

US & Multilateral Trade Policy Developments

Japan External Trade Organization

May 2019

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US Trade Actions

Section 301

USTR Indicates Section 301 Exclusion Process to be Established for “List 3” Goods

In early May, 2019, the Office of the US Trade Representative (USTR) indicated in a communication to Congress that it would soon allow interested parties to request the exclusion of particular products from the 10% additional tariff USTR has imposed on approximately USD \$200 billion worth of China-origin goods under Section 301 of the Trade Act of 1974. USTR already has established exclusion processes for the first two tranches of products covered by the

Section 301 action, which together are valued at \$50 billion and are subject to an additional duty of 25%. However, USTR until recently had maintained that it would establish an exclusion process for the third (\$200 billion) list of goods only if the ongoing US-China trade negotiations were unsuccessful and the United States therefore increased the duty rate on such goods to 25% (which indeed took place on May 10, 2019). Congress and the US business community have repeatedly urged USTR to establish a List 3 exclusion process.¹

USTR Robert Lighthizer indicated that USTR would establish an exclusion process for List 3 goods in a written response to “questions for the record” submitted by Rep. Suzan DelBene (D-WA) after a February 27 House Ways and Means Committee hearing.² In his written response, which reportedly was transmitted in April and was made public in early May, USTR Lighthizer noted his past position that USTR would initiate an exclusion process for List 3 “if the duty rate on those tariffs were raised to 25 %.” However, he acknowledged that “Members of Congress believe that we should have an exclusion process for List 3”, and stated that “[f]or this reason, we have begun preparations to launch a process by the end of the month [*i.e.*, April].”

Despite Ambassador Lighthizer’s statement, USTR has not yet established the new exclusion process, and it remains unclear if (or when) USTR will do so, particularly given the ongoing bilateral negotiation in which the United States and China are discussing the possible removal of some or all of the Section 301 tariffs. The outcome of that negotiation remains uncertain. Ambassador Lighthizer’s statement could be viewed as an indication that a US-China deal is not imminent, or that the List 3 tariffs (or a portion thereof) will remain in place for a substantial period of time even after an agreement is reached. Its publication might also be viewed as a negotiating tactic (*i.e.*, to show the Chinese Government that the United States is ready to walk away from the talks). Absent further clarification, therefore, Ambassador Lighthizer’s statement is likely to prompt mixed reactions from the US business community, which on one hand has advocated a List 3 exclusion process but has also sought the full and immediate removal of all Section 301 tariffs upon signing of a US-China agreement.

If USTR does establish a product exclusion process for List 3, the process will likely mirror the ones that USTR established for Lists 1 and 2. In both cases, USTR published a Federal Register notice inviting interested parties to submit exclusion requests and setting out the criteria that should be addressed in such requests.³ All exclusion requests were due within a relatively short timeframe of approximately 90 days after the notice’s publication, and USTR has not subsequently re-opened the process for further exclusion requests or stated if it will do so. USTR received more than 13,700 exclusion requests for products on Lists 1 and 2 (of which more than 6,900 remain pending), and less than 1,500 requests have been approved so far. USTR is likely to receive many more requests for List 3, given its annual trade value of \$200 billion (compared to \$50 billion for Lists 1 and 2).

Due to the challenges involved in the existing Section 301 exclusion process and the uncertain outcome of ongoing negotiations with China, interested parties may wish to monitor closely any announcements from USTR regarding the initiation of the exclusion process for List 3.

¹ Notably, an explanatory statement issued by congressional appropriators in February alongside the *Consolidated Appropriations Act of 2019* directed USTR to establish an exclusion process for products subject to the Section 301 tariffs on List 3 goods. Such explanatory statements are not legally binding, but the directives contained therein usually are followed by agencies. Nevertheless, USTR declined to establish the List 3 exclusion process, even after the Act was signed into law.

² The written response is available here: https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Rep.%20DelBene%20QFR%20Responses_0.pdf

³ USTR stated that each request for exclusion 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 U.S. interests; and
- Whether the particular product is strategically important or related to “Made in China 2025” or other Chinese industrial programs.

President Trump Threatens Section 301 Tariff Increase on “List 3” Goods and Fourth Round of Tariffs Ahead of Bilateral Negotiations with China

On May 5, 2019, President Trump announced that he intends to increase the Section 301 tariff rate on approximately \$200 billion worth of “List 3” Chinese imports to 25% (from the current rate of 10%) beginning on Friday, May 10, 2019. He further threatened to impose an additional tariff of 25% on approximately \$325 billion worth of annual Chinese imports that are not currently subject to Section 301 tariffs. President Trump’s announcement came as a Chinese delegation led by Vice Premier Liu He was preparing to travel to the United States on Wednesday, May 8 for bilateral trade negotiations with the United States. According to US officials, the announcement was prompted by recent difficulties in the bilateral negotiations, which are in an advanced stage but continue to encounter obstacles related to technology transfers and other issues. US officials also confirmed late on Monday, May 6, that the Federal Register notice announcing the tariff increase, effective Friday morning, would be issued the following day (Tuesday, May 7).

We discuss these developments and their implications below.

Potential Section 301 tariff increase and new Section 301 tariffs

As of May 6, the Office of the US Trade Representative (USTR) had not issued a formal Federal Register notice implementing the threatened tariff increase on the List 3 Chinese imports. However, USTR Robert Lighthizer stated late in the day on Monday that the notice will be published tomorrow (*i.e.*, May 7), and that the tariff increase will be scheduled to take effect at 12:01am EDT on Friday, May 10. The threatened tariff increase on List 3 goods was previously scheduled to occur on March 1, 2019, but USTR issued a Federal Register notice postponing the increase “until further notice” at the direction of President Trump, who cited “substantial progress” in the bilateral negotiations (*please refer to the W&C US Trade Alert dated March 1, 2019.*)

USTR Lighthizer did not explain whether the forthcoming Federal Register notice (or a separate notice) will address President Trump’s separate threat of an additional 25% tariff on \$325 billion in imports from China that are not currently subject to Section 301 tariffs. Such an action would represent a major escalation of the US-China trade dispute.

Ongoing US-China negotiations

President Trump’s announcement was prompted by recent challenges that have emerged in the ongoing bilateral negotiations between the United States and China, and appears to be aimed at maximizing US leverage over China in those negotiations. The negotiations, which have been ongoing for six months, are considered by some US officials and business groups to be in the “endgame” stage, and administration officials previously said that they hoped to reach an agreement with China during the negotiating round scheduled for this week. However, during a negotiating round held last week in Beijing, China allegedly backtracked on commitments the United States believed China previously had made in the negotiations, according to US officials. USTR Lighthizer stated on May 6 that “[w]e felt we were on track to get somewhere. Over the course of the last week, we have seen an erosion of commitments by China.” He did not elaborate.

According to published reports, however, several major sticking points have emerged in recent days:

- First, China previously committed to enact domestic legal changes to address US concerns regarding forced technology transfers – one of the key “structural issues” the United States has emphasized in the Section 301 investigation – but last week stated that it would not accept any agreement language requiring changes to Chinese law. US officials previously considered that the negotiations regarding technology transfers were resolved, and viewed the move as an attempt by China to renegotiate settled language (indeed, President

Trump's May 5 statement references China's alleged "attempt to renegotiate", and USTR Lighthizer accused China of "reneging" on its previous commitments.)

- In addition, multiple sources have reported that the United States has made significant concessions in the talks in recent weeks in an attempt to conclude a deal – including by dropping demands with respect to industrial subsidies and cyber-theft of trade secrets, which also were emphasized in the Section 301 investigation – but that China reportedly continues to resist concessions on many US priorities (e.g., data localization, cloud computing, pharmaceutical and intellectual property issues, and biotechnology).
- Finally, China has sought the full and immediate elimination of the Section 301 tariffs, whereas the United States is seeking to keep at least some of the tariffs in place until China has implemented its commitments under the agreement. USTR Lighthizer stated today that this issue remains unresolved.

In this context, President Trump's threat appears to be aimed at extracting last-minute concessions from China on technology transfer and other issues during this week's negotiations. However, the move also heightens the risk that the talks collapse altogether. China's Foreign Ministry stated on May 6 that China still intends to send a delegation to the United States this week to continue the bilateral negotiations, despite President Trump's announcement. This could change, however, particularly given that USTR Lighthizer has confirmed that USTR will publish a formal Federal Register notice to implement the threatened tariff increase – something that cannot be easily reversed at the last minute. Moreover, China might refuse to engage in further negotiations if the tariff increase ultimately is imposed, and would likely respond to such action by retaliating further against US exports and companies.

