

Global Economy Podcast – Episode 119

The Trump Tariffs on Trial:

What Are the Cases in the Supreme Court About?

Full Transcript

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Fredrik Erixon: Hello, and welcome to ECIPE's Global Economy Podcast. My name is Fredrik Erixon, and today we are going to take a deep dive into the process in the United States over the legality of the so-called "Trump tariffs". And with me today to explain what's going on is Jeffrey Schwab, the Senior Counsel and Interim Director of Litigation at the Liberty Justice Centre, a public interest litigation firm that works to protect economic liberty, private property rights, free speech, and other fundamental rights.

Welcome so much, Jeffrey.

Jeffrey Schwab: Thanks for having me.

Fredrik Erixon: So, let me take a moment to set this up first. On April 2nd this year, the Trump administration announced the so-called "Liberation Day tariffs". Since then, there has been a lot of back and forth on the tariffs and how they are applied to other nations.

I think most of our listeners and viewers have probably followed this very closely already. Today we're going to talk about the legality of these tariffs and Jeff is the perfect man to do this with because he is one of the persons behind the fact that we are now waiting for the US Supreme Court to rule on whether these tariffs are legal or not, and precisely whether the administration has the power to unilaterally decide levels of tax in the United States. In this case, which I think is called V.O.S. Selections Inc. vs. Trump, Jeff and his colleagues sued the administration and argued that the International Emergency Economic Powers Act does not give the power to the President to unilaterally introduce tariffs in the way the administration did. Jeff and his team won in late May in the US Court of International Trade, and after a process of appeals, the case is now at the US Supreme Court, which had an oral hearing which was widely covered on November 5th.

So why don't we start there, Jeffrey? Where is the process now, and what is it that you're waiting for?

Jeffrey Schwab: So, we've had an oral argument in the Supreme Court. The only thing that is left to happen is for the Supreme Court to issue an opinion and a ruling on how it will decide whether the tariffs are legal or not. There are a lot of different possibilities on what the court could do, and of course, nobody knows what it will do and what it won't do.

But it's not clear to me that on whatever day the Supreme Court rules that that will be the day that this case is done. There may be other issues. For example, one of the major issues that I think a lot of American businesses are concerned about is whether or not they'll get refunds for the tariffs that they have paid.

And the Supreme Court may or may not address that. If they don't, obviously, that'll be something that will be heavily litigated by a lot of different businesses. And also, the other aspect of this is that although

this case deals with the President's use of the International Emergency Economic Powers Act, or IEEPA, there are other provisions of law that Congress has passed that allow the President to impose tariffs.

Although I think in more limited ways, I don't think the President will be able to do what he did here, which is a straight across-the-board tariff on every country, on every product, with some exceptions. So, we'll have to see what the administration does in response, even if we win the case.

Fredrik Erixon: Yeah, there has been a lot of commentary after the November 5th hearing. And I've seen even different betting firms that are suggesting that there is a good chance that your side is going to win, Jeff, on the basis of the type of questions that some of the Supremes were asking. But if we, I mean, we don't know that, and it's difficult to speculate on these issues.

But on the back of, for instance, the decision that came out in the US Court of International Trade, I mean, how would you evaluate the strength of the case that you've made to the Supreme Court?

Jeffrey Schwab: Well, obviously, we feel like it's a very strong case. And I think it is, in part, because the administration's position is very extreme. It's extreme in the sense that, essentially, what the administration is arguing is that it has basically unlimited tariff power.

It can impose tariffs under IEEPA whenever it wants, on any country it wants, for any reason it wants, and then change its mind immediately for any reason. And over the course of the last, say, nine months, we've seen that. We've seen the President change his mind quickly on certain tariffs for various reasons, not reasons that are related to the so-called emergency that is required for him to declare to use IEEPA.

And so, this is obviously a big problem, because I think the biggest problem for our clients is that, because the President claims to have this power, there's a large amount of uncertainty about what the actual tariff is going to be at any point. And of course, that makes it very difficult to run a business. And so, uncertainty is very bad for business, because they are already operating in uncertainty. And so for our clients, it's really bad.

But in terms of the legal case, I think the arguments are very strong, because nobody has ever done this before. It's unprecedented. And also, the administration is claiming that essentially the Courts can't second-guess the President, no matter what his justification is. And Courts generally don't like to hear that they are irrelevant when it comes to whether or not the President is acting outside of his authority.

