

# US & Multilateral Trade Policy Developments

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**Japan External Trade Organization**

April 2019

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# US Trade Actions

## Section 301

### USTR Excludes Additional Products of China from Section 301 Tariff on “List 1” Goods

On April 17, 2019, the Office of the US Trade Representative (USTR) announced that it will exclude 21 products from the 25% additional tariff imposed by the United States on approximately \$34 billion worth of Chinese imports under Section 301 of the Trade Act of 1974. The granted exclusions will apply retroactively as of the July 6, 2018 effective date of the 25% additional tariff, and will be effective for one year after the publication of USTR’s exclusion determination in the Federal Register. This is the third set of exclusion requests that USTR has approved under the Section 301 exclusion process. A summary of USTR’s exclusion determinations and the status of the Section 301 exclusion process is discussed below.

#### Background

On July 6, 2018, the United States imposed an additional tariff of 25% on approximately \$34 billion worth of annual imports from China (“List 1” goods), pursuant to Section 301 of the Trade Act of 1974. On July 11, 2018, USTR published a Federal Register notice establishing a process for interested parties to request the exclusion of particular products from the additional tariff. USTR stated that exclusion requests should address the following factors:

- Whether the particular product is available only from China;
- Whether the imposition of additional duties on the particular product would cause severe economic harm to the requester or other US interests; and
- Whether the particular product is strategically important or related to “Made in China 2025” or other Chinese industrial programs.<sup>1</sup>

Properly filed exclusion requests are subject to a review process consisting of, *inter alia*, the following steps:

- Public comment period. Interested persons have 14 days from the date a request is posted on [www.regulations.gov](http://www.regulations.gov) to respond to the request. If a response is submitted, the requester has 7 days to reply to the response.
- Initial substantive review. After the public comment period closes, USTR conducts an “initial substantive review” of whether the exclusion request should be granted, based on the substantive criteria listed above and in the Federal Register notice.
- Administrability review. If a request passes the initial substantive review, USTR consults with US Customs and Border Protection (CBP) to determine whether an exclusion would be administrable. Requests that pass the administrability review are granted.

### Exclusion Determinations of April 17, 2019

#### Scope of Exclusions

USTR announced its decision to exclude additional products from the 25% tariff in a draft Federal Register notice scheduled for publication on April 18, 2019. The exclusions granted by USTR are established in 21 “specially prepared product descriptions” that cover certain products within a specified 10-digit Harmonized Tariff Schedule of the United States (HTSUS) subheading. The full list of newly excluded products is provided below.

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<sup>1</sup> The USTR also cited the “Made in China 2025” industrial plan in the 2019 National Trade Estimate (NTE) Report on Foreign Trade Barriers, which was published on March 29, 2019. The report states that the industrial plan aims “to replace foreign technologies, products and services with Chinese technologies, products and services in the China market through any means possible so as to equip Chinese companies to dominate international markets.” The NTE report also notes that this and other issues (e.g., investment restrictions and technology transfer and intellectual property) were the subject of USTR’s recent investigation of China under Section 301, based on which the United States “has imposed additional tariffs on \$250 billion worth of Chinese imports”. It further notes that China has responded to that action by imposing retaliatory tariffs on US goods. However, the report does not reference directly the ongoing bilateral negotiations between the United States and China regarding the issues raised in the Section 301 investigation and other issues.

"Specially Prepared Product Descriptions" Excluded
Pumps designed for countertop appliances for serving beer, the foregoing that control the level of carbonation by means of sonic waves (described in statistical reporting number 8413.19.0000)
Roller machines designed for cutting, etching or embossing paper, foil or fabric, manually powered (described in statistical reporting number 8420.10.9080)
Water oxidizers and chlorinators (described in statistical reporting number 8421.21.0000)
Ratchet winches designed for use with textile fabric strapping (described in statistical reporting number 8425.39.0100)
Continuous action elevators and conveyors, designed to convey mineral materials (described in statistical reporting number 8428.33.0000)
Counterweight castings of iron or steel designed for use on fork lift and other works trucks (described in statistical reporting number 8431.20.0000)
Tines, carriages, and other goods handling apparatus and parts designed for use on fork lift and other works trucks (described in statistical reporting number 8431.20.0000)
Parts of drill sharpening machines (described in statistical reporting number 8466.93.9885)
Outer shells of hydraulic accumulators, of iron or non-alloy steel, cylindrical with hemispherical heads on each end (described in statistical reporting number 8479.90.9496)
Parts of mechanical awnings and shades (described in statistical reporting number 8479.90.9496)
Reject doors, pin protectors, liners, front walls, grates, hammers, rotor and end disc caps, and anvil and breaker bars, of iron or steel, the foregoing parts of metal shredders (described in statistical reporting number 8479.90.9496)
Steering wheels designed for watercraft, of stainless steel, having a wheel diameter exceeding 27 cm but not exceeding 78 cm (described in statistical reporting number 8479.90.9496)
Pressure regulators of brass or bronze, whether high or low inlet type, having a rated flow rate of 55,000 - 150,000 BTU/hr, maximum inlet pressure of 0.17 MPa to 1.72 MPa, inlet connection with POL or thread type of fitting (described in statistical reporting number 8481.10.0090)
Pipe brackets of aluminum, each with 4 ports, the foregoing measuring 27.9 cm x 20.3 cm x 17.8 cm and weighing 11.34 kg, designed for installation into air brake control valves (described in statistical reporting number 8481.90.9040)
Push pins and C-poles of steel, designed for use in variable force solenoid valves (described in statistical reporting number 8481.90.9040)
Ball bearings of a width not exceeding 30 mm (described in statistical reporting number 8482.10.5032)
Inductor baseplates of aluminum, each with a length measuring 149.20 mm or more but not over 275 mm, with a width measuring 119.40 mm or more but not over 232 mm and with a depth of 10.50 mm or more but not over 19 mm, with a weight of 0.48 kg or more but not over 3.2 kg (described in statistical reporting number 8504.90.9690)
Parts of soldering irons and soldering machines (described in statistical reporting number 8515.90.4000)
Motor vehicle gear shift switch assemblies, comprised of a plunger, connector and gear shift lever (described in statistical reporting number 8536.50.9065)
Pressure switches designed for use in heat pumps and air-conditioning condensers having a rating of 1.90 megapascals or more but not over 4.55 megapascals (described in statistical reporting number 8536.50.9065)
Instruments for measuring or checking voltage or electrical connections; electrical circuit tracers (described in statistical reporting number 9030.33.3800)

According to USTR, the granted exclusions cover 348 separate exclusion requests. USTR has noted that the scope of each exclusion is governed by the scope of the product descriptions listed above, and not by the product descriptions set out in any particular request for exclusion.

## Exclusion Procedures

The granted exclusions will apply retroactively as of the July 6, 2018 effective date of the additional 25% tariff, and will be effective for one year after the publication of USTR's exclusion determination in the Federal Register. The exclusions are available for any product that meets the description set forth in the Federal Register notice, regardless of whether the importer filed an exclusion request. USTR has stated that US Customs and Border Protection (CBP) will issue instructions on entry guidance and implementation of the new exclusions.

## **Outlook**

The new set of exclusions granted by USTR will provide relief for some US businesses and consumers. However, like the first two sets of exclusions announced in December and March, they apply only to a small portion of the imports subject to the Section 301 tariffs (which cover approximately 6,800 HTSUS 8-digit subheadings) and represent a small share of the total volume of exclusion requests USTR has received. As shown in the chart below, USTR has received 10,837 exclusion requests for products on List 1, but has approved only 10%, and has denied 49%, of such requests. USTR also has yet to issue any determinations on exclusion requests relating to List 2 goods, and has declined to establish an exclusion process for List 3 goods while the tariff rate remains at the current level of 10%. USTR has said that it will continue to issue determinations on pending Section 301 exclusion requests "on a periodic basis."