Outlook

A collapse in the US-China talks would have significant ramifications beyond the direct impact of the associated tariff increases on importers, exporters, and consumers. Indeed, the US financial markets have appeared sensitive to developments in the US-China negotiations, but still appear to expect that a final deal will emerge in the coming days or weeks. Thus, a collapse in the talks would likely cause a significant negative market reaction. The Trump administration's desire to avoid this outcome (and, conversely, to prompt a positive market reaction should the talks succeed) ahead of the 2020 presidential election has been one of its principal motivations for seeking an agreement with China. The Chinese government also has appeared motivated to reach an agreement, given the magnitude of Chinese exports to the United States and its desire to avoid further economic turmoil. Moreover, the threatened US tariff increase on "List 3" goods, as well as new tariffs on China-origin goods not yet covered by the Section 301 measures, could prompt domestic legal challenges from US business groups, who have warned that they consider such actions to be inconsistent with US law. For these reasons, and given the overall status of the negotiations, it remains possible that the two sides will reach an agreement that averts the threatened tariff increase on "List 3" goods and other Chinese imports. Nevertheless, President Trump's threat has injected significant new uncertainty into the negotiations, and has provided only a very brief window for the two sides to resolve the complex and sensitive issues that remain.

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measures, could prompt domestic legal challenges from US business groups, who have warned that they consider such actions to be inconsistent with US law. For these reasons, and given the overall status of the negotiations, it remains possible that the two sides will reach an agreement that averts the threatened tariff increase on “List 3” goods and other Chinese imports. Nevertheless, President Trump’s threat has injected significant new uncertainty into the negotiations, and has provided only a very brief window for the two sides to resolve the complex and sensitive issues that remain.

US Trade Representative Issues Federal Register Notice to Implement May 10th Tariff Increase on “List 3” Chinese Goods; Chinese Delegation to Visit Washington on May 9th

On May 8, 2019, the Office of the US Trade Representative (USTR) published a draft Federal Register notice increasing the Section 301 tariff rate on approximately \$200 billion worth of “List 3” Chinese imports to 25% (from the current rate of 10%), effective at 12:01am EDT on Friday, May 10, 2019 **but** only with respect to goods exported to the United States on or after May 10 and subsequently entered for consumption – thus sparing China-origin goods already *en route* (or soon to be *en route*) to the United States but landing after May 9, 2019. The notice also confirms that USTR will establish a process by which List 3 goods may be excluded from the 25% duty, but leaves details regarding the process itself to a future notice.

The Federal Register notice is scheduled for official publication in the Federal Register on Thursday, May 9. USTR Robert Lighthizer announced on Monday, May 6 that USTR would issue the notice at the direction of the President and because, in the view of the Trump administration, China recently “[retreated] from specific commitments that have already been made” in the ongoing bilateral negotiations between the two countries – a move that the United States considers to be “unacceptable.” (*For additional information, please refer to the W&C US Trade Alert dated May 6, 2019.*)

Following USTR Lighthizer’s statement, China’s Ministry of Commerce stated that China’s Vice Premier, Liu He, still plans to visit the United States from May 9 to 10 to continue the bilateral negotiations. However, China also has pledged to retaliate should the United States implement its threatened tariff increase on May 10. US officials have acknowledged that the two sides could potentially reach an agreement this week that would avert the tariff increase, but the current state of the discussions and the limited time available for further negotiations has heightened doubts that such an agreement will be reached.

USTR’s Federal Register notice does not reference the potential fourth round of Section 301 tariffs that the Trump administration has threatened to impose on the remaining \$325 billion in annual US imports from China that are not now subject to Section 301 duties. However, USTR Lighthizer indicated on Monday that USTR might publish a separate Federal Register notice proposing such tariffs for public comment this week, signaling that the US-China trade dispute could escalate even further in the coming days.

We discuss these developments and their implications below.

Federal Register notice on “List 3” tariff increase

USTR’s Federal Register notice states that the United States continues to engage with China “with the goal of obtaining the elimination of the acts, policies, and practices” covered in the Section 301 investigation, but that “[i]n the most recent negotiations, China has chosen to retreat from specific commitments agreed to in earlier rounds.” Thus, “in light of the lack of progress in discussions with China, the President has directed the Trade Representative to increase the rate of additional duty to 25 percent” on products covered by USTR’s third (\$200 billion) tariff action in the Section 301 investigation. Such products are currently subject to an additional duty of 10 percent.

Effective date and exemption for goods in transit

The notice states that the tariff increase on List 3 goods will be effective with respect to goods that are (i) entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 10, 2019; and (ii) exported to the United States on or after May 10, 2019. Thus, the notice appears to exclude from the increased tariff rate goods that are shipped from China prior to May 10 but enter the United States on or after the effective date of the tariff increase. Consequently, subject merchandise already in transit to the United States (*e.g.*, goods that were exported before the United States announced the tariff increase) may be able to enter at the previous Section 301 duty rate of 10%, provided that the importer can demonstrate that the goods were exported before May 10.

USTR's prior Section 301 actions have not provided such exemptions for goods in transit, but USTR may have done so in this case due to the unusually short notice given to importers regarding the coming tariff increase. USTR's notice does not specify how parties can demonstrate that goods were exported prior to May 10, but forthcoming announcements from US Customs and Border Protection may provide instructions on this point. Customs regulations and guidance indicate that the date of export would be the date the merchandise finally leaves the country of export for the United States. Our informal discussions with CBP for confirmation on determining the date of export have thus far provided no additional guidance.

List 3 exclusion process confirmed

The notice confirms that USTR will establish a process by which interested persons may request that particular products on List 3 be excluded from the 25% duty. USTR has stated that it will publish a separate notice describing the product exclusion process, including the procedures for submitting exclusion requests, and an opportunity for interested persons to submit oppositions to a request. USTR did not specify when it will initiate the List 3 exclusion process, but it will likely do so within the next several weeks. The exclusion processes for Lists 1 and 2 were initiated approximately 3 weeks and 5 weeks, respectively, after USTR announced the imposition of tariffs on such products.

If USTR does establish a product exclusion process for List 3, the process will likely mirror the ones that USTR established for Lists 1 and 2. In both cases, USTR published a Federal Register notice inviting interested parties to submit exclusion requests and setting out the criteria that should be addressed in such requests. All exclusion requests were due within a relatively short timeframe of approximately 90 days after the notice's publication, and USTR has not subsequently re-opened the process for further exclusion requests or stated if it will do so. USTR received more than 13,700 exclusion requests for products on Lists 1 and 2 (of which more than 7,000 remain pending), and less than 1,500 requests – covering a small portion of covered goods – have been approved so far. USTR is likely to receive many more requests for List 3, given its annual trade value of \$200 billion (compared to \$50 billion for Lists 1 and 2).

Given the challenges involved in the existing Section 301 exclusion process, the increased duty rate on List 3 goods, and the current difficulties in the bilateral negotiations with China, interested parties may wish to monitor closely any announcements from USTR regarding the List 3 exclusion process and prepare to submit exclusion requests as soon as possible after the process is initiated.

No mention of potential "List 4" tariffs

USTR's Federal Register notice does not reference the potential fourth round of Section 301 tariffs that the Trump administration has threatened to impose on the remaining \$325 billion in annual US imports from China that are not currently subject to Section 301 duties. However, USTR Lighthizer indicated on Monday that USTR might publish a separate Federal Register notice proposing such tariffs this week.

If USTR does propose a fourth tariff action in the Section 301 investigation, it will likely follow the same process it used prior to the implementation of the first three tariff actions. In those instances, USTR issued a Federal Register

notice (1) containing a proposed list of products to be subject to additional tariffs; (2) requesting public comments on whether products should be removed from (or added to) the list based on certain criteria (with a comment deadline approximately one month after the date of the notice); and (3) scheduling a public hearing on the proposed tariff list approximately one month after the date of the notice. Based on this process, USTR removed certain products from the lists of goods on which tariffs ultimately were imposed (e.g., due to lack of alternative sources for the product or disproportionate economic harm to US interests).

A fourth US tariff action covering the remainder of US imports from China would represent a major escalation of the bilateral trade dispute, and would affect a wide range of products including consumer goods (toys, sports equipment, footwear, and clothing), textiles, electronics and machinery, chemicals, plastics and rubber. USTR has not clarified whether goods that were removed from the first three proposed tariff lists based on public comments would be included on the fourth proposed tariff list.

