

Beyond the Court: Congress and the Future of Emergency Tariffs

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President Trump is imposing new tariffs effective on Tuesday, February 24, under Section 122 of the Trade Act of 1974 (“Section 122”). The Section 122 tariffs replace the tariffs imposed under the International Emergency Economic Powers Act (“IEEPA”), and that the Supreme Court on Friday found unlawful. Does a solid legal footing exist for the Section 122 tariffs? Given the

amount of money at issue for U.S. businesses, it is not hard to imagine a new wave of litigation attacking Section 122, and again seeking refunds of Section 122 duties collected.

Section 122 is a blank slate. President Trump is the first president to impose tariffs under Section 122, and indeed the first president to take any action under Section 122 according to the Congressional Research Service.^[1] No court opinions thus exist that have examined executive action under Section 122.

As discussed below, however, the court opinions relating to the IEEPA tariffs indicate that trade deficits are a valid basis for temporary tariffs under Section 122. Whether Section 122 will survive closer scrutiny is, ultimately, impossible to predict given the lack of any precedent or past practice as to Section 122’s scope.

Basis for New Section 122 Tariffs.

The new Section 122 tariffs and the prior IEEPA tariffs identified longstanding, persistent, and large trade deficits as justifying action. In particular, President Trump issued an executive order under IEEPA to address the longstanding U.S. trade deficit, and to

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authorize the global reciprocal tariffs.[2] Section 122 allows the imposition of tariffs “to deal with large and serious United States balance-of-payment deficits” or to “prevent an imminent and significant depreciation of the dollar in foreign exchange markets.”[3]

In issuing his proclamation on Friday evening imposing Section 122 tariffs, President Trump cited the longstanding and persistent deficit as justifying the action. Thus, “[r]estricting imports through the surcharge imposed in this proclamation is required to address the fundamental international payments problems within the meaning of section 122 that I have found to exist.”[4]

Section 122 Discussion in IEEPA Litigation.

In the IEEPA litigation, the Court of International Trade (“CIT”) relied heavily on Section 122 to find that the IEEPA tariffs were unlawful. The CIT found that Section 122 “removes the President’s power to impose remedies in response to balance-of-payments deficits, and specifically trade deficits” from IEEPA’s scope of authority.[5] Section 122 is a “non-emergency statute with greater limitations”[6] compared to IEEPA. The CIT, accordingly, said that Section 122 effectively displaced any tariff authority that might be read into IEEPA, at least with respect to trade imbalances. “Trade deficits...can be directly impacted by mechanisms such as import quotas and tariffs, as authorized by Section 122.”[7]

The U.S. Court of Appeals for the Federal Circuit (“CAFC”) affirmed the CIT judgment, and also used Section 122 as context for interpreting IEEPA. The CAFC majority opinions cited Section 122 for the proposition that Congress delineated tariff authority carefully, and subject to procedural and durational limits.[8] The majority opinions of the Supreme Court said nothing particularly about Section 122, except to say that numerous U.S. trade statutes place limits on the duration, amount, and scope of tariffs.[9]

While the Supreme Court majority opinions did not reference Section 122 at all, Justice Kavanaugh’s dissent did. He cited Section 122, along with other statutes, as providing “expansive” power to the President to impose tariffs.[10] Justice Kavanaugh also cited Section 122 to diminish the importance of the Supreme Court’s IEEPA decision: “with respect to tariffs in particular, the Court’s decision might not prevent Presidents from imposing most if not all of these same sorts of tariffs under other statutory authorities.”[11] Thus, from Justice Kavanaugh’s perspective, Section 122’s broad authority created an alternative to IEEPA that could be used to implement global tariffs.

Whether Section 122 is Vulnerable to Lawsuit.

All of the above is to say that IEEPA litigation suggests Section 122 is a basis to impose global tariffs to remedy trade deficits.[12] Not a lot more can be said than this, as of today. Any reviewing court of Section 122 tariffs would have to confront a dearth of authority on Section 122. There is no existing Section 122 practice, nor are there any cases directly reviewing executive action under Section 122.

A reviewing court presumably would have to afford the President at least some discretion in determining the circumstances under which Section 122 is appropriately used. President Trump's Section 122 proclamation cites to findings of the executive branch as to the scope, severity, and impact of trade deficits. It is unlikely that a reviewing court would meaningfully subject those findings to judicial review.

President Trump's Section 122 proclamation exempts certain goods from tariffs. A potential plaintiff might argue this framework does not provide a uniform "surcharge" in the words of Section 122. The Section 122 tariffs apply to goods from all countries,^[13] including those for which the United States has a trade surplus. This might be argued to be a "surcharge" in excess of what is necessary. Section 122 does allow, but does not seem to require, the President to exempt countries from tariffs if they have large and persistent trade surpluses.^[14]

Conclusion.

To conclude, the Section 122 tariffs are novel, as were the tariffs under IEEPA. However, unlike the IEEPA tariffs, a potential plaintiff will have to go deeper than saying the statute does not permit tariffs. Section 122 explicitly permits tariffs. The CIT, CAFC, and Supreme Court discussion of Section 122 in the IEEPA litigation suggest that Section 122 is an avenue for President Trump to impose global tariffs to address the U.S. trade deficit. Whether that authority is lawfully exercised remains to be seen.