Fredrik Erixon: And the companies that you represent in this case, can you tell us a little bit about what these companies are?

I suppose they are companies that import products from other countries, and they have been forced to pay tariffs as a result of the "Liberation Day tariffs". What type of companies are we talking about? Is it retail, food, furniture, or textiles?

Jeffrey Schwab: So, when we put this case together, we were looking for a diverse range of companies. In general, when I litigate cases, I feel like three to five plaintiffs is about an ideal amount, just in case somebody loses interest or doesn't have standing to sue, we would have somebody else who would be there to continue the case. So, we thought three to five businesses would be ideal.

We found five. They're all in different industries, and they're all different sizes, but they're what I think most people would call small businesses under one or two hundred people.

One of our businesses is called MicroKits. It's literally one guy in his loft creating these electronic kits that use electronic parts to make sounds in a way that makes them sound like musical instruments. He

creates these himself and then sells them, and they're kits that a kid or even an adult can put together and make a cool little device that makes sound. So just one guy, and of course, many electronic parts come from Asia. And so, his business was significantly impacted. In fact, he had to raise his prices and really almost completely shut down a lot of his production, meaning that Christmas time, right around now, which is his big time to sell, he didn't have as many units as he normally would have. And so, his sales are significantly worse than what he would have predicted at the beginning of 2025.

Fredrik Erixon: You've already touched upon some part of the legal argument that you've been making, but if we go to the heart of it. So, anyone who has gone through taking a university class in the American political system will know that it's been the standard interpretation that it's the US Congress which makes decisions on tariffs and on the broader adoption of US trade policy.

Like many others, there are different types of provisions that enable the executive to take decisions, sometimes to withdraw, trade concessions that have been given to other countries in trade negotiations in the past.

There are other types of legal grounds for taking different types of actions, and that can be around anti-dumping or investigating general fairness in the broad trade policy setup here. So that's basically also where I think most of the practitioners have thought about US trade policy for a long time, that at the core of it, it's the US Congress that makes these decisions, but there are some exemptions here that can allow the administration to take certain types of actions. And here we have now a decision which was not made by the US Congress, so it's not a tariff package with congressional approval.

So, is that the heart of the case, right? And I assume that is your principal case against the Administration.

Jeffrey Schwab: Yeah, that's right. I think that the basis at the heart of the case is the fact that the US Constitution gives Congress, not the President, the power to impose taxes and tariffs.

That's pretty well established, and of course, it has a history. There's a reason that taxes are with the elected branch that is closest to the people, not the executive branch, and that's in our history, in our Revolutionary War history, and the reasons for that conflict.

So obviously, it's very important, and then there actually is a lot of wisdom in that, as we see, when you give an executive unilateral authority to impose tariffs, it creates a huge amount of uncertainty because he can change his mind at any time. That's very bad for business. So, it actually was a nice forethought, I guess, by the founders of our Constitution to put it in a branch that moves a little bit slower so that there's more certainty for business. Obviously, I don't think they could have foreseen the enormous global economy that we have today, but it works for it.

And also, the way that tariffs have been imposed in the United States has changed since our founding. We did not have an income tax at the beginning of our founding, and the federal government was mostly run on tariff revenue. But that's when the economy was much smaller. The global economy was much smaller, and the government was very much smaller. And so, since the income tax, we've shifted away from that policy. And also, interestingly, about the same time, Congress started giving the President more and more power to impose tariffs himself or herself by what we call delegations of power. But these delegations have had very strict limits. Sometimes there are limits in terms of what the process is. Sometimes they have to get congressional approval. Often, they have limits on what the amount can be or the timing. Maybe it only allows the President to increase tariffs or decrease tariffs for a period of six weeks or something like that.

And so here, we have the President interpreting a statute called the International Economic Emergency Powers Act, IEEPA, that no President has ever interpreted as giving the President power to impose tariffs at all. That statute's about 50 years old. And I suppose the irony of the case is that the statute was, in part, Congress's attempt to pull back power that the President had had under previous administrations, in particular after the Nixon administration, because Congress was much more concerned about the use of executive power after the Nixon administration. And so, IEEPA was actually part of a series of bills that were supposed to restrain executive power. And the President, ironically, is interpreting them to give him a huge amount of power that is actually given to Congress and the Constitution.