A full list of the Harmonized Tariff System of the United States (HTSUS) codes and products potentially affected by such tariffs is available upon request.

Outlook

As noted above, China's Ministry of Commerce confirmed on May 7 that Chinese Vice Premier Liu He plans to visit Washington from May 9 to 10, at the invitation of USTR Lighthizer and Secretary Mnuchin, to continue negotiations with the United States. Both US officials during a May 6 briefing indicated that the United States is not walking away from the bilateral negotiations, but that the Trump administration considers China's alleged efforts to renegotiate previously-agreed commitments to be unacceptable. USTR Lighthizer accused China of seeking "substantial and substantive changes" to agreed-upon language that amounted to "reneging on prior commitments", which reportedly related to technology transfer and other issues. He speculated that China did so because "these were serious real commitments that were enforceable and...some people in China found that difficult and objected to it." Secretary Mnuchin stated that China's recent demands represented "a big change in the direction for the negotiations," and that "[w]e are not willing to go back on documents that have been negotiated in the past[.]"

During the same briefing, Secretary Mnuchin indicated that the May 10 tariff increase on List 3 goods could potentially be averted if, during the negotiations scheduled this week, "the [Chinese] team came back and was prepared to meet the commitments that they made to us previously and negotiate in good faith on the remaining issues[.]" Ambassador Lighthizer stated that "[i]f we can get the kind of deal that makes substantial structural changes, the President would like that kind of deal, but that's just not where we are right now[.]" Though the United States has not rejected the possibility of calling off the tariff increase, it currently appears more likely that the increase will occur as scheduled, particularly given the US decision to publish the Federal Register notice, the current state of the bilateral negotiations, and the limited time remaining for further negotiations (indeed, Vice Minister He is not scheduled to arrive in Washington until May 9, less than 24 hours before the tariff increase takes effect). However, the Federal Register notice language tying application of the tariffs to the date of exportation could mute the immediate commercial impact of Friday's tariff increase and buy negotiators more time – *i.e.*, the several weeks it takes for ocean freight to leave China and arrive in the United States – to resolve the current impasse and thereby avert serious financial harm to US and Chinese stakeholders.

Nevertheless, China's Ministry of Commerce warned on May 8 that, if the United States implements the tariff increase on List 3 goods, China "will have to take necessary countermeasures". Such countermeasures are expected to take the form of further tariff increases on US goods. China has not indicated whether it will continue to conduct bilateral negotiations with the United States if the List 3 tariff increase occurs, but there is a significant risk that a US tariff increase on Friday and subsequent Chinese retaliation will cause the negotiations to come to a standstill or collapse altogether (particularly if the United States also goes forward with the threatened "List 4" tariffs

on all remaining Chinese imports). Thus, while many stakeholders had hoped that the ongoing negotiations with China might soon lead to a reduction in the Section 301 tariffs and Chinese retaliation, there is now a real risk that trade restrictions between the two countries will escalate further in the near- to medium-term.

USTR's Federal Register notice is available [here](#).

United States Increases Section 301 Tariff Rate on “List 3” Goods to 25%, Clarifies Treatment of Goods Exported Before May 10

On May 10, 2019, the Section 301 tariff rate on approximately \$200 billion worth of “List 3” Chinese imports increased to 25% (from the previous rate of 10%), after US and Chinese negotiators failed to reach an agreement to avert the scheduled tariff increase. The USTR formally announced the tariff increase in a Federal Register notice published on May 9.⁴ USTR and US Customs and Border Protection (CBP) subsequently have issued new guidance clarifying that List 3 goods exported to the United States prior to May 10 are still subject to the previous (10%) Section 301 duty rate, as long as they are entered into the United States before June 1, 2019 (*on May 31, this deadline was extended to June 15, 2019 – more details below*).

Applicability of increased duty rate on List 3 goods

USTR's May 9 Federal Register notice provides that the tariff increase on List 3 goods will be effective with respect to goods that are (i) entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 10, 2019; and (ii) exported to the United States on or after May 10, 2019. USTR and CBP have subsequently issued guidance clarifying this language. In a second Federal Register notice, USTR clarified that goods exported prior to May 10 are still subject to the previous 10% duty rate, as long as they are entered into the United States before June 1, 2019 (emphasis added):

In a notice published on May 9, 2019 (May 9 Notice), the U.S. Trade Representative (Trade Representative) increased the rate of additional duty from 10% to 25% for the products of China covered by the September 2018 action that are (i) entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 10, 2019, and (ii) exported to the United States on or after May 10, 2019. **This notice provides that products of China that are covered by the September 2018 action and that were exported to the United States prior to May 10, 2019, are not subject to the additional duty of 25%, as long as such products are entered into the United States prior to June 1, 2019. Such products remain subject to the additional duty of 10% for this interim period.**

In addition, CBP has issued guidance clarifying which products will be subject to the 10% duty rate and which will be subject to the increased 25% duty rate. In a May 10 CSMS message, CBP stated the following:

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on May 10, 2019, and exported to the United States on or after May 10, 2019, the rate of additional duties on imported articles classified in a subheading covered by the September 21, 2018 Federal Register notice, as amended, will be 25% ad valorem.

⁴ The Federal Register notice is available here: <https://www.federalregister.gov/documents/2019/05/09/2019-09681/notice-of-modification-of-section-301-action-chinas-acts-policies-and-practices-related-to>

For subject goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on May 10, 2019, and exported to the United States on or after May 10, 2019, report the following HTS numbers and duty rates:

HTS: 9903.88.03 and 9903.88.04
Duty Rate: 25%

For subject goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on May 10, 2019, and before June 1, 2019, and exported to the United States before May 10, 2019, report the following HTS number and duty rate:

HTS: 9903.88.09
Duty Rate: 10%

The subject imports of China that are entered into the United States on or after June 1, 2019 are subject to the 25% rate of additional duty under HTS 9903.88.03 and 9903.88.04.

Based on the above guidance, there are three potential tariff scenarios for List 3 goods exported from China to the United States:

- **Scenario 1:** Goods exported prior to May 10 and entered into the United States prior to June 1, 2019 are subject to a Section 301 duty rate of 10%;
- **Scenario 2:** Goods exported prior to May 10 and entered into the United States on or after June 1, 2019 are subject to a Section 301 duty rate of 25%; and
- **Scenario 3:** Goods exported on or after May 10 are subject to a Section 301 duty rate of 25% if entered into the United States.

On May 31, USTR announced it would extend the amount of time List 3 goods exported from China have to enter the United States before they are subject to an additional tariff increase from 10% to 25%. Goods exported before May 10, 2019 now have until June 15, 2019 (extended from June 1) to enter before they are subject to 25% tariffs. This “limited extension” is to account for “the transit time between China and the United States by sea.”⁵

Outlook

The United States and China continued to hold bilateral negotiations on May 10 following the implementation of the List 3 tariff increase, but they have not confirmed whether the negotiations will continue beyond that date. Shortly after the US tariff increase took effect, China’s Ministry of Commerce (MOFCOM) issued a statement reiterating that China “will have to take necessary countermeasures” in response to the List 3 tariff increase. China has not yet clarified these “countermeasures,” for example by publishing a list of US goods on which it plans to increase import tariffs, but is expected to do so soon. The US tariff increase and expected Chinese retaliation will heighten tensions between the two countries and could potentially lead to a pause (or collapse) of the negotiations.

Even if the two sides agree to continue negotiations in the coming weeks, a quick agreement to reverse the tariff increase on List 3 goods and any Chinese retaliation currently appears unlikely given the state of the negotiations. The differences in the two parties’ positions now appear to be more wide-ranging than previously reported, relating not only to proposed Chinese commitments on technology transfer but also on intellectual property protection and trade secrets, competition policy, financial services, and foreign exchange practices. Resolving such issues quickly

⁵ The USTR press release is available here: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/notice-regarding-application-section>

will be difficult, and we therefore expect the increased Section 301 tariff rate and expected Chinese retaliation to remain in place for the near-term. Moreover, President Trump on May 9 reiterated his threat to impose additional tariffs on the remaining \$325 billion in annual Chinese imports that are not currently subject to Section 301 duties, stating that his administration is “starting the paperwork” necessary to propose such tariffs. It therefore is possible that the US-China trade dispute will escalate even further in the coming weeks and months. Some observers are hopeful that further escalation of the dispute (or a potential stalemate) could potentially be averted through a direct meeting between Presidents Trump and Xi at the June 28-29 G20 summit in Japan, but this is far from guaranteed.