Status of Section 301 Product Exclusion Requests				
Product List	Granted	Denied	Pending	Total Received
List 1 (\$34 billion)	1,094	5,312	4,431	10,837
List 2 (\$16 billion)	0	0	2,924	2,924
List 3 (\$200 billion)	N/A (no exclusion process)			

Some observers are hopeful that the ongoing bilateral negotiations between the United States and China might soon result in the removal of some or all of the Section 301 tariffs, but this is not guaranteed. Indeed, Trump administration officials reportedly are seeking to keep at least some of the Section 301 tariffs in place even after a potential US-China agreement is signed, and until China demonstrates that it has fulfilled its obligations under the agreement. Thus, USTR's exclusion process might remain the only avenue for some parties to obtain relief from the Section 301 tariffs in the near term, even if a US-China agreement is reached.

USTR's draft Federal Register notice can be viewed here:

<https://www.federalregister.gov/documents/2019/04/18/2019-07758/product-exclusions-chinas-acts-policies-and-practices-related-to-technology-transfer-intellectual>

## **Section 232**

### **Update on US Section 232 Investigation of Automotive Goods**

In April, there have been several noteworthy developments concerning the Section 232 investigation of automotive imports:

#### **Possible delay of Presidential determination**

National Economic Council (NEC) Director Larry Kudlow has stated twice in the past week that President Trump might postpone his determination in the Section 232 auto investigation beyond the May 18 deadline. He stated on

March 28 that “[t]he president is exercising his legal right to take the 90 days [to make a decision], and, by the way, he could take longer[.]” This is the first time that a Trump administration official has publicly acknowledged the possibility of delaying the determination past the initial 90-day deadline set forth in Section 232(c)(1). Kudlow also appeared to confirm that the Commerce Department’s report contains an affirmative finding and recommends import restrictions, stating that “[t]he Commerce Department set out several options...and the options cover the waterfront.”

If the administration seeks to delay its final determination past the May 18 deadline, it may rely on the authority provided in Section 232(c)(3), which affords the President additional time to negotiate an agreement that limits the subject imports and authorizes him to take additional actions if the negotiations fail. Specifically, if the President determines within 90 days of receiving the Secretary’s report that the action that should be taken based thereupon is “the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States” of the subject merchandise, and:

1. No such agreement is entered into before the date that is 180 days after the date on which the President makes the determination; or
2. Such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article;

the President “shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.” There is no recent precedent for the negotiation of an agreement to limit or restrict imports under Section 232(c)(3). However, the administration might cite its proposed bilateral trade negotiations with Japan and the EU as potentially leading to agreements to “limit or restrict” subject automotive imports. On that basis, the administration could seek to delay further action in the Section 232 auto investigation by 180 days (*i.e.* until November 14, 2019).

It is unclear whether the Trump administration will attempt to delay action in the autos investigation beyond the May 18 deadline, but there are several reasons it might seek to do so. President Trump reportedly does not want the results of the Section 232 auto investigation to disrupt the ongoing bilateral negotiations with China, and it now appears that those negotiations might drag out into the summer. In addition, announcing Section 232 restrictions on automotive goods (particularly finished automobiles) in May would likely foreclose any possibility of Congress approving the US-Mexico-Canada Agreement (USMCA) this year, as many Members of Congress are strongly opposed to such restrictions (a point that USTR Lighthizer reportedly has emphasized to President Trump). President Trump might therefore be inclined to delay action on autos until later this year, after the US-China negotiation is potentially completed and the USMCA’s fate in Congress is known. Moreover, during the 180-day period authorized under Section 232(c)(3), President Trump could continue to wield the threat of automotive tariffs as “leverage” in the proposed bilateral negotiations with Japan and the EU. We therefore see a significant possibility that the administration seeks to delay its final determination on autos beyond the May 18 deadline.

### “New Democrat Coalition” letter

Nine House Democrats representing the moderate “New Democrat Coalition” sent a letter<sup>2</sup> to President Trump on March 27 urging him not to impose Section 232 tariffs on automotive goods. The House Democrats stated that “we remain deeply concerned about the findings of the Department of Commerce’s Section 232 investigation into imported automobiles and auto parts...Any attempt to impose tariffs on these products will directly harm our hard-

<sup>2</sup> The letter is available here: [https://newdemocratcoalition-himes.house.gov/sites/newdemocratcoalition.house.gov/files/documents/POTUS%20New%20Dem%20Trade%20Task%20Force%20Auto%20232%20Letter\\_032719.pdf](https://newdemocratcoalition-himes.house.gov/sites/newdemocratcoalition.house.gov/files/documents/POTUS%20New%20Dem%20Trade%20Task%20Force%20Auto%20232%20Letter_032719.pdf)

working American workers and companies, and the economy as a whole.” They added that imposing such tariffs for reasons unrelated to national security “clearly oversteps the authority granted by Congress.”

The nine signatories of the letter are members of the New Democrat Coalition’s Trade Task Force, and are part of the relatively small group of congressional Democrats that has supported US trade agreements in recent years. Their votes therefore are considered essential to securing the approval of the USMCA implementing legislation in the House of Representatives. The signatories of the letter represent a range of solidly Republican, solidly Democratic, and “swing” states: they are Reps. Terri Sewell (D-AL), Ron Kind (D-WI), Rick Larsen (D-WA), Greg Meeks (D-NY), Lizzie Fletcher (D-TX), Suzan DelBene (D-WA), Donald Beyer (D-VA), Susan Davis (D-CA) and Stephanie Murphy (D-FL). Their letter illustrates the tension between the Trump administration’s stated goal of securing approval of the USMCA and the President’s interest in automotive import restrictions.

### **Chairman Grassley to introduce Section 232 reform bill**

On March 26, 2019, Senate Finance Committee Chairman Chuck Grassley (R-IA) announced<sup>3</sup> that he would introduce legislation “in the coming weeks” to “reform the process by which the executive branch could use national security as a basis to restrict imports under section 232 of the Trade Expansion Act of 1962.” He stated that, under the forthcoming bill, “any restrictions imposed by the president would be limited to a defined period of time unless extended by an Act of Congress. During this time, the executive branch would be required to consult with Congress and provide reports on the achievement of any national security objectives as well as the economic impact of the president’s action, allowing Congress to act in a fully-informed manner. The bill would also require a product exclusion process that is transparent and accountable to Congress.”

Chairman Grassley has repeatedly stated that he is seeking a bipartisan, veto-proof majority (*i.e.*, 67 Senate votes) in favor of the bill, on the assumption that President Trump would likely veto the legislation. Indeed, NEC Director Kudlow indicated on April 3 that the President would veto the bill if it is presented to him for signature, confirming our expectation that the Grassley legislation will need broad bipartisan support if it is to become law. Chairman Grassley has repeatedly cautioned the administration against imposing automotive import restrictions under Section 232, and has expressed doubts that there is a legitimate national security basis for such actions. He also speculated this week that the administration is withholding the release of the Commerce Department’s report on the investigation because “I think it’s a study that would embarrass the administration.” Chairman Grassley’s decision to publicly spearhead Section 232 reform legislation over the President’s opposition demonstrates the extent to which Members of Congress, including Republican leaders, have become alarmed about the possibility of Section 232 tariffs on automotive goods.

### **United States Releases Annual Assessment of Foreign Trade Barriers**

On March 29, 2019, the Office of the United States Trade Representative (USTR) published its annual National Trade Estimate (NTE) Report on Foreign Trade Barriers, which “highlights significant foreign barriers to U.S. exports, U.S. foreign direct investment, and U.S. electronic commerce.” This year’s NTE report comes at an important time, as the Trump administration has been vocal about its view that current trading arrangements have permitted widespread unfair treatment of the United States, including by its largest trading partners. The administration has shown that it is willing to address such issues through negotiation: for example, it has recently proposed formal negotiations with Japan and the EU, is in the midst of bilateral negotiations with China, and has completed a renegotiation of the North American Free Trade Agreement with Canada and Mexico. At the same time, the administration also has been willing to take aggressive unilateral actions in response to perceived unfair treatment, causing significant commercial disruptions and frictions in the global trading system.