So that leads us to our actual legal claims. And we have several in this case, which I think, going back to your question about how strong our case is, I think makes our case strong. As a lawyer, you like to say, "Well, here are my arguments, and if you disagree with the first one, then that doesn't matter. Here's the second one." And we have about six or seven where you only have to agree with us on one of them to rule in our favour. And so, some of them are basically statutory interpretations. So, the first is obviously just that IEEPA doesn't authorise tariffs at all. No President has ever said that. It says nothing about duties or tariffs or allowing the President to impose them. It's an emergency statute used for economic sanctions when a particular country has done something that is a threat to some interest that the United States has, and it's been used for that purpose for the last five decades. And so that's, I think, the easiest way for us to win is that it just doesn't allow tariffs at all. Pretty easy, straightforward.

But there are some limits in IEEPA. One of them is that the President has to actually declare an emergency.

In this case, in Liberation Day tariffs, the emergency was the US trade deficit. Now, we think that's a bad, just not the correct emergency. First of all, there's nothing wrong with the US trade deficit. We've had one for about 50 years. It's not been harmful. And I am not an economist, so I'm not going to get into the economics of it. But I think in general, it's pretty well established that at least for the United States, the trade deficit that it has and has had over the last 50 years is not a bad thing for its economy. It's generally a pretty good thing. And so, we just don't think it's an emergency.

But IEPA also requires that the emergency be based on an unusual and extraordinary threat. And we don't think there's anything unusual or extraordinary about the trade deficit either, or even that it's a threat. And so those are three more reasons why a court could agree with us.

The President's argument for that isn't necessarily to say we're wrong. It's that it says that the Courts can't second-guess the President's decisions on those things. The problem with that argument is that, basically, that would mean that if IEPA does authorise tariffs, it has essentially no way for the courts to check the President's power. And the President responds by saying, "Well, Congress can repeal IEEPA or take action to stop the President if they think he's getting out of hand." And that might be true, except that the President can veto any law that Congress passes. And so, for Congress to actually rein in the President, Congress would have to have a veto-proof majority. That's two-thirds of both the House and the Senate. In our current political economy or landscape, that is basically impossible. And so that means that effectively there's no, under the Administration's argument, there's no actual restriction by either of the branches of government. We, especially as someone who's a constitutional litigator, think that our three branches of government should be relatively coequal and be checks on each other so that one of them doesn't get out of hand.

I personally think that the executive branch over the last several decades has gotten a little bit too powerful. Obviously, we have a history where we're a little bit sceptical of executives that have too much power for good reason, I think. And I mean, I think the history bears that out as well over the course of

world history in the last 250 years or so. And so that's very important. Now, all of that is just a statutory argument about what IEEPA allows.

If we get into the other arguments, they're essentially what we call constitutional arguments. And that means that even assuming we're wrong on all of those, even assuming the President is correct, that IEEPA does allow this, then what we say is we've got a constitutional issue. And that's because we have this idea called the non-delegation doctrine, which essentially means Congress can't just give any of its constitutional powers away to the executive branch without any restriction.

So, Congress couldn't just say, "You know what? We're done with tariffs. Let's just give the President all the tariff authority."

In general, our Supreme Court doesn't like that. There's got to be some restriction, some meaningful restriction. And if the President's argument is correct, there are no meaningful restrictions at all. And effectively, the President can do whatever he wants. And that, we think, would create a constitutional non-delegation problem. And along with that, the Supreme Court does not like to interpret statutes that create constitutional issues.

So, there is a doctrine about the interpretation of statutes that says, well, if it were unconstitutional, then maybe that's not the correct way to interpret it. And so that's sort of our last argument, is even if you think the President's right, it will create this constitutional issue. And so maybe that interpretation isn't correct because it seems unlikely that Congress would just delegate all of its authority to the President, especially in a statute that says nothing about tariffs.

Fredrik Erixon: And perhaps to put this also in context for non-American listeners and viewers, so your case is not the only case, right, which has been brought against the liberation tariff. So, how does your case sit with other cases? Are the different arguments, are they, I mean, of course they represent different lines, but are they making a different argument than the argument you're making?

Jeffrey Schwab: Yes, in a way. Our case sued only under the Liberation Day tariff, so that was a strategic decision. We represent five small businesses and just those five small businesses.