USTR Proposes Fourth Round of Section 301 Tariffs on \$300 Billion Worth of Chinese Imports; China Announces Increased Tariffs on \$60 Billion in US Goods

On May 17, 2019, USTR released a Federal Register notice⁶ proposing additional tariffs on approximately \$300 billion worth of goods imported from China (“List 4”), pursuant to Section 301 of the Trade Act of 1974. The notice proposes additional *ad valorem* duties “of up to 25%” on List 4 goods, *i.e.*, nearly all remaining Chinese goods not already included on Lists 1-3, and establishes a timeline for public comment and a hearing on the proposed tariffs. Significantly, List 4 includes goods that were excluded from prior lists in response to public comments, including all five products omitted from List 2 (containers; alginic acid; splitting, slicing and paring machines; floating docks; and microtomes) in mid-2018.

The key dates announced in USTR’s draft notice are as follows:

- Requests to appear at the public hearing and summaries of testimony are due on June 10, 2019.
- The hearing will take place on June 17, 2019, at which time written submissions are also due.
- Post-hearing comments are due seven days after the final day of hearings. Given the large number of goods at issue, this deadline will likely be on or around June 27, 2019.

Similar to previous tariff proposals, USTR requests that comments on the proposed List 4 tariffs address (i) the specific tariff subheadings to be subject to increased duties, including whether the subheadings listed in the Annex should be retained or removed, or whether subheadings not currently on the list should be added; (ii) the level of the increase, if any, in the rate of duty; and (iii) the appropriate aggregate level of trade to be covered by additional duties.

In commenting on the inclusion or removal of particular tariff subheadings on List 4, USTR requests that commenters also address whether imposing increased duties on a particular product would (i) be practicable or effective to obtain the elimination of China’s acts, policies, and practices at issue in the Section 301 investigation; or (ii) cause disproportionate economic harm to US interests, including small- or medium-size businesses and consumers.

The notice indicates that “the United States and China intend to continue further discussions,” and in remarks made on May 13, President Trump said he had “not made that decision yet” whether to impose the final round of tariffs.

China announces retaliatory tariffs

On May 13, China announced its own retaliatory tariffs covering approximately \$60 billion in goods imported from the United States, in response to the United States’ May 10 “List 3” tariff hike. China’s State Council Tariff Commission (SCTC) issued two notices on May 13:

⁶ The Federal Register notice is available here: <https://www.federalregister.gov/documents/2019/05/17/2019-10191/request-for-comments-concerning-proposed-modification-of-action-pursuant-to-section-301-chinas-acts>

- SCTC Notice No. 3 of 2019⁷ increases tariffs as of June 1, 2019, from the levels currently dictated by SCTC Notice No. 8 of 2018 (September 18, 2018). Tariffs will increase from (i) 10% to 25% on 2493 “List 1” goods; (ii) 10% to 20% on 1078 “List 2” goods; and (iii) 5% to 10% on 974 “List 3” goods. Tariffs will remain at 5% for 595 “List 4” goods. These tariff levels were first proposed by Notice No. 6 of 2018 (August 3, 2018), but were revised downwards by SCTC Notice No. 8 of 2018 following the United States’ decision to impose only 10%, rather than 25%, tariffs on its own List 3.
- SCTC Notice No. 4 of 2019⁸ introduces a product exclusion procedure open to Chinese companies that import, produce, or use products covered by SCTC Notices No. 5, 6, and 7 of 2018. The procedure applies only to products covered by additional tariffs already announced by China which have not been suspended or terminated (such as on vehicles and auto parts). Applications relating to Notices No. 5 and 7 of 2018 shall be filed between June 3 and July 5, 2019, and applications relating to Notice No. 6 of 2018 shall be filed between September 2 and October 18, 2019. Applications will be considered based on (i) the difficulty in searching for alternative sources; (ii) the injury caused by the additional tariff to the economy of the applicant; and (iii) broader negative impacts caused by the additional tariff to the relevant industry or to society. Exclusions, once granted, will be valid for one year.

Outlook

Negotiations are set to continue, and a breakthrough is possible—although perhaps unlikely—before the effects of the latest escalation are fully absorbed by either country. The United States’ List 3 tariff hike took effect on May 10, but it does not apply to goods already in transit from China on that date, so most affected goods are not yet arriving on US shores. Likewise, China’s latest action only takes effect on June 1, leaving a nearly three-week negotiating window prior to enforcement. Furthermore, today’s List 4 notification leaves some flexibility (specifically mentioning that the United States and China would continue negotiations, and proposing tariffs “up to 25%”). In an interview on May 12, Director of the National Economic Council Larry Kudlow said that Chinese officials have invited US Trade Representative Robert Lighthizer to Beijing to continue talks. President Trump also confirmed that he would meet with President Xi at the G-20 summit in late June.

Section 232

President Trump Issues Proclamation Finding National Security Threat from Automotive Imports Under Section 232; Directs USTR to Initiate Negotiations with Japan, the EU, and Other “Appropriate” Countries

On May 17, 2019, President Trump issued a Proclamation⁹ containing his determinations in the US investigation into the effects imports of automobiles and automobile parts on the national security of the United States, pursuant to Section 232 of the Trade Expansion Act of 1962. In the Proclamation, President Trump (i) determines that imports of automobiles and certain automobile parts threaten to impair the national security of the United States (concurring with the Secretary of Commerce’s finding in the investigation); but (ii) delays a final decision on potential automotive import restrictions to allow the USTR to negotiate agreements with Japan, the European Union, and any other country USTR “deems appropriate” to “address the threatened impairment of the national security[.]” The Proclamation does not state what remedies or other actions the President might take if those negotiations fail, nor

⁷ SCTC Notice No. 3 and the four tariff lists are available here (in Chinese): http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201905/t20190513_3256788.html

⁸ SCTC Notice No. 4 and implementing details are available here (in Chinese): http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201905/t20190513_3256786.html

⁹ The Proclamation is available here: <https://www.whitehouse.gov/presidential-actions/adjusting-imports-automobiles-automobile-parts-united-states/>

does it – contrary to earlier media reports – expressly exclude any countries from potential import restrictions. Instead, the Proclamation states only that recently negotiated agreements with Canada, Mexico and Korea “could help to address” the alleged threat to national security. As a result, trade-related tensions in the US and global auto industries will likely remain high for the foreseeable future.

Department of Commerce report and national security determination

The Proclamation provides a brief summary of the Secretary of Commerce’s report on the Section 232 investigation, which was submitted to the President on February 17, 2019 but has not been made public. The Proclamation contains the following information about the Department of Commerce’s report and investigation:

- **Scope.** The Section 232 investigation covered “imports of passenger vehicles (sedans, sport utility vehicles, crossover utility vehicles, minivans, and cargo vans) and light trucks...and certain automobile parts (engines and engine parts, transmissions and powertrain parts, and electrical components)[.]” The categories of automobile parts covered by the investigation had not previously been disclosed. However, the Proclamation does not provide any further details (e.g., specific HTSUS codes) regarding the scope of the investigation or its findings and recommendations.
- **National security determination.** The Secretary’s report concluded that “the present quantities and circumstances of automobile and certain automobile parts imports threaten to impair the national security as defined in section 232.” This determination was based on a finding that American-owned automotive research and development (R&D) “is critical to national security,” but is threatened by automotive imports and closed foreign markets. In particular--
 - “The rapid application of commercial breakthroughs in automobile technology is necessary for the United States to retain competitive military advantage and meet new defense requirements...The United States defense industrial base depends on the American-owned automotive sector for the development of technologies that are essential to maintaining our military superiority.” However, “increases in imports of automobiles and automobile parts...have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers.”
 - Furthermore, “protected foreign markets, like those in the European Union and Japan, impose significant barriers to automotive imports from the United States, severely disadvantaging American-owned producers and preventing them from developing alternative sources of revenue for R&D in the face of declining domestic sales.”
 - Because “[d]efense purchases alone are not sufficient to support . . . R&D in key automotive technologies,” American-owned automobile and automobile parts manufacturers “must have a robust presence in the U.S. commercial market[.]” However, American innovation capacity “is now at serious risk as imports continue to displace American-owned production.” An alleged lag in R&D expenditures by American-owned producers “is weakening innovation and, accordingly, threatening to impair our national security.”