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<sup>3</sup> Chairman Grassley’s letter is available here: <https://www.grassley.senate.gov/news/news-releases/grassley-leading-effort-reform-232-tariff-process>

These developments have generated significant interest in the administration's views and priorities with respect to the trade policies of the United States' major trading partners. This report aims to shed light on these issues by reviewing key developments in this year's NTE with respect to major US trading partners, namely China, Japan, the European Union, Canada, Mexico, Brazil, and Korea.

## China

The 2019 NTE lists a multitude of longstanding US concerns about China's trade and industrial policies, which "seek to limit market access for imported goods, foreign manufacturers and foreign services suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries." It also identifies several new US concerns, and highlights the Trump administration's recent efforts to obtain the elimination of certain Chinese practices through the unilateral actions it has taken against China under Section 301 of the Trade Act of 1974. We discuss these issues below.

### New developments in the 2019 NTE

The report highlights several new developments over the last year that are of concern to the United States, including the following:

- E-Commerce. China's new E-Commerce Law, which entered into force in January 2019, allegedly "introduced provisions that weaken the ability of rights holders to protect their rights online and that make it more difficult for Chinese electronic commerce platforms to be liable for selling counterfeit and other infringing goods[.]"
- Financial services. China recently finalized measures that remove equity caps relating to Chinese-owned banks, but "in practice, China has maintained restrictions that do not allow for significant non-Chinese competition in commercial banking activities." Foreign suppliers also allegedly have been unable to secure licenses to supply electronic payment services in China under a licensing process that China established in 2017 following an adverse WTO ruling, and have had similar difficulties with respect to internet-enabled payments services.
- Agriculture. China's most recent WTO notification "showed that China had exceeded its *de minimis* level of domestic support for soybeans (in 2012, 2014 and 2015), cotton (from 2011 to 2016), corn (from 2013 to 2016), rapeseed (from 2011 to 2013) and sugar (2012)." The report also expands on prior criticism of China's sanitary and phytosanitary (SPS) restrictions on beef, pork, and poultry, and flags a new concern that China "has not approved longstanding market access requests for a variety of U.S. horticultural products[.]"
- Audiovisual services. China's National Radio and Television Administration (NRTA) has issued a "problematic" draft measure that "would impose new restrictions in China's already highly restricted market for foreign creative content on over-the-air television, cable television and online audiovisual-content platforms."
- Cosmetics regulations. China allegedly imposes "discriminatory testing and documentation requirements for imported cosmetics and personal care products" and does not recognize international standards for good manufacturing practices and product safety assessment.
- Section 232 retaliation. The report also notes that China has imposed retaliatory tariffs in response to the US Section 232 measures on steel and aluminum, and that the United States is challenging this action in the WTO.

### Investment, technology transfer, and intellectual property

Like previous iterations of the NTE, the report highlights several alleged barriers related to technology transfer, foreign investment, and intellectual property protection:



- Investment restrictions and technology transfer. China “seeks to protect many domestic industries through a restrictive investment regime”, and its investment restrictions are among a “variety of tools” that it uses to require or pressure US companies to transfer technologies and intellectual property to Chinese companies.
- “Made in China 2025”. China’s “Made in China 2025” industrial plan aims “to replace foreign technologies, products and services with Chinese technologies, products and services in the China market through any means possible so as to equip Chinese companies to dominate international markets”.
- Intellectual property. China’s intellectual property rights protection and enforcement regime “continue to present serious barriers to U.S. exports and investment”, and there are “[s]erious inadequacies in the protection and enforcement of trade secrets”.

The report notes that some of these issues were the subject of USTR’s recent investigation of China under Section 301, based on which the United States “has imposed additional tariffs on \$250 billion worth of Chinese imports”. It further notes that China has responded to that action by imposing retaliatory tariffs on US goods. However, the report does not reference directly the ongoing bilateral negotiations between the United States and China regarding the issues raised in the Section 301 investigation and other issues.

### **Other alleged barriers**

The report also describes a wide range of longstanding US concerns about China’s trade policies and economic model that are not directly related to the recent Section 301 action:

- Subsidies and excess capacity. China “continues to provide substantial subsidies to its domestic industries”, and is “the world’s leading offender in creating noneconomic capacity[.]”
- Services and digital trade. Chinese regulators “use case-by-case approvals, discriminatory regulatory processes, informal bans on entry and expansion, overly burdensome licensing and operating requirements, and other means to frustrate the efforts of U.S. suppliers of services to achieve their full market potential in China.” In addition, China maintains “restrictions on cross-border data flows and requirements to store and process data locally[.]”
- Trade remedies. China’s regulatory authorities “seem to be pursuing antidumping and countervailing duty investigations and imposing duties – even when necessary legal and factual support for the duties is absent – for the purpose of striking back at trading partners that have exercised their WTO rights against China.”
- Export restraints. China “continues to deploy a combination of export restraints, including export quotas, export licensing, minimum export prices, export duties and other restrictions[.]”
- Agriculture. China remains “a difficult and unpredictable market for U.S. agricultural exporters, largely because of inconsistent enforcement of regulations and selective intervention in the market by China’s regulatory authorities.” China’s regulators fail to “routinely follow science-based, international standards and guidelines”.

### **Bilateral negotiations**

As noted above, the report does not reference directly the ongoing bilateral negotiations between the United States and China, in which the United States is seeking Chinese commitments to eliminate not only the policies identified in the Section 301 investigation, but other alleged trade barriers discussed in the NTE. For example, the United States reportedly is seeking commitments from China related to digital trade, services (e.g., electronic payments, motion pictures, and cloud computing), and various agriculture issues (e.g., biotechnology approvals). However, the extent to which these issues will be addressed in a potential US-China agreement remains unclear, and other key trade

frictions highlighted in the NTE undoubtedly will remain. The NTE notes that the Trump administration is pursuing other avenues to address such issues (e.g., by “working with the EU and Japan to identify further effective action and potential rules that could address problematic subsidies practices not currently covered by existing obligations.”)

## Japan

The report highlights a range of barriers to goods and services trade with Japan, including in areas such as agriculture and automotive trade that are likely to be central to forthcoming bilateral FTA negotiations. In addition to discussing longstanding issues identified in previous iterations of the NTE, this year’s report introduces new sector-specific issues aligned with the Trump administration’s stated trade priorities. We discuss the most significant issues highlighted in the report below.

### New developments in the 2019 NTE

USTR notes several new or exacerbated regulatory challenges that it sees as negatively impacting US companies’ competitiveness relative to their Japanese counterparts, including: (i) changes to the reimbursement pricing system adversely affecting US medical devices and pharmaceuticals companies; (ii) newly-noted tariffs of 3.5 percent to 10 percent on certain fish and seafood products; (iii) new concerns relating to government procurement procedures, including that technical specifications are selected to exclude US products and services, or direct procurements towards a specific Japanese company; (iv) a potentially problematic geographical indications law; and (v) the denial of access to the electrical grid for US companies attempting to sell renewable energy. While these additions are relatively narrow in scope, the updated report does demonstrate a continued focus on incremental market access issues, both for goods and services, some of which could be addressed via a bilateral FTA.

