ON U.S.-ORIGIN GOODS
Retaliatory Tariffs (Affecting U.S. Exports)

China: imposed tariffs over past year on $100b worth of US-origin products
Will likely impose additional tariffs in retaliation for List 4
Now has exclusion process

EU: created possible list of $22.6b worth of US-origin products

India Slaps Back: on June 16, 2019 imposed tariffs on 28 US products
WAYS TO MANAGE THE TRADE WARS
File an application for exclusion from the tariffs

- Section 301: File with USTR. List 1 and List 2 products: you can no longer apply. BUT, you can take advantage of exclusions granted to someone else, if your product falls in same definition and HTSUS subheading. Ongoing process – need to monitor.

- List 3: application process is open through September 30th. If successful, exclusion will be retroactive to September 24th, 2018, and apply prospectively for 1 year.

- Need to take steps to preserve rights to refunds if successful.

- List 4: unclear if will be application process (maybe not until rise to 25%)

- Section 232: File with DOC. Unlike Section 301 exclusions, exclusions are company-specific. Good success rate so far.

- Removal of GSP status: no exclusion application process.

- Possible tariffs on EU: remains to be seen whether exclusion process will be established if tariffs are imposed.
Move production from the tariffed country

- Do not have your product manufactured in any country the tariffs are being applied
- This is easier said than done. Companies which have already moved supply chains have booked much of excess capacity in Vietnam, other Asian countries. Non-Chinese suppliers may not be capable of producing your goods.
- Countries which are subject to tariffs may be moving target (for example, President Trump recently mentioned imposing tariffs on Vietnam).
Change the country of origin of your good

- Tariffs are imposed based on country of origin of good – not necessarily where it was shipped from
- If you change the country of origin of your good, your good may be removed from tariffs
- For example, parts of good are manufactured in China, shipped to Mexico, further manufactured in Mexico, and then imported to U.S. may lose their Chinese origin IF they are “substantially transformed” in Mexico
- Substantial transformation is very fact specific, and can depend upon such factors as physical changes in the good, complexity of the processing, value added, etc.
- Assembly alone usually does not substantially transform the assembled parts
- Keep in mind -No transshipment! - You need to exercise due diligence here.
Can’t change production? Then try to change the way your good is entered.

• First thing to check is whether your good may be reclassified in another provision which is not subject to the tariffs (for Chinese-origin goods, announcement re List 4 makes this option less likely).

• Reclassification may be because current classification which you’re using is incorrect – or you could change something about the good to make it change classification (tariff engineering)

• Examining/changing valuation is another option.

• Make sure that value is being correctly calculated and declared, and that all statutory deductions from value have been taken.

• Another, more “complex” valuation option: First Sale
First Sale Doctrine - 1

- Two sales take place: vendor – middleman, and middleman – importer
- If First Sale requirements are satisfied, dutiable value is sale price from vendor to middleman, not middleman to importer
- Critical Facts:
  - Sales from vendor – middleman and middleman – importer must be bona fide sales
  - Both sales must be at arm’s length
  - Goods clearly destined for US at the time of sale to middleman (objective factors)
  - All statutory additions to price included (e.g., packing costs, commissions, assists, royalties, licensing fees, proceeds from subsequent sale)
- Document, document, document
First Sale Doctrine - 2

• Challenges:
  – If parties are related entities
  – Showing goods are clearly destined for US market at first sale to middleman
  – Meticulous documentation – both transactions
  – Don’t try this at home!

• Customs hates this – and First Sale transactions notably on the rise

• It is challenging, but it can be done
Special Duty Programs

• Programs that fall in Chapter 98 of the Tariff
• With certain exceptions, goods that fall within Chapter 98 provisions are exempt from Section 301 tariffs on Chinese-origin goods
• Example: There are provisions for certain agricultural goods and parts of those goods
Repairs and Alterations: There are special tariff provisions that allow goods to be exported from the United States to be repaired, altered, or processed abroad. Upon return, Section 301 duty is paid only on the value of the repairs, alterations, and processing performed abroad.
TIBs

Temporary Importation Under Bond (TIB): Merchandise sent to the U.S. for processing or repair and returned to its country of origin can be entered for up to 3 years without payment of duty. A bond is posted to ensure the exportation of the good, but once the good is exported, the bond is cancelled and the importer is not liable for any duties, including Section 301 duties.
Other Possibilities

• Duty drawback (only works for Section 301, not Section 232 tariffs) – if requirements are met, Customs will refund 99 percent of duties and fees on goods subject to tariffs which are subsequently exported. Substitution drawback may also be used.

• Bonded facilities and movements. Section 301 tariffs not applicable to goods entered temporarily in bond (TIB). Goods may be entered into a bonded warehouse and stored for up to 5 years; tariffs will not be applicable if goods are exported directly from warehouse, or (possibly) if exclusion has subsequently been granted or tariffs have lapsed.

• Foreign Trade Zones (FTZs): additional tariffs will not apply to goods entered into FTZs prior to tariff effective dates (List 4)
SOME TAKE-AWAYS
Take Aways for Impacted Companies

• Do work with an expert in determining what your remedies may be, and in implementing them. The strategies we’ve discussed can be tricky and fact-specific.

• Do your due diligence!

• Do expect Customs to be watching. Customs is giving this area extra scrutiny.

• Do get a binding ruling from Customs if reclassifying goods or if changing valuation to First Sale.
Options for Impacted Companies

• Do not transship goods through another country to try to evade the tariffs.
• Do not misclassify goods or underreport their value in an attempt to avoid tariffs at the border.
• Do not change the way you have classified materials or make changes to their valuation without consulting with a professional.
• Evasion of the tariffs will subject you to steep penalties. Customs already has broad authority here – and is seeking even more power.
Contact Us with Your Questions

Let us put our 100 years of direct former government experience to work for you to identify and solve problems involving approval, manufacture and movement of products in and out of the U.S. market.

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