In light of the above factors, the Secretary concluded that automobiles and certain automobile parts are being imported into the United States “in such quantities and under such circumstances as to threaten to impair the national security of the United States.” The Secretary found that such imports are “weakening our internal economy” and that “[t]he contraction of the American-owned automotive industry, if continued, will significantly impede the United States’ ability to develop technologically advanced products that are essential to our ability to maintain technological superiority to meet defense requirements and cost effective global power projection.”

- **Recommendations.** The Proclamation states that, based on the above findings, the Secretary recommended actions to the President to adjust automotive imports, and that “[o]ne recommendation was to pursue

negotiations to obtain agreements that address the threatened impairment of national security.” The Proclamation does not state what other recommendations were provided in the report (e.g., import restrictions).

As noted above, the Trump administration has not published the Secretary’s report on the Section 232 investigation, and it has not indicated when it will do so. Though the statute requires that the report be published, it does not provide a specific deadline for doing so. However, the affirmative determinations made by the Secretary and the President will likely heighten congressional and industry pressure to publish the report so that the reasoning and factual basis for the Secretary’s findings can be scrutinized.

Presidential determinations on national security and appropriate action

The Proclamation contains the following substantive sections:

- **National security determination.** The President concurs “in the Secretary’s finding that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States[.]”
- **Determination on “necessary and appropriate” action.** The Proclamation directs USTR to “pursue negotiation of agreements contemplated in [Section 232 (c)(3)(A)(i)] to address the threatened impairment of the national security with respect to imported automobiles and certain automobile parts from the European Union, Japan, and any other country the Trade Representative deems appropriate.” The President has determined that this action is “necessary and appropriate” to remove the threatened impairment of national security.

The referenced statutory provision affords the President 180 days to negotiate an agreement that “limits or restricts” the subject imports and authorizes him to take additional actions if the negotiations fail, though the Proclamation itself omits the “limits or restricts” language. Under the law, 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.”

The Proclamation does not state what “other actions” the President might take if the negotiations to be conducted by USTR fail. While the Proclamation makes no direct reference to potential import restrictions, it does not rule them out, and the Trump administration is expected to continue using the threat of such restrictions as “leverage” in the proposed negotiations and, perhaps, with other trading partners. However, the Proclamation states only that “[w]ithin 180 days of the date of this proclamation, the Trade Representative shall update [the President] on the outcome of the negotiations[.]” An accompanying White House press release simply states that “if agreements are not reached within 180 days, the President will determine whether and what further action needs to be taken.”

- **Possible country exemptions.** The Proclamation does not exclude any country from potential Section 232 measures on automotive imports, nor does it reference the USMCA side letters in which the United States

agreed to exclude significant volumes of Canadian and Mexican automotive goods from any such measures. It states only that the President, in making his determination under Section 232, has “considered the renegotiated United States-Korea Agreement and the recently signed USMCA, which, when implemented, could help to address the threatened impairment of national security found by the Secretary.” By not guaranteeing that these countries will be excluded from future Section 232 measures, this language might be intended to increase pressure on Canada and Mexico to ratify the USMCA, and on Korea to implement the revised KORUS agreement.

Outlook

The President’s decision to delay a final determination on automotive import restrictions was expected, given the economic and political ramifications of such restrictions and the fact that the Trump administration’s trade agenda currently is dominated by other priorities that would be disrupted by significant new Section 232 measures. These priorities include the USMCA, for which the Trump administration is currently seeking congressional approval; the nascent bilateral negotiations with Japan and the European Union; and the ongoing bilateral negotiation with China, all of which would have been jeopardized by new Section 232 restrictions on automotive imports. Moreover, it appeared unlikely that the Trump administration would announce significant new tariffs on automotive imports so soon after increasing Section 301 tariffs on \$200 billion in Chinese imports and proposing similar tariffs on the remaining \$300 billion in Chinese imports earlier this month – moves that drew a negative reaction from financial markets.

Though the Trump administration has deferred temporarily a final decision regarding Section 232 restrictions on automotive imports, the Proclamation raises serious concerns that such restrictions might be imposed in the future, particularly given (i) the President’s broad affirmative determination that nearly all automotive goods imports from all sources threaten national security; and (ii) the implication that restrictions might be imposed if Japan, the European Union, and potentially other countries do not quickly negotiate trade agreements with the United States that “address the threatened impairment” through unspecified means. Completing such negotiations within the next six months will be difficult, particularly given that the US-Japan negotiations remain in preliminary stages and the US-EU negotiations have not yet begun due to significant disagreements between the two sides over their scope.

Moreover, the negotiations could be complicated significantly by potential US demands for limitations on Japanese and EU automotive exports to the United States. Indeed, the “agreements contemplated in [Section 232 (c)(3)(A)(i)]” and referenced in the Proclamation “limit or restrict” the importation into, or the exportation to, the United States of the subject merchandise (whereas the WTO Agreements prohibit voluntary export restraints and similar measures). Japan and the EU are expected to resist strongly any commitments that would limit or restrict their automotive exports to the United States, even at volumes substantially above current trade (as Mexico and Canada agreed to in their respective side letters to the USMCA). Indeed, EU Trade Commissioner Cecilia Malmstrom stated after the release of the Proclamation that “[t]he EU is prepared to negotiate a limited trade agreement [including] cars, but not WTO-illegal managed trade.” Japan similarly has stated that any trade agreement it reaches with the United States must be consistent with WTO rules. The United States has not publicly clarified what commitments it will seek in the forthcoming negotiations with Japan and the EU regarding automotive trade, and if they will involve limitations on automotive exports. In addition, it has not indicated what actions, if any, it plans to take with respect to automotive imports from other countries not referenced in the Proclamation. Thus, while the Proclamation has temporarily delayed a final decision in the Section 232 investigation, it has prolonged and exacerbated the uncertainty regarding the Trump administration’s plans for automotive import restrictions.

President Trump Reduces Section 232 Tariff Rate on Steel Imports from Turkey to 25%, Withdraws Turkey's GSP Designation

On May 16, 2019, President Trump issued a Proclamation¹⁰ reducing to 25% (from 50%) the *ad valorem* tariff applicable to imports of steel articles from Turkey under Section 232 of the Trade Expansion Act of 1962. The President previously had increased the Section 232 tariff rate on steel articles from Turkey from 25% to 50% in Proclamation 9772 of August 10, 2018; the new Proclamation has the effect of reversing that tariff increase so that the rate applicable to Turkey again matches that of most other countries. In addition, President Trump on May 16 issued a separate Proclamation terminating Turkey's designation as a beneficiary developing country under the Generalized System of Preferences (GSP) program, meaning that imports of previously GSP-eligible articles from Turkey will no longer benefit from preferential tariff treatment.

Reduction of Section 232 tariff on steel articles from Turkey

The Proclamation provides that the additional tariff applicable to steel articles from Turkey under Section 232 will be reduced to 25%, effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 21, 2019. According to the Proclamation, the reduction is appropriate because "imports of steel articles have declined by 12% in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48% in 2018, with the result that the domestic industry's capacity utilization has improved at this point to approximately the target level recommended in the [Secretary of Commerce's January 2018 report on the effect of imports of steel articles on the national security of the United States under section 232]."

The Proclamation further states, however, that "[m]aintaining the existing 25% *ad valorem* tariff on most countries is necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report." An additional 25% *ad valorem* tariff is currently applicable to imports of steel articles from all countries except Australia, Canada, Mexico, Argentina, Brazil, and South Korea (the latter three being instead subject to a quota arrangement). Despite the removal of Section 232 tariffs on steel and aluminium imports from Canada and Mexico, there is no indication that the broader steel tariff regime will change in the near- or medium-term.

Termination of Turkey's GSP designation

Also on May 16, President Trump issued a separate Proclamation¹¹ terminating Turkey's designation as a beneficiary developing country under the GSP program "based on its level of economic development[.]" Accordingly, the termination of Turkey's status as a beneficiary developing country took effect on May 17, 2019. President Trump originally notified Congress of his intention to remove Turkey from the GSP program on March 4, at which time the Office of the United States Trade Representative explained that Turkey "is sufficiently economically developed and should no longer benefit from preferential market access to the United States market". As a result of the Proclamation, imports of previously GSP-eligible articles from Turkey will no longer benefit from preferential tariff treatment. In response to the Proclamation, Turkish Minister of Trade Ruhsar Pekcan stated that "[t]he removal of Turkey from the GSP does not comply with our endeavors to achieve \$75 billion in bilateral trade volume."