Shortly after we filed our case, the solicitor generals and attorney generals of 12 states filed their own case, saying that they, with very similar arguments, said that not only were the Liberation Day tariffs illegal, but also the tariffs on Mexico, Canada, and China, the justification of which was illegal fentanyl coming into the country. I kind of shortened those tariffs to the "fentanyl tariffs". We didn't sue for the strategic reason that if we're going to say that there's no emergency, it's a lot easier to say that the trade deficit is an emergency than to say that fentanyl coming into our country isn't an emergency. I'm not sure that, I mean, I think, I don't think it's an emergency. I don't think it is justified, but sometimes in litigation, you want to get the easiest argument and get a win on the easiest argument. Now, it didn't end up mattering because, as you said, there are several other cases.

So, there was this other case. There was also a case; now, those two cases were filed in a court called the Court of International Trade. The Court of International Trade has exclusive jurisdiction over certain trade issues. And in particular, it has jurisdiction over the statutory tariffs. Now, there were several other cases, including a case called Learning Resources that was filed in the district court. I forget which, there are many district courts, but it was filed in one. And there the issue was, well, does the district court have jurisdiction at all to hear this case? Because it seems like the Court of International Trade has jurisdiction. And that's what the administration argued.

And so while our case was working its way up, while we had a hearing on the merits before the Court of International Trade, and then we went up to the next court called the Federal Circuit, and now we are in the final sort of appellate court called the Supreme Court, Learning Resources, the district court decided that he did have jurisdiction, the judge did have jurisdiction. Obviously, that is in conflict with the Court of International Trade's decision, which said we have exclusive jurisdiction. And so, they went up directly to the Supreme Court and tried to get an immediate Supreme Court review of that decision.

The court initially denied it on an emergency basis. And by the time our case got up through the Federal Circuit, and we applied for review by the Supreme Court, they had also applied. And so, when the decided to hear our case, and also the case of the states, which by the time we got to the Federal Circuit had those two cases had been consolidated together.

The court also granted the Learning Resources case. And in theory, the issue that that brings up is whether the district courts or the Court of International Trade has jurisdiction over this issue. We think we're correct. And the reason is that the argument for why the district court has jurisdiction is that this is the President's actions are illegal. So, they're not really tariffs. And therefore, the district courts have jurisdiction; the Court of International Trade does not, because it only has jurisdiction over legal tariffs.

The problem with that argument is that it's circular because you have to decide the merits of the claim before you decide jurisdiction. That's generally not how US courts work; we want to decide whether the court has jurisdiction before we get to the merits. And so that issue was technically there. And in a little bit of a strange positioning, we're actually on the side of the administration on that argument. And Learning Resources is against us.

I think effectively, that won't make a difference, at least practically, that won't make a difference. Because whoever has jurisdiction, I think the court will rule on the merits one way or the other. Interestingly, the court had zero questions about jurisdiction at oral argument in an oral argument that was two and a half hours long. So, it doesn't seem like it's an issue that is of real concern to them. But it is a technical issue. And that shows what, and it sort of explains why we have three different cases actually before the Supreme Court about this one issue.

Fredrik Erixon: Yeah. So, let's finally assume that the Supreme Court will principally support your case. What happens then?

I suppose your clients have; they have been taxed in the sense that they have been forced to pay tariffs for the goods, and they want their money back, I assume. So, is that the practical consequence in the first instance, now that those who have basically received the bill from the US Tax Authority to pay for the tariffs can claim the money back?

Jeffrey Schwab: Well, it is a little bit complicated, in part, because we don't know what the court will do on that issue.

There were some questions at oral argument about what would happen if the court ruled in our favour. And I think the court has a couple of different concerns.

One is if they rule that we are correct and the tariffs were illegal, and that the President or the Administration, the government has to give all the tariff money that it collected under these illegal tariffs back to anybody who paid it. I mean, that would create a little bit of a bureaucratic nightmare. And also, we're talking about a lot of money. I think my latest sort of guess is like something like \$90 billion, something like that. It's a lot of money, maybe not for the US government, but it is a lot of money. And so that could create a problem. And I think at least a couple of the justices, maybe the justices that

wouldn't rule in our favour anyway, were concerned about that sort of mess, including Justice Barrett, who said, "What will happen? And then is it just going to be a mess?" And then after the answer of the lawyer, she just said, "So basically a mess."

And that's a possibility. I don't think it necessarily has to be a mess. The way that the federal government imposes, like actually practically takes the tariff, is that there's an account essentially set up, like basically like a credit account, and everything is recorded. So, there should be documentation, I think it's all computerised. And in theory, you just reverse the process, and you can give everybody, you know, everybody back the money, because when the tariff is imposed, it's coded with the basis, you know, what the basis of the tariff is.