### Other alleged barriers

The report highlights several other alleged trade barriers, most of which have been discussed in prior versions of the NTE:

- **Tariffs.** The Report focuses on Japan’s high tariffs “that hinder U.S. exports of agricultural and other food products to its market,” including on fish, grains, sugar, citrus, wine, dairy, and certain processed foods. USTR also notes high tariffs and tariff-rate quotas on US leather, footwear, and travel goods.
- **Nontariff barriers.** Priority nontariff barriers to US imports include: a tariff-rate quota on imported rice; the requirement that wheat imports be routed through Japan’s state trading entity; a restrictive beef special safeguard; a variable levy-like pork import regime; a low *de minimis* threshold for low-value imports; and unique standards and testing protocols for automobiles.
- **Technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) barriers.** Alleged TBT and SPS issues include labelling requirements for food products processed in Japan, which could limit Japanese manufacturers’ utilization of US ingredients; restrictions on food additives; cattle age limits for beef imports; and burdensome application requirements for maximum residue level approvals.
- **Services barriers.** Certain sectors are heavily regulated and challenging for foreign service providers, including: express delivery; insurance and financial services; legal services; telecommunications services; and renewable energy services.
- **Anticompetitive practices.** The report alleges underutilization of the Anti-Monopoly Act to deter cartel conduct and a lack of fairness and transparency in the Japan Fair Trade Commission’s procedures.

- Sector-specific issues. The report includes specific barriers to trade/investment in the following areas: automotive industry; medical devices and pharmaceuticals; nutritional supplements; cosmetics; and aerospace.

### **Bilateral negotiations**

The Report notes that “[i]n September 2018, President Trump and Prime Minister Abe agreed to start negotiations for a U.S.-Japan Trade Agreement, and the Administration notified Congress on October 16, 2018, of its intent to start negotiations following the completion of relevant domestic procedures.” As outlined in USTR’s published negotiating objectives for the proposed agreement, released on December 21, 2018, the agreement is meant to be comprehensive, including trade in goods and services, investment, digital trade, intellectual property, regulatory practices, sanitary and phytosanitary measures, technical barriers to trade, state-owned enterprises, labor and environment, currency, and government procurement, among other areas. The priority concerns highlighted by USTR in its negotiating objectives in many cases overlap with those outlined in the the NTE report, including increased market access for automotive goods, pharmaceuticals/medical devices, and agriculture (*for more details on the US negotiating objectives for the proposed US-Japan Trade Agreement, see the W&C trade alert dated January 9, 2019*). However, the Trump administration has indicated that it may pursue negotiations with Japan “in stages”, focusing on market access for goods (and particularly agricultural goods) during the first stage.

### **European Union**

The report notes that the United States and the EU “share the largest economic relationship in the world”, but claims that “U.S. exporters and investors nonetheless face persistent barriers to entering, maintaining, or expanding their presence in certain sectors of the EU market.” The report focuses extensively on tariffs and alleged non-tariff barriers affecting US agricultural exports – an issue that the Trump administration is seeking to address through proposed bilateral trade negotiations with the EU. USTR claims that these and other barriers “have contributed to annual U.S. trade deficits with the EU”. As the report notes, some of the listed barriers have been highlighted in the NTE for years, but many of the items listed are new. We discuss the most significant issues highlighted in the report below.

#### **New developments in the 2019 NTE**

- Digital services tax. The report notes that, in March 2018, the European Commission proposed a directive to levy an interim tax on certain types of digital services that would apply to companies with annual worldwide revenues exceeding €750 million (\$849 million) and revenues within the EU exceeding €50 million (\$57 million). The report acknowledges that the effort to reach agreement on an EU-wide digital services tax was later abandoned, but it highlights efforts by several EU member states to impose their own digital services taxes in 2019, including France, Italy, Spain, and the United Kingdom. The report warns that the United States “opposes proposals by any country to single out digital companies”, and that US companies believe the proposed measures are discriminatory.
- Geographical indications. The report escalates the United States’ criticism of the EU’s approach to recognition of geographical indications, stating that “[t]he United States does not believe that the EU should bargain for specific GI recognition in its bilateral trade agreements in return for market access, because such intellectual property rights should be evaluated independently on their merits, based on the unique circumstances of each country.”
- High-quality beef (HQB) quota. The report notes that the United States and the EU have engaged in negotiations to change the EU’s HQB quota after the EU received a mandate to do so from the European Council in October 2018. The United States claims that its access to the EU beef market has been eroded because countries such as Argentina, Australia, and Canada have also been able to ship under the HQB quota, which was established in 2009 as a compromise solution to the US-EU beef hormone dispute.

- Ruling on gene-edited crops. USTR notes that, in July 2018, the Court of Justice of the European Union ruled that gene-edited crops are subject to the same “onerous barriers” associated with EU regulations implemented under its GMO Directive and that the judgement “is anticipated to further exacerbate and expand existing agricultural trade barriers to innovative agricultural products.”
- Cybersecurity certification. The report states that the European Commission’s September 2017 Cybersecurity Act proposal “proposes a voluntary EU-wide certification and labeling scheme for Internet of Things products and services” and that “some observers are concerned that the result could be a de facto mandatory approach to certification and labeling.”
- Platform Regulation. In April 2018, the European Commission proposed a new regulation on platform-to-business services and online search services. According to the report, US companies have raised concerns that the requirements could create market access barriers and potentially compromise trade secrets that are critical to their provision of such services.
- Maximum residue levels (MRLs). In January 2019, the EU published regulations setting MRLs for several active substances at the limit of detection “ignoring U.S. comments requesting that they reconsider.” The report asserts that the rules will affect crop protection products for tree nuts, wine grapes, berries, and other fruits, which in total represent over \$3 billion in US exports to the EU.
- Retaliatory tariffs. The report notes that the EU adopted tariffs ranging from 10 percent to 50 percent on a range of US products in retaliation against the United States’ Section 232 tariffs on steel and aluminum. It further notes that the United States has challenged this action at the WTO.

### **Other alleged barriers**

The report also highlights several longstanding US concerns regarding the EU’s trade and investment policies:

- SPS barriers. The report contains extensive criticism of the EU’s approach to food safety regulation. It expresses concern that many EU measures “unnecessarily restrict trade without furthering their safety objectives because they are not based on scientific principles, maintained with sufficient scientific evidence, or applied only to the extent necessary.” Among the many alleged barriers listed in the report are restrictions related to hormones in meat; agricultural biotechnology; pathogen reduction treatments; certification requirements limiting US agricultural exports such as fish, meat, dairy, eggs, processed products, and animal byproducts; certification requirements for bovine diseases; hazard-based cutoff criteria for agricultural chemicals; and pesticide maximum residue limits.
- Agricultural tariffs. The report notes that the EU’s agricultural tariffs average 10.8 percent, compared to its average non-agricultural tariff rate of 4.2 percent.
- Customs barriers. The report expresses concern that the EU does not administer its laws through a single customs administration, which allegedly leads to non-uniformity of administration.
- Technical barriers to trade. Among the many alleged TBT issues flagged in the report are the EU regulations concerning the production, marketing, and use of chemicals – known as Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH); elements of the EU Cosmetics Regulation and the EU Renewable Energy Directive; country of origin labelling (COOL) requirements; and nutritional labelling regulations.
- Subsidies. The report flags various financial transactions and equity arrangements throughout the EU, which it states “raise questions as to the role of state funding or subsidizing private or quasi-private organizations,

including in the manufacture of civil aircraft.” The report also discusses the US case brought at the WTO concerning Member State subsidies provided to Airbus.

- Intellectual property. Concerns include the EU’s “overbroad” protection of geographical indications; legislative developments relating to the draft Directive on Copyright; trademark issues and implementation of the EU’s trademark directive; and implementation of a directive on trade secrets.
- Services barriers. The report highlights numerous alleged barriers relating to the supply of telecommunications services, audiovisual media services, satellite and cable services, legal services, accounting and auditing services; and pharmacies.
- Digital trade barriers. The report states that the EU’s General Data Protection Regulation (GDPR) “restricts the transfer of the personal data of EU citizens outside of the EU”, and that the United States remains concerned that the implementation and administration of the GDPR “create disproportionate barriers to trade.” It notes that the United States has received a determination of partial adequacy from the EU in the form of the Privacy Shield Framework, but warns that legal challenges in the EU “continue to create uncertainty around the transfer of data for US and other foreign companies.”