Turkey was the fifth-largest GSP user in 2017, with exports under the program valued at \$1.66 billion. Transportation equipment accounted for the largest share (16%) of Turkey's exports under GSP, followed by "food and kindred products", miscellaneous manufactured commodities, non-metallic minerals, and plastics and rubber products.

¹⁰ The Proclamation is available here: <https://www.whitehouse.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states/>

¹¹ The Proclamation is available here: <https://www.whitehouse.gov/presidential-actions/proclamation-modify-list-beneficiary-developing-countries-trade-act-1974/>

United States, Canada, and Mexico Reach Agreement to Eliminate Section 232 Steel and Aluminum Tariffs and Retaliation

On May 17, 2019, the United States reached an agreement with Canada and Mexico to remove the US tariffs imposed on steel and aluminum products from those countries pursuant to Section 232 of the Trade Expansion Act of 1962, as well as the retaliatory tariffs that Canada and Mexico have imposed on US goods in response. The Section 232 tariffs and retaliatory measures between the United States and Canada will be removed within two days, according to a joint statement issued by the two countries. The United States and Mexico as of May 17 have not yet issued a joint statement detailing the agreement between them, but statements from the Office of the US Trade Representative (USTR) and the Office of the President of Mexico indicate that the two countries have agreed to similar or identical terms. The Section 232 tariffs, which have been in effect with respect to imports from Canada and Mexico since May 2018, were seen as an impediment to the ratification of the United States-Mexico-Canada Agreement (USMCA).

US-Canada Joint Statement

According to the joint statement from the United States and Canada, released Friday afternoon by Global Affairs Canada, the two countries have agreed to the following terms:

1. All Section 232 tariffs on Canadian steel and aluminum products, as well as all tariffs Canada imposed in retaliation for the Section 232 action, will be eliminated “no later than two days from the issuance” of the joint statement;
2. The United States and Canada will terminate all pending WTO litigation between them concerning the Section 232 tariffs^[1];
3. The United States and Canada will “implement [as-yet-determined] effective measures” to (1) “[p]revent the importation of aluminum and steel that is unfairly subsidized and/or sold at dumped prices”; and (2) “[p]revent the transshipment of aluminum and steel made outside of Canada or the United States to the other country[.]”
4. The United States and Canada will establish an agreed-upon process for monitoring aluminum and steel trade between them. In monitoring for surges, “either country may treat products made with steel that is melted and poured in North America separately from products that are not.”
5. In the event that imports of aluminum or steel products “surge meaningfully beyond historic volumes of trade over a period of time, with consideration of market share”, the importing country may request consultations with the exporting country. After such consultations, the importing party “may impose duties of 25 percent for steel and 10 percent for aluminum in respect to the individual product(s) where the surge took place[.]” If the importing party takes such action, the exporting country agrees to retaliate only in the affected sector (*i.e.*, aluminum and aluminum-containing products or steel), thus ruling out “cross-retaliation” targeting other sectors. The agreement does not define the period of review or what would constitute a “meaningful” surge.

USTR issued a press release on Friday evening stating that the agreement “is great news for American farmers that have been subject to retaliatory tariffs from Canada and Mexico. At the same time, the Agreement will continue to protect America’s steel and aluminum industries.” The USTR press release refers to a single “agreement,”

^[1] Related WTO disputes include those brought by Canada against the United States (DS550: United States - Certain Measures on Steel and Aluminium Products); by Mexico against the United States (DS551: United States - Certain Measures on Steel and Aluminium Products); by the United States against Canada (DS557: Canada - Additional Duties on Certain Products from the United States); and by the United States against Mexico (DS560: Mexico - Additional Duties on Certain Products from the United States).

suggesting that the terms agreed to by the United States and Mexico are similar (and perhaps identical) to those agreed to by the United States and Canada. A brief summary of the US-Mexico agreement released by Office of the President of Mexico on Friday evening also suggests that the terms are similar to those agreed between the United States and Canada, though important details are omitted (*e.g.*, with respect to the possible re-imposition of duties and retaliation).

Notably, the agreements with Canada and Mexico do not impose quotas in place of tariffs, as has been the case with other countries that have been excluded from the Section 232 tariffs (*i.e.*, Argentina, Brazil, and South Korea). Canadian and Mexican negotiators had called for the complete removal of tariffs without any quotas, but the Trump administration previously had seemed reluctant to agree to those terms.

Outlook

It is expected that President Trump will soon issue a Proclamation implementing the removal of the Section 232 tariffs for Canada and Mexico. Although the agreements announced today are light on details with respect to monitoring and enforcement, the removal of the Section 232 tariffs and retaliation will relieve trade tensions that had threatened to forestall legislative progress in all three countries towards ratifying and eventually implementing the USMCA.

Despite earlier indications that the removal of tariffs would be tied to USMCA ratification (*i.e.*, the tariffs would only be lifted upon domestic ratification by all parties), the immediate lifting of tariffs suggests political will on the part of the Trump administration to spur near-term action on the NAFTA replacement. Indeed, influential US lawmakers have taken the position that removing the Section 232 tariffs on Canada and Mexico is a prerequisite to congressional consideration of the USMCA. Therefore, while the removal of the tariffs does not guarantee the USMCA's fate this year or next, a significant political obstacle has been overcome.

The US-Canada joint statement is available [here](#).

The USTR press release is available [here](#).

The statement from the Office of the President of Mexico is available [here](#).

United States Eliminates Section 232 Tariffs on Steel and Aluminum from Canada and Mexico; Canada and Mexico Eliminate Retaliatory Tariffs on US Goods

On May 17, 2019, the United States announced that it had reached agreements with Canada and Mexico to remove the US tariffs imposed on steel and aluminum products from those countries pursuant to Section 232 of the Trade Expansion Act of 1962, as well as the retaliatory tariffs that Canada and Mexico have imposed on US goods in response. The United States now has published the final text of the two bilateral agreements, and all three countries have taken the actions required thereunder to terminate the Section 232 tariffs and retaliatory measures as of May 20, 2019.

Bilateral agreements on the removal of Section 232 tariffs and retaliation

On May 18, USTR published the full text of the bilateral agreements reached with Canada¹² and Mexico¹³ to eliminate the Section 232 tariffs and retaliation. As shown below, the terms of the two agreements (which took the form of “joint statements” between the respective governments) are nearly identical:

¹² The text of the US-Canada agreement is available here: https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Canada.pdf

1. The parties agreed that all Section 232 tariffs on Canadian and Mexican steel and aluminum products, as well as all tariffs Canada and Mexico imposed in retaliation for the Section 232 action, would be eliminated “no later than two days from the issuance” of the joint statements;
2. The parties will terminate all pending WTO litigation between them regarding the Section 232 action¹⁴;
3. The parties will “implement [as-yet-determined] effective measures” to (1) “[p]revent the importation of aluminum and steel that is unfairly subsidized and/or sold at dumped prices”; and (2) “[p]revent the transshipment of aluminum and steel made outside of [Canada/Mexico] or the United States to the other country[.]”
4. The United States and Canada will establish an agreed-upon process for monitoring aluminum and steel trade between them, as will the United States and Mexico. In monitoring for surges, “either country may treat products made with steel that is melted and poured in North America separately from products that are not.”
5. In the event that imports of aluminum or steel products “surge meaningfully beyond historic volumes of trade over a period of time, with consideration of market share”, the importing country may request consultations with the exporting country. After such consultations, the importing party “may impose duties of 25% for steel and 10% for aluminum in respect to the individual product(s) where the surge took place[.]” If the importing party takes such action, the exporting country agrees to retaliate only in the affected sector (*i.e.*, aluminum and aluminum-containing products or steel), thus ruling out “cross-retaliation” targeting other sectors. The agreement does not define the period of review or what would constitute a “meaningful” surge.

The agreement between the United States and Mexico contains additional language providing that, in assessing whether there has been a surge in steel imports, each country will take into account certain quantities of imports needed for new investments. Specifically, “the United States will consider that new investment in the United States may require an additional 225,000 metric tons of billet from Mexico”, and “Mexico will consider that new investment in Mexico may require an additional 200,000 metric tons of cold-rolled steel from the United States”, in assessing whether there has been a surge in steel imports.