So, in theory, at least according to some people that I've talked to, it shouldn't actually be that hard of a process; it might be complex, because there are a lot of people that have in businesses that have paid the tariffs. But in theory, it may not be that much of a mess.

What seems like might be more likely is that, in American law, in cases, generally, a case is just about the plaintiffs in that case.

And so, usually, the relief, except for extraordinary circumstances, is generally tailored to the parties in the case. Now, practically, sometimes that doesn't make a difference. So, for example, one of the things that we're asking for is an injunction to stop the federal government from imposing tariffs based on this. Now, if the government took that very strictly and said, "Okay, we won't impose tariffs on your clients, but we will on other people", then other people just bring their own lawsuits. And then they would win because the Supreme Court ruled in our favour. So practically, the federal government won't do that; they will just stop imposing the tariffs because they don't want to be sued by 1000 different groups to stop it individually. So practically, the injunction doesn't matter. But what we're talking about essentially is our damages. And so, it's possible that the damages of our clients, the amount that they've paid in tariffs, will be returned to them. But then other businesses that have paid the tariffs will have to figure out a way to get their tariffs back. And generally, that might mean that they have to file their own lawsuits. And in fact, since the oral argument in November, several companies have filed their own lawsuits in the Court of International Trade seeking a refund, including last week, Costco, one of the bigger companies to have done that.

So, you see, I think some of these businesses are being cautious about whether a ruling in my clients' favour is actually going to help them immediately or whether they're going to have to take proactive steps. And so, some of them have taken proactive steps just in case.

Fredrik Erixon: And very final now, I'm not going to hold you for much longer, Jeffrey. But what happens next?

I mean, we're waiting for the Supreme Court to make a decision. So, if I have read the newspapers correctly, we don't know exactly when that's going to be. Some say it can happen this side of the new year. Other people are saying it's more likely to happen on the other side of the new year.

So how would that work? Will they just surprise everyone and release the decision? Or will you get an advanced warning, saying in a week from now, the Supreme Court is going to issue its ruling?

How does it work?

Jeffrey Schwab: It won't necessarily be a surprise. It will. Generally, when the court is going to issue an opinion or opinions, it will say, you know, tomorrow or in two days, we're going to issue opinions. It won't

tell you what the opinions are. But I think if the court says it's going to issue opinions anytime in the next month, there's a good chance that it will be our case.

I think there's a good reason to think that it will be on this side of the new year, in part because of how quickly the court took the case. It took it on an expedited basis. Although you know, it's been nine or 10 months since the imposition of "Liberation Day tariffs". The courts have actually moved on this pretty fast. Not for normal people. People who run businesses say this has been slow, and that's true. But for litigation, this is lightning fast. You don't get from complaint to the Supreme Court in nine months in the American federal judicial system. I think the court knows it's an important decision that has a timely aspect to it. I think it's very, very possible that it will issue an opinion on this side of the new year, and I'm hopeful that it does because I think that would be better to have it sooner rather than later.

But of course, they can do whatever they want. Who knows what the discussion is among the justices. I think that it's possible that there are different reasons for whichever way they're going to rule. And so there might be different opinions. The more opinions that there are from different justices, including reasons why they disagree with the majority opinion or reasons that they agree, but for different reasons, the longer it will take because you have more things to write and more people writing them. So, that is one thing that could hold things up.

Fredrik Erixon: All right, very good. And if it doesn't happen on this side of the new year, so it comes next year, it will, of course, also be the 250th anniversary of the US Declaration of Independence. So perhaps a good opportunity to reaffirm the principle that America is a republic and it is Congress who makes these decisions, not the executive, not even, not a British King, nor a US President.

Jeffrey Schwab: Yes, absolutely. We did fight a revolutionary war about an executive having too much power over the American economy. And I think that it's a good point and one that we should as Americans, particularly those who generally like more limited government, at least I do, that is a good opportunity to remind ourselves why.

Fredrik Erixon: Very good. Thank you so much, Jeffrey, for taking the time to enlighten us on this and maybe also wish you good luck with the decision or the opinion coming from the Supreme Court.

It's been a delightful half hour that I spent with you now, and I thank you very much for it.

Jeffrey Schwab: Thank you. I really enjoyed it.