Notably, the report does not mention the Trump administration’s October 16, 2018 notification to Congress regarding the administration’s intention to enter into trade negotiations with the EU. That notification followed a joint statement of July 25, 2018 in which President Trump and European Commission President Jean-Claude Juncker agreed to begin preliminary discussions on a “joint agenda” of bilateral trade initiatives, including a potential negotiation to liberalize US-EU trade in non-automotive industrial goods and services. Those negotiations have stalled, however, due to the United States’ subsequent insistence that proposed agreement cover tariff and non-tariff barriers affecting US agricultural exports to the EU. The EU has insisted that agricultural issues be excluded from the proposed agreement, but they clearly remain a top priority for the Trump administration, as this year’s NTE report indicates.

## Canada

The 2019 NTE report highlights a range of alleged barriers to goods and services trade with Canada, most of which have been raised in prior iterations of the NTE. It also includes a new discussion of the proposed US-Mexico-Canada Agreement (USMCA), which the Trump administration claims will reduce some of the barriers to trade with Canada highlighted in the NTE report. We discuss the most significant issues highlighted in the report below.

### New developments in the 2019 NTE

This year’s report includes a new discussion of the USMCA, which USTR claims will “modernize and rebalance” US trade relations with Canada. It notes, for example, that Canada agreed under the USMCA “to eliminate milk classes 6 and 7, discriminatory grading of US wheat, and British Columbia’s discriminatory treatment of US wine in grocery stores.” The Agreement also “includes obligations to strengthen enforcement against counterfeiting and piracy, camcording of movies, satellite and cable signal theft, transparency with respect to new geographical indications, and copyright protection and enforcement in the digital environment.” In addition, the USMCA “will ensure that Canada eliminates its rule prohibiting simultaneous substitution of advertising for the Super Bowl.”

The report also focuses on Canadian tariffs ranging from 10 percent to 25 percent on various products imported from the US, which Canada imposed in July 2018 in retaliation against the United States’ Section 232 tariffs on steel and aluminum. The report says that the United States “will take all necessary action” to protect US interests, and includes discussion of the related WTO case brought by the United States against Canada.

### Other alleged barriers

Aside from the discussion of the USMCA and Canada's retaliatory tariffs, the United States' trade priorities with respect to Canada remain largely unchanged from previous iterations of the NTE:

- Nontariff barriers. Priority nontariff barriers include: agricultural supply management systems to regulate the dairy, chicken, turkey, and egg industries; Canada's use of milk classes; restrictions on US grain exports; Ministerial exemptions for bulk imports of fresh fruits and vegetables; customs barriers (personal duty exemptions and the *de minimis* threshold); and limitations on importation of alcohol.
- TBT and SPS barriers. Alleged TBT and SPS barriers include regulations on compositional standards for cheese; front-of-packaging labelling requirements for pre-packaged foods; and restrictions on US seeds exports.
- Subsidies. The report alleges that Canada has provided subsidies to companies in its aerospace sector.
- Government procurement. The report expresses concern that the reaction by the Government of Canada to Boeing's recent trade remedy action against Canada's Bombardier may place US companies at a disadvantage when bidding on future Canadian defence procurement projects.
- Intellectual property rights protection. Canada was downgraded to the Priority Watch List in USTR's Special 301 Report in 2018 for allegedly failing to resolve "longstanding deficiencies" in the protection and enforcement of intellectual property rights, including with respect to medicines and pirated and counterfeit goods.
- Services, digital trade, and e-commerce. Certain sectors allegedly are heavily regulated and challenging for foreign service providers, including telecommunications services, radio-television broadcasting (due to requirements for Canadian content in broadcasting), and financial services. The Report states that the US government will closely monitor the "Creative Canada" initiative to ensure it is implemented in a manner that does not constitute a barrier to digital trade.

## Mexico

The 2019 NTE report discusses several alleged trade barriers that US providers of goods and services face in Mexico, including customs issues, non-tariff barriers, and challenges related to intellectual property rights protection. Some of the alleged barriers are new, whereas others reflect longstanding US concerns and have been included in prior iterations of the NTE. The report also includes a new discussion of the proposed US-Mexico-Canada Agreement, which USTR claims will "rebalance" US trade with Mexico. We discuss the most significant issues highlighted in the report below.

### New developments in the 2019 NTE

- EU-Mexico FTA and Geographical Indications. The report notes that "in April 2018, Mexico and the European Union (EU) came to an agreement in principle on a free trade agreement in which Mexico agreed to protect 340 names for foodstuffs, wines, and beers." The United States is "highly concerned about Mexico negotiating product-specific IP outcomes as a condition of market access from the EU, and reiterates the importance of each individual IP right being evaluated on its individual merit in Mexico."
- Import Licensing. The report criticizes Mexico's decision to suspend its alternative scheme for issuing steel import licenses in December 2018, which it claims has resulted in confusion and concerns for steel exporters and Mexican customers.
- Telecommunications. The United States is concerned that, due to a proposed regulatory revision, certain US information and communications technology exports will no longer be exempt from Mexican testing requirements, and that Mexico will no longer recognize the results of conformity assessment procedures from the United States.

- Oil auctions. The report notes that President Lopez Obrador has “cancelled oil auctions for three years”, but has reassured companies that contracts awarded under the previous Mexican administration as part of Mexico’s 2013 energy reform will be respected.
- Section 232 retaliation. The report notes that Mexico has imposed tariffs ranging from 7 to 25 percent in response to the United States’ steel and aluminum tariffs under Section 232, and that the United States has challenged this action at the WTO.
- USMCA. The report claims that the proposed USMCA will “modernize and rebalance” US trade relations with Mexico. It asserts, for example, that the agreement “reduces incentives to outsource by providing strong labor and environmental protections, innovative rules of origin, and revised investment provisions.” The Agreement also “locks in Mexico’s telecommunications and energy reforms”, “brings labor and environment obligations into the core text of the agreement and makes them fully enforceable”, “cracks down on data localization measures”, and “includes obligations to strengthen enforcement against counterfeiting and piracy, camcording of movies, satellite and cable signal theft, transparency with respect to new geographical indications, and copyright protection and enforcement in the digital environment.”

### **Other alleged barriers**

The report highlights several other alleged barriers to US goods and services trade with Mexico, many of which have been raised by the United States in prior editions of the NTE:

- Customs Barriers. US exporters continue to express concerns about Mexican customs administrative procedures, including insufficient prior notification of procedural changes, inconsistent interpretation of regulatory requirements at different border posts, and uneven enforcement of Mexican standards and labeling rules.
- Non-Tariff Barriers (NTBs). US concerns include certain energy efficiency labeling requirements and unique testing requirements that are different from requirements in the United States or elsewhere. The US spirits industry also has raised concerns regarding ageing requirements, minimum and maximum limits for various components, alcohol content limits, as well as minimum spirit content requirements for certain labels.
- SPS Measures. The report criticizes certain Mexican restrictions regarding the importation of potatoes and stone fruit from the United States.
- Intellectual property. The report cites “obstacles to U.S. trade in intellectual property-intensive goods and services”, including “the wide availability of pirated and counterfeit goods, via both physical and virtual markets.”
- Services and investment. The report highlights several alleged barriers facing US providers of telecommunications services, despite Mexico’s reform of the sector in 2013 and 2014, as well as audiovisual services. Moreover, despite energy reforms enacted by Mexico in 2013, certain barriers to investment in the oil and hydrocarbons sectors allegedly remain (e.g., local content requirements). Other sectors, such as ground transportation services and transportation infrastructure, (such as airport management), are closed to foreign participation.