Presidential Proclamations terminating Section 232 tariffs for Canada and Mexico

In accordance with the bilateral agreements, President Trump on March 19 issued Proclamations providing that imports of steel¹⁵ and aluminum¹⁶ products from Canada and Mexico will no longer be subject to the Section 232 tariffs, effective with respect to goods entered for consumption or withdrawn from warehouse for consumption on or after 12:01 a.m. eastern daylight time on May 20, 2019. Any imports of steel or aluminum articles from Canada and Mexico that were admitted into a US foreign trade zone under “privileged foreign status” prior to 12:01 a.m. eastern daylight time on May 20, 2019 shall not be subject, upon entry for consumption made after 12:01 a.m. eastern daylight time on May 20, 2019, to the Section 232 tariffs.

The Proclamation states that the President has determined to terminate the Section 232 tariffs because the measures set forth in the new agreements with Canada and Mexico “will provide effective, long-term alternative

¹³ The text of the US-Mexico agreement is available here:

https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Mexico.pdf

¹⁴ Related WTO disputes include those brought by Canada against the United States (DS550: United States - Certain Measures on Steel and Aluminium Products); by Mexico against the United States (DS551: United States - Certain Measures on Steel and Aluminium Products); by the United States against Canada (DS557: Canada - Additional Duties on Certain Products from the United States); and by the United States against Mexico (DS560: Mexico - Additional Duties on Certain Products from the United States).

¹⁵ The Proclamation concerning steel imports is available here: <https://www.whitehouse.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states-2/>

¹⁶ The Proclamation concerning aluminum imports is available here: <https://www.whitehouse.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states-2/>

means to address the contribution of these countries' imports to the threatened impairment of the national security." In light of this decision, the President also considered whether it is necessary to adjust (*i.e.*, increase) the Section 232 tariffs as they apply to other countries, and determined that the appropriate course of action is to maintain the current tariff levels of 25% and 10% for steel and aluminum, respectively.

Termination of retaliatory tariffs imposed by Canada and Mexico

In accordance with the bilateral agreements, Canada and Mexico have taken the following actions terminating their respective retaliatory tariffs on US goods:

- **Canada.** On May 19, Canada's Border Services Agency issued Customs Notice 19-09,¹⁷ which states that "[e]ffective May 19, 2019, the United States Surtax Order (Steel and Aluminum): SOR/2018-152 and the United States Surtax Order (Other Goods): SOR/2018-153 imposing surtax on certain products originating in the United States are repealed. Please note that importers will no longer be required to pay surtax pursuant to the above-referenced orders." The two surtax orders were introduced by Canada in June 2018 in response to the United States' Section 232 action, and applied to certain steel, aluminum, and other products of the United States with an annual import value of approximately \$12.8 billion.
- **Mexico.** On May 20, Mexico's Ministry of Economy published a Decree¹⁸ repealing the provisions of its June 5, 2018 Decree that imposed retaliatory tariffs on approximately \$3.6 billion in US exports, including steel products, pork, apples, potatoes, and cheese, among other items. The Decree repealing Mexico's retaliatory tariffs took effect on the date of its publication in Mexico's Official Gazette (*i.e.*, May 20, 2019).

Outlook

US business groups and Members of Congress of both parties have welcomed the new agreements to eliminate the Section 232 tariffs and retaliatory measures between the United States, Canada, and Mexico. However, and as noted above, the specific actions that the parties will take under the new agreements, including to counteract transshipment and the importation of dumped and unfairly subsidized goods, have not yet been determined. Moreover, the agreements contemplate the potential re-imposition of duties and retaliatory measures in response to import "surges" based on unspecified criteria.

The US presidential Proclamations terminating the Section 232 duties similarly contemplate the potential re-imposition of duties, stating that "[t]he United States will monitor the implementation and effectiveness of these measures in addressing our national security needs, and [the President] may revisit this determination as appropriate." Thus, despite the recent agreements, tensions related to steel and aluminum trade among the three countries could re-emerge in the future. Moreover, while some US business groups and Members of Congress have expressed hope that the agreements will provide new momentum towards US congressional approval of the US-Mexico-Canada Agreement (USMCA), influential congressional Democrats have reiterated in recent days that their primary concerns about the agreement (*e.g.*, regarding labor, environment and enforcement provisions) remain unaddressed. Thus, despite the removal of the Section 232 tariffs and retaliation among the USMCA parties, it appears that the Agreement still faces an uphill battle in the US Congress.

¹⁷ Canada's Customs Notice 19-09 is available here: <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn19-09-eng.html>

¹⁸ The Decree repealing Mexico's retaliatory tariffs is available here (in Spanish): https://www.dof.gob.mx/nota_detalle.php?codigo=5560685&fecha=20/05/2019

Other Trade Actions

USTR Issues Annual Special 301 Report; Warns of Potential Unilateral and Dispute Settlement Actions Against “Priority Watch List” Countries

USTR released its annual “Special 301” report dated April 25, 2019 identifying countries that, in USTR’s view, do not adequately or effectively protect and enforce intellectual property rights or otherwise deny market access to US persons that rely on protection of intellectual property rights.[1] Like previous Special 301 reports, this year’s report places such countries into two categories:

- a “Watch List”, comprised of countries in which particular problems allegedly exist with respect to IP protection, enforcement, or market access for persons relying on IP rights; and
- a “Priority Watch List”, comprised of countries that allegedly present the most significant concerns and therefore are the focus of “increased bilateral attention” concerning the specific problem areas.

This year’s Special 301 report is particularly notable, as it contains new language warning that USTR intends to initiate unilateral actions under Section 301 of the Trade Act of 1974 or WTO dispute settlement proceedings against certain countries that have repeatedly been on the Priority Watch List.

Special 301 designations for 2019

USTR identified 36 trading partners in this year’s Special 301 report. It placed these countries into the following categories:

Watch List	Priority Watch List
<ul style="list-style-type: none"> • Barbados • Bolivia • Brazil • Canada • Colombia • Costa Rica • Dominican Republic • Ecuador • Egypt • Greece • Guatemala • Jamaica • Lebanon 	<ul style="list-style-type: none"> • Mexico • Pakistan • Paraguay • Peru • Romania • Switzerland • Thailand • Turkey • Turkmenistan • United Arab Emirates • Uzbekistan • Vietnam
	<ul style="list-style-type: none"> • Algeria • Argentina • Chile • China • India • Indonesia • Kuwait • Russia • Saudi Arabia • Ukraine • Venezuela

While most of the countries listed above have previously appeared in the Special 301 report, there were some notable changes to the country designations. For example, Canada and Colombia were “upgraded” from the Priority Watch List to the Watch List, whereas Saudi Arabia was newly added to the Priority Watch List, having previously been on the Watch List. Tajikistan was removed from the Special 301 report altogether, whereas Paraguay was newly added to the Watch List.

“Cross-cutting” IP issues

The report identifies several “cross-cutting” IP issues that USTR views as problematic and that allegedly are present in many of the jurisdictions identified in the report. These include the following:

- **Pharmaceuticals and medical devices.** USTR has been engaging with trading partners, including Algeria, Argentina, Australia, Canada, China, Colombia, Ecuador, Egypt, India, Indonesia, Japan, Korea, Mexico, New Zealand, Saudi Arabia, Turkey, and the UAE, to address concerns related to IP protection and enforcement and market access barriers with respect to pharmaceuticals and medical devices.
- **Border enforcement.** USTR claims that many trading partners, including Brazil, China, Colombia, Hong Kong, India, Indonesia, Nigeria, Paraguay, Singapore, Thailand, Turkey, the UAE, and Vietnam, do not provide adequate or effective border enforcement against counterfeit and pirated goods.
- **Piracy.** USTR alleges that (i) online and broadcast piracy remains a challenging copyright enforcement issue in many countries, including Argentina, Bulgaria, Canada, Chile, China, Colombia, Greece, India, Mexico, the Netherlands, Romania, Russia, Saudi Arabia, Switzerland, Ukraine, and elsewhere; (ii) several countries, including Brazil, India, the UAE, and Ukraine, have not adequately addressed copyright piracy; and (iii) countries such as Argentina, Brazil, China, Costa Rica, Egypt, Greece, Indonesia, Kenya, Mexico, Nigeria, the Philippines, Romania, Russia, Thailand, and Vietnam do not have in place effective policies and procedures to ensure their government agencies do not use unlicensed software.
- **Patentability criteria.** USTR alleges that US persons face “restrictive patentability criteria that undermine opportunities for export growth” in countries such as Argentina, India, and Indonesia. USTR also claims that, in Argentina, China, India, and Saudi Arabia, US persons face a lack of effective protection against unfair commercial use, as well as unauthorized disclosure, of test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products.
- **Trade secrets.** According to USTR, inadequate protection for trade secrets in a number of countries, notably China and India, “puts U.S. trade secrets at unnecessary risk.”
- **Geographical indications.** The report criticizes European Union’s approach to the protection of geographical indications (GIs) in the EU and third-country markets, citing its “negative market access effects” on US producers and traders, particularly those with prior trademark rights or who rely on the use of common names.