### **Brazil**

The 2019 NTE report highlights a range of alleged barriers maintained by Brazil, including with respect to digital trade, tariffs and other restrictions (e.g., on ethanol imports), restrictions in the services sector, and intellectual property protection. Most of these issues have been discussed in prior iterations of the NTE. However, this year’s report also

discusses several recent instances in which Brazil has reduced barriers to US exports, in the view of the Trump administration. We discuss the most significant issues highlighted in the report below.

### **New developments in the 2019 NTE**

This year's report highlights the following new developments with respect to Brazil:

- Barriers to digital trade. USTR notes that Brazil in August 2018 adopted a measure on the protection of personal data that “will apply to any processing of the personal data of Brazilians done by people or entities, regardless of the type of means, the country where the data is located, or the headquarters of the entity.” USTR categorized this measure as a “data localization requirement”.
- Wheat TRQ. USTR notes that, “[a]s an outcome of the meeting between President Trump and President Bolsonaro on March 19, 2019,” Brazil announced it will implement a 750,000 metric ton (MT) duty-free MFN tariff-rate quota (TRQ) tariff-rate quota on wheat imports. Brazil previously has applied the MERCOSUR Common External Tariff (CET) of 10 percent tariff on imported wheat from non-MERCOSUR trading partners, including the United States.
- Pork. The report states that “U.S. fresh, frozen, and further processed pork products are ineligible for import into Brazil”, but notes that “[i]n the Joint Statement following the meeting between President Trump and President Bolsonaro on March 19, 2019, the leaders announced agreement on science-based conditions to allow for the importation of U.S. pork to Brazil.”

The above commitments from Brazil regarding the wheat TRQ and US pork imports were first announced in a joint statement from President Trump and new Brazilian President Jair Bolsonaro in March. During the March visit, Brazilian Minister of Economy Paulo Guedes indicated that Brazil is interested in holding further discussions with the United States on liberalizing bilateral trade, though this possibility is not mentioned in the NTE report.

### **Other alleged barriers**

In addition to the above issues, the report highlights the following alleged barriers to US trade with Brazil, most of which have been discussed in prior iterations of the NTE:

- Import tariffs. The report questions Brazil's use of MERCOSUR's CET flexibilities to raise or lower import tariffs, particularly on industrial products, to protect domestic industries from import competition and to manage prices and supply. It states that the lack of predictability with regard to tariff rates makes it difficult for US exporters to forecast the cost of doing business with Brazil.
- Ethanol tariff-rate quota (TRQ). The report strongly objects to Brazil's implementation of a TRQ on ethanol imports in September 2017, which ended reciprocal duty-free trade in ethanol between the world's largest ethanol consumers and producers.
- Non-automatic import licenses. The report lists US exporters' complaints about Brazil's non-automatic import license procedures in several sensitive sectors, such as agricultural commodities, pharmaceuticals, footwear, textiles and apparel, and automobiles and automotive parts.
- Conformity assessment requirements. The report highlights complaints about conformity assessment procedures for telecommunications products and equipment, toys and medical devices.
- Wine and spirits. US industry remains concerned about certain requirements that restrict importation of US wine and spirits, such as requirements on labeling of sugar content, restrictions on the use of certain food additives



applied to spirit-based beverages, use of certain grape varieties allowed for production of fine wine, and use of certain pesticides.

- Tax incentives for the automotive sector. On November 8, 2018, Brazil implemented a new tax incentive program, known as “Rota 2030”, for the improvement of energy efficiency and car safety in the automotive sector. This program replaced “Inovar-Auto”, a program that the WTO ruled inconsistent with Brazil’s WTO obligations in January 2019. The NTE Report questions whether the new program only benefits domestic manufacturers and does not apply to automobile importers.
- Subsidies. The Report details some positive developments that have taken place with regard to government subsidies, although some US concerns remain on certain programs, including the provision of preferential loans that are conditioned on the use of local content. According to the Report, the US will closely monitor Brazil’s agricultural domestic support programs for cotton, corn, rice, soybeans and wheat in meetings of the WTO Committee on Agriculture.
- Intellectual property. Brazil remained on USTR’s Special 301 Watch List in 2018. Major US concerns relate to, *inter alia*, high levels of counterfeiting and piracy online and offline; weak IP enforcement at the tri-border region between Argentina, Brazil and Paraguay; delays in the review of patent and trademark applications; and lack of pharmaceutical test data protection.
- Services barriers. Certain services sectors are heavily regulated and challenging for foreign service providers, including audiovisual services; express delivery; insurance and financial services; and telecommunications services.

## Korea

The report details several new and longstanding US concerns regarding alleged trade barriers maintained by Korea, including with respect to agriculture, digital trade, and services. However, this year’s report also touts recent “modifications and amendments” to the United States-Korea Free Trade Agreement (KORUS) that entered into force in January 2019, which in the view of the Trump administration will benefit US exporters particularly in the automotive sector. We discuss the most significant issues highlighted in the report below.

### New developments in the 2019 NTE

- KORUS improvements in the auto sector. The report notes that, as part of the recent renegotiation of KORUS, Korea has agreed to take a number of actions that will facilitate US automotive exports. These include (1) doubling from 25,000 to 50,000 the number of US-origin vehicles per manufacturer per year that may be imported and sold in Korea that meet US safety standards in lieu of Korean safety requirements; (2) expanding the “eco-credit cap” from 14 grams to 17.9 grams, which is identical to the US cap; and (3) harmonizing emission requirements and testing standards for gasoline engine vehicles with US EPA requirements and standards, thereby allowing vehicles exported to Korea to show compliance with Korea’s gasoline emissions standards using the same tests they conduct to show compliance in the United States.
- Dispute over competition policy enforcement. The report states that US firms have raised concerns that the Korea Fair Trade Commission (KFTC) “has targeted foreign companies with aggressive enforcement efforts” and that the agency’s procedures violate Korea’s KORUS obligations because they inhibit the ability of companies to adequately defend themselves during investigatory proceedings and hearings. The report claims that recent proposed amendments to Korea’s Monopoly Regulation and Fair Trade Act do not “meaningfully” address these concerns, and notes that, as a result, the United States on March 15 “requested the first ever consultations with the Republic of Korea under the chapter on Competition-Related Matters of [KORUS].”

- Origin verification. The report notes that, in the context of the 2018 KORUS agreement amendment discussions, Korea agreed to “specific systemic changes to its origin verification procedures”, which have previously been a concern for US companies.
- E-commerce. The report includes a new claim that certain Korean measures limit foreign electronic commerce suppliers from selling products and services denominated in local currency, the Korean won, and that “[b]y requiring firms seeking to offer won-denominated products and services to register as payment gateways to be able to process such transactions, Korea effectively limits cross-border distribution services, since Korea requires a local entity to hold the payment gateway registration.”
- SPS restrictions on horticultural products. The United States is seeking to resolve alleged SPS barriers that limit export of a variety of horticultural products to Korea.
- Pharmaceutical pricing. The report claims that, although amendments made in December 2018 removed “discriminatory elements” of Korea’s premium pricing system for pharmaceuticals, they also narrowed the program’s scope “in a manner that may dramatically limit the ability of any company, foreign or domestic, to qualify for premium pricing.”

#### **Other alleged barriers**

- Digital trade and e-commerce. The report highlights a range of alleged data localization requirements and other restrictions, including “restrictions on the export of location-based data”; “stringent requirements on service providers seeking to transfer customer data outside Korea”; protections for personal data that “appear to discriminate against any suppliers reliant on foreign data storage and processing”; “facilities localization requirements with respect to payment gateway services”; and policies that “have the effect of favoring local cloud computing providers suppliers to the detriment of foreign service suppliers.”
- TBT issues. The report expresses concerns about Korea’s regime for registering and evaluating chemicals under the Registration and Evaluation of Chemicals (K-REACH) Act, including alleged lack of guidance on its implementation, insufficient time for companies to implement the requirements, and lack of protection for confidential business information.
- SPS issues. Korea’s regulatory system for agricultural biotechnology “continues to present challenges to U.S. agricultural exports.” In addition, while the United States and Korea in 2008 reached a bilateral agreement to fully reopen Korea’s market to US beef and beef products, as a transitional measure such products imported into Korea must be derived from animals less than 30 months of age. The report also claims that certain beef products are still prohibited for importation. Other alleged market access challenges are cited regarding fruit, potatoes, and Korea’s use of maximum residue limits.
- Government procurement. According to the report, the Korean government requires network equipment procured by government agencies to undergo additional verification in Korea by Korean government authorities, even if the products received certification under the Common Criteria Recognition Arrangement outside Korea.
- Services barriers. The report highlights alleged barriers to the provision of audiovisual services, including screen and broadcast quotas for foreign content, as well as financial services, franchising services, and telecommunications services.
- Investment. According to the report, US investors have on occasion raised concerns about “possible discrimination and lack of transparency” in investment-related regulatory decisions in Korea, including decisions

by tax authorities. The report also flags sector-specific investment restrictions related to television broadcasting, agriculture and power generation.

## US FTA Developments

### US-Mexico-Canada Agreement Faces Difficult Path to Congressional Approval

In recent weeks, the Trump administration and members of the US business community have continued to engage with the US Congress to advocate congressional approval of the US-Mexico-Canada Agreement (USMCA), which they have identified as a top priority. However, several recent developments have reinforced our view that Congress is unlikely to approve the Agreement this year or in 2020. Opposition to the Agreement among congressional Democrats – including some members of the moderate “New Democrat Coalition” – appears to be intensifying, and the House Democratic leadership has joined labor groups and progressive Democrats in demanding renegotiation of the USMCA text and implementation of Mexican labor reforms prior to House consideration of the Agreement.

In addition, the Trump administration has remained unwilling to eliminate its Section 232 restrictions on Canadian and Mexican steel and aluminum, which Members of both parties have cited as a precondition for any vote. Finally, the US International Trade Commission’s (ITC) recent economic assessment of the USMCA prompted prominent congressional Democrats to criticize the Agreement, despite the ITC’s topline findings that the USMCA would produce small economic gains for the United States.

#### Speaker Pelosi comments on renegotiation and Mexican labor reform

House Speaker Nancy Pelosi (D-CA) indicated this month that her previously-stated concerns about the USMCA’s enforcement provisions can be resolved only through renegotiation of the USMCA text, and that the Trump administration’s preferred approach (*i.e.*, to address such concerns in the USMCA implementing legislation) would be insufficient. She stated that “enforcement has to be in the treaty, not in the implementing legislation” because implementing legislation “only bears on how we act,” rather than on the actions of the other USMCA parties. Speaker Pelosi also declared that the House of Representatives “can’t even consider” the USMCA until Mexico has not only enacted, but also implemented, reforms to its labor laws that were specified in the USMCA. She said that “[w]e have to see that [Mexico passes] the legislation, that they have the factors in place that will make sure it’s implemented and they demonstrate some commitments in sincerity...we have to see the evidence of what’s happening, not only that they pass the bill but implement the policy.”

These demands are a significant obstacle to the USMCA’s passage. All three USMCA parties have rejected the possibility of renegotiating the agreement – a position that Mexico reiterated after Speaker Pelosi’s comments – and the process would likely be time-consuming and contentious even if the parties agreed to do so. Moreover, making US congressional consideration of the USMCA contingent on Mexico’s implementation of labor reforms – which entail, among other things, the creation of new administrative bodies and labor courts – could delay that consideration by several weeks if not longer. Though the Mexican Congress is expected to enact labor reform legislation by May 1, observers have noted that the budget and regulations of the new administrative body and labor courts must subsequently be submitted to the Mexican Congress and approved, and that implementation of the reforms therefore will not be immediate.

Notably, key labor groups such as the AFL-CIO have taken the same position as Speaker Pelosi regarding the preconditions for a USMCA vote. AFL-CIO President Richard Trumka stated this month that the text of the agreement must be renegotiated to fix “enforcement” issues, and that Mexico must implement labor reforms before a USMCA vote can proceed. He expressed skepticism that Mexico can enact and implement the necessary labor reforms in time for the USMCA to be approved during the summer of 2019.

## House Democrat letters on USMCA

On April 9, House Ways and Means Committee Chairman Richard Neal (D-MA) sent a letter<sup>4</sup> to USTR Robert Lighthizer explaining that “in the next days, you will be hearing more from my colleagues and from me about our concerns with the new agreement,” including with respect to labor and environmental standards, enforcement, and “access to affordable healthcare.” House Democrats subsequently sent four letters to USTR Lighthizer raising concerns about the USMCA. Notably, all four letters were signed by members of the moderate New Democrat Coalition, whose votes are considered essential to securing the approval of the USMCA implementing legislation in the House of Representatives.

- **Labor chapter.** An April 11 letter<sup>5</sup> from 25 House Democrats questions whether the USMCA “will lead to meaningful and lasting labor reform in Mexico.” In particular, it expresses concerns regarding “the enforceability of the violence and intimidation provision,” as well as provisions that were designed to address perceived shortcomings in labor chapter language that were “exposed” by a recent CAFTA-DR panel report. It also warns that “the dispute settlement mechanism applicable to the new Agreement’s labor – and other – obligations, are designed to be easily frustrated and will be ineffective...it should be obvious that enforcement in an improved, new NAFTA cannot rely on the broken elements of the existing NAFTA’s dispute settlement procedures.” Signatories of the letter included Chairman Neal, House Ways and Means Trade Subcommittee Chairman Earl Blumenauer (D-OR), and several members of the New Democrat Coalition (Reps. Ron Kind (D-MI); Terri Sewell (D-AL); Suzan DelBene (D-WA); Brendan Boyle (D-PA); Tom Suozzi (D-NY); Stephanie Murphy (D-FL); and Steven Horsford (D-NV)).
- **Environment chapter.** A letter<sup>6</sup> sent by the same group of lawmakers on April 17 states that “we are particularly disappointed” that the USMCA environment chapter (i) “fails to incorporate the May 10 framework requiring parties to adopt, maintain, and implement all seven of the relevant multilateral environmental agreements”;<sup>7</sup> (ii) “lacks any apparent provisions directed at mitigating the effects of climate change”; and (3) contains rules that are “nowhere near equivalent to current U.S. law” regarding trade in illegally taken animal and plant products. Like the labor letter, it also warns that the USMCA’s dispute settlement provisions “are designed to be easily frustrated”, and “cannot rely on the broken elements of the existing NAFTA’s dispute settlement procedures.”
- **Dispute settlement.** A letter<sup>8</sup> sent by the same group of lawmakers on April 25 notes that, in a NAFTA dispute brought by Mexico against the United States in 2000, the United States managed to prevent the formation of the arbitral panel, and that “no other case has ever been resolved through NAFTA’s state-to-state mechanism since.” The letter claims that “the new Agreement’s mechanism for resolving disputes carries over NAFTA’s

<sup>4</sup> Chairman Neal’s letter is available here:

[https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2019.04.09\\_Ltr%20from%20Chairman%20Neal%20to%20Amb.%20Lighthizer%20re%20NAFTA%20Replacemen....pdf](https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2019.04.09_Ltr%20from%20Chairman%20Neal%20to%20Amb.%20Lighthizer%20re%20NAFTA%20Replacemen....pdf)

<sup>5</sup> The April 11 letter from 25 House Democrats is available here:

<https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2019.04.11%20WM%20Dem%20Ltr%20to%20Amb%20Lighthizer%20re%20NAFTA%20Labor.pdf>

<sup>6</sup> The letter relating to the USMCA environment chapter is available here:

<https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/2019.04.17%20WM%20Dem%20Ltr%20to%20Amb%20Lighthizer%20re%20NAFTA%20Environment.pdf>

<sup>7</sup> The “May 10 framework” refers to an agreement reached by the George W. Bush Administration and congressional Democrats on May 10, 2007 setting out agreed principles on labor, environment, IPR, government procurement, and foreign investment to be applied to four FTAs under consideration at that time: Colombia, Panama, Peru, and South Korea. The May 10 framework has since been viewed by Congressional Democrats as a benchmark that should be met or exceeded in all new US trade agreements.

<sup>8</sup> The letter relating to the USMCA dispute settlement mechanism is available here: <https://waysandmeans.house.gov/media-center/press-releases/ways-means-committee-democrats-emphasize-importance-enforcement>

flawed procedures”, and therefore questions whether disputes “over broken promises in the labor, environment, or any other chapter in [the USMCA] will lead to recourse or remedy[.]”

- **Mexican labor reforms.** A letter<sup>9</sup> sent by 85 House Democrats on April 12 discusses labor law reform efforts in Mexico. It warns that “labor law reform that meets or exceeds [USMCA Annex 23-A] in every respect must be a prerequisite” to a US House vote on the USMCA. It further warns that “without swift and certain enforcement mechanisms—which the deal currently lacks—the new labor and environmental protections in the deal will have *no effect*.” Signatories of the letter included members of the Congressional Progressive Caucus as well as Members of the New Democrat Coalition (Reps. Brendan Boyle (D-PA); Charlie Crist (D-FL); and Tom Suozzi (D-NY)).

The above letters indicate that some moderate Democrats are taking positions similar to those articulated by Speaker Pelosi, progressive Democrats, and labor groups regarding the USMCA, including the overarching concern that the USMCA’s dispute settlement provisions are ineffective. Moreover, some moderate Democrats have recently appeared sympathetic to Speaker Pelosi’s demands for renegotiation of the USMCA text. For example, Rep. Kind, who serves as Co-Chair of the New Democrat Coalition’s Trade Task Force, stated this month that “we need a better explanation from [USTR Lighthizer] and Canada and Mexico why it would be so difficult to go in and tweak the agreement, make those changes in the body as opposed to doing something outside the agreement.” These developments represent a setback for the Trump administration, which is targeting moderate House Democrats in its effort to secure approval of the implementing legislation.

#### **Lack of progress on removal of Section 232 tariffs**

Several Members of Congress – including Senate Finance Committee Chairman Chuck Grassley (R-IA) – have taken the position that the United States’ Section 232 tariffs on steel and aluminum from Canada and Mexico must be removed before Congress considers the USMCA. However, negotiations between the United States, Canada and Mexico regarding the removal of the restrictions appear to have stalled due to the United States’ continued insistence that the Section 232 tariffs be replaced by quotas. The United States reportedly has shown no flexibility on this issue, including with respect to the proposed quota volumes, citing the need to maintain the overall level of protection provided to the domestic industry by the Section 232 measures. Canadian Ambassador David MacNaughton stated earlier this month that “[t]here are no negotiations at the present moment [on Section 232]...there have been what I would describe as restating positions.” It is unclear whether the Trump administration will yield on this issue, particularly given the President’s personal opposition to reducing the level of protection for US steel and aluminum producers under Section 232. However, failure to do so could cost the administration crucial support for the USMCA, including among some Republicans who have insisted that they will not vote for the Agreement unless the tariffs are removed.

#### **ITC report**

On April 18, the ITC released its economic assessment of the USMCA, as required by section 105(c) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. The ITC projected that the USMCA would increase US real GDP by \$68.2 billion (0.35%) and US employment by 176,000 jobs (0.12%), in contrast with a recent IMF study which projected that the agreement would have a negligible effect on GDP. Though the administration touted the ITC’s findings, experts have noted that the ITC employed a different methodology than it has used in past FTA assessments, and that the new methodology assigned greater weight to “provisions that reduce policy uncertainty” related to international data transfer, cross-border services, and investment. When such provisions are excluded from the analysis, the ITC finds that the USMCA would decrease US real GDP by 0.12% and

<sup>9</sup> The April 12 letter on Mexico’s labor law reform efforts is available here: [https://pascrell.house.gov/uploadedfiles/letter\\_mexico\\_labor\\_signed\\_041219.pdf](https://pascrell.house.gov/uploadedfiles/letter_mexico_labor_signed_041219.pdf)

US employment by 0.04%. The ITC also found that, while the USMCA's automotive rules of origin would lead to a net increase of 28,000 jobs, they also would (i) increase vehicle prices (prompting a decline in vehicle consumption), (ii) reduce US vehicle production, employment in vehicle production, and exports; and (iii) lead to an increase in US imports from outside North America. Perhaps anticipating such findings, USTR published its own report (on the same day as the ITC report) claiming, based on information collected from US automakers, that the USMCA auto rules would lead to significant increases in US automotive investments and employment. However, observers have noted that many of the investment decisions touted in the report predate the USMCA (and in some cases, the Trump administration).

Despite the ITC report's positive topline findings, its release prompted key congressional Democrats to criticize the USMCA. Chairman Neal stated that "we must closely review analyses of the terms of the agreement relating to labor, environment, enforcement, and intellectual property, as I remain concerned that these portions of the renegotiated deal are not yet acceptable." Senate Finance Committee Ranking Member Ron Wyden (D-OR) said that the report "confirms what has been clear since this deal was announced – Donald Trump's NAFTA represents at best a minor update to NAFTA, which will offer only limited benefits to U.S. workers." House Ways and Means Trade Subcommittee Chairman Earl Blumenauer stated that "[b]efore the release of the ITC report, I believed that the renegotiated NAFTA, as written, needed to be improved before House consideration. Nothing in this report alleviates those concerns."

## Outlook

As these events show, the Trump administration has encountered major obstacles in its effort to secure congressional approval of the USMCA, and Democratic opposition to the Agreement appears to be intensifying. The 2020 presidential election, which will be in full swing later this year, will exacerbate these challenges. We therefore see only a brief political window (*i.e.*, this summer or early fall) during which approval of the USMCA by the current Congress is politically feasible. However, this would require quick action on the part of the administration. Indeed, even if USTR were to submit the draft statement of administrative action for the USMCA on May 1, it would not be able to submit the implementing legislation until June 4, based on the current congressional schedule and the requirements set forth in TPA. This would leave just 27 legislative days for the House to consider the agreement before the August congressional recess, meaning that the House could not approve the Agreement this summer unless it agreed to act far quicker than the TPA timelines require (which appears unlikely). Assuming the implementing legislation is introduced on June 4, a House Ways and Means Committee vote would not be required under TPA until October 21, a House floor vote would not be required until November 21, and a final vote in the Senate would not be required until February 7, 2020, based on the current legislative schedule.

Moreover, the submission of the implementing legislation could be delayed further if congressional Democrats continue to insist upon renegotiation of the USMCA text, implementation of Mexican labor reforms, and other accommodations prior to consideration of the bill, and the Trump administration remains reluctant to submit the bill over Democratic objections (which would greatly diminish its chances of approval). Thus, unless the Trump administration is able to quickly satisfy or persuade Democratic lawmakers to drop their demands, which currently appears unlikely, congressional consideration of the implementing legislation will be pushed well into the 2020 presidential election cycle, making it far more difficult to secure approval of the bill. We therefore see a less than 30% chance that Congress approves the USMCA implementing legislation this year or in 2020.