USTR’s specific concerns on these and other issues are elaborated in individual “country reports” that assess the state of intellectual property rights protection and enforcement in each Watch List and Priority Watch List Country. In addition, alongside the Special 301 report, USTR published its annual Special 301 Out-of-Cycle Review of Notorious Markets, which identifies illustrative examples of online and physical markets that allegedly “engage in, facilitate, turn a blind eye to, or benefit from substantial copyright piracy and trademark counterfeiting” according to information submitted to USTR.

Threat of unilateral and dispute settlement actions

Unlike prior Special 301 reports, this year’s report contains language warning that USTR may soon initiate unilateral actions under Section 301 of the Trade Act of 1974, or WTO dispute settlement actions, against countries that have been on the Priority Watch List for multiple years. The threat of possible unilateral actions under Section 301 is particularly noteworthy given the Trump administration’s recent use of that law to impose tariffs on approximately \$250 billion worth of annual imports from China, based in part on intellectual property concerns. The Section 301 provisions, which predate the WTO Agreements, had not previously been used to impose unilateral trade restrictions in the WTO era.

This year's Special 301 report states that "[t]his Administration continues to closely monitor developments in and to engage with those countries that have been on the Priority Watch List for multiple years. Over the coming weeks, USTR will review the developments against the benchmarks established in the Special 301 action plans for those countries."^[2] It adds that, "[f]or countries that fail to address U.S. concerns, USTR will take appropriate actions, such as enforcement actions under Section 301 of the Trade Act or pursuant to World Trade Organization or other trade agreement dispute settlement procedures, necessary to combat unfair trade practices and to ensure that trading partners follow through with their international commitments." With the exception of Saudi Arabia, all countries currently on the Priority Watch List have been on that list for multiple years, and thus could potentially be subject to such actions:

Country	Time on Priority Watch List
Algeria	10 years
Argentina	23 years
Chile	12 years
China	14 years
India	24 years
Indonesia	10 years
Kuwait	4 years
Russian Federation	22 years
Ukraine	4 years
Venezuela	14 years

The report's language regarding unilateral and dispute settlement actions is vague and does not guarantee that USTR will take any particular action with respect to the above-listed countries. However, the initiation of new Section 301 investigations into certain acts, policies, and practices of one or more of the listed countries cannot be ruled out, particularly given the Trump administration's recent use of Section 301 and other unilateral trade measures, and its stated desire to utilize maximum "leverage" to secure concessions from trading partners. Indeed, the Special 301 report emphasizes that "[a] top trade priority for the Administration is to use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property (IP) rights." Thus, while it is unclear whether the United States will initiate Section 301 investigations of any Priority Watch List countries or impose trade restrictions based thereupon, it appears likely that such countries will face increased pressure from the United States in the coming months to address the US concerns highlighted in the Special 301 report.

President Trump Threatens Tariffs on All Goods Imported from Mexico to Address "Border Crisis"

On May 30, 2019, President Trump announced his intention to impose an additional tariff of 5% on all goods imported from Mexico beginning on June 10, 2019, pursuant to the International Emergency Economic Powers Act (IEEPA). President Trump stated that he intends to take such action in order to address the "illegal migration crisis" at the United States' southern border, and that the additional tariff will increase on a monthly basis through October 1, 2019 (and will remain in effect thereafter) unless and until Mexico takes "effective actions" to alleviate the crisis. President Trump has not yet issued a formal Proclamation or Executive Order implementing the threatened tariff increases, and Mexican President Andrés Manuel López Obrador has sent a delegation to the United States for negotiations aimed at averting the imposition of the tariffs.

May 30 statement regarding "Emergency Measures to Address the Border Crisis"

President Trump's May 30 announcement¹⁹ states that there has been a "sustained influx of illegal aliens" through the United States' southern border and claims that "Mexico's passive cooperation in allowing this mass incursion constitutes an emergency and extraordinary threat to the national security and economy of the United States." It further states that, "[t]o address the emergency at the Southern Border", the President is "invoking the authorities granted...by the International Emergency Economic Powers Act."

The President has stated that he intends to take the following actions under IEEPA:

- **June 10: 5% tariff.** Starting on June 10, 2019, the United States will impose a 5% tariff on "all goods imported from Mexico." If the illegal migration crisis "is alleviated through effective actions taken by Mexico, to be determined in [the United States'] sole discretion and judgment, the Tariffs will be removed."
- **July 1: 10% tariff.** "If the crisis persists," the tariff will be raised to 10% on July 1, 2019.
- **August 1: 15% tariff.** If Mexico "still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States," the tariff will be increased to 15% on August 1, 2019.
- **September 1: 20% tariff.** Similarly, if Mexico "still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States," the tariff will be increased to 20% on September 1, 2019.
- **October 1 and thereafter: 25% tariff.** If Mexico "still has not taken action to dramatically reduce or eliminate the number of illegal aliens crossing its territory into the United States," the tariff will increase to 25% on October 1, 2019. The tariff will permanently remain at the 25% level "unless and until Mexico substantially stops the illegal inflow of aliens coming through its territory."

The Trump administration has not provided any additional details regarding the proposed tariff action. However, President Trump will likely need to issue a formal Proclamation or Executive Order in the coming days to implement the tariffs. Such documents may provide details on the precise timing and scope of the tariffs, and whether the administration will establish a process whereby specific products can be excluded from the tariff based on requests from interested parties. The administration has established such exclusion processes in connection with the additional tariffs imposed on steel and aluminum products under Section 232 of the Trade Expansion Act of 1962 and on nearly half of Chinese imports under Section 301 of the Trade Act of 1974.

US business groups and Members of Congress have criticized the President's proposed tariffs. Senate Finance Committee Chairman Chuck Grassley (R-IA) stated that "[t]rade policy and border security are separate issues. This is a misuse of presidential tariff authority and counter to congressional intent[.]" Chairman Grassley also warned that imposition of the threatened tariffs "would seriously jeopardize" US congressional approval of the US-Mexico-Canada Agreement (USMCA), which already faces an uphill battle in Congress. Groups such as the US Chamber of Commerce (Chamber), the National Association of Manufacturers, and the Business Roundtable have similarly warned that the threatened tariffs would have significant adverse consequences for US businesses and consumers and would jeopardize congressional approval of the USMCA. The trade press has reported that the Chamber may take legal action in response to the President's action.

Outlook

In response to President Trump's announcement, Mexican President Andrés Manuel López Obrador on May 31 sent a delegation to the United States, led by Mexico's Foreign Affairs Secretary Marcelo Ebrard, to attempt to negotiate

¹⁹ The Announcement is available here: <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/>

an agreement with the United States to avert the imposition of the tariffs. In a May 30 letter,²⁰ President López Obrador urged President Trump to resolve the issue by “deepening the dialogue” with Mexico, stating that “[s]ocial problems are not resolved by taxes or coercive measures.” President López Obrador’s letter does not threaten to impose retaliatory measures on US goods (rather, it states that “I do not believe...in the ‘eye for an eye’ precept”), nor does it threaten to abandon the proposed USMCA, which was submitted to the Mexican Senate for consideration on May 30. Rather, President López Obrador stated in a May 31 press conference that President Trump’s announcement “does not stop the process that was already started to ratify the [USMCA]. We’re going to continue.” Mexico’s Deputy Foreign Minister for North America Jesus Seade warned on May 30 that Mexico would respond “forcefully” if tariffs ultimately were imposed, but did not elaborate and emphasized that Mexico would like to seek a negotiated solution with the United States to address the issue of illegal border crossings.

The Trump administration has not reacted publicly to Mexico’s recent statements. However, Acting White House Chief of Staff Mick Mulvaney and Acting Homeland Security Secretary Kevin McAleenan indicated on May 30 that the tariffs could potentially be avoided or removed quickly if the United States deems that Mexico is cooperating to address US concerns. Thus, the imposition of the threatened tariffs might be averted as a result of bilateral negotiations in the coming days. Nevertheless, the Trump administration has demonstrated it is willing to take significant unilateral actions, even against close US trading partners such as Mexico, and has provided only a short window of 11 days for the two sides to reach a negotiated solution on a complex and politically sensitive issue that is not normally linked to trade policy.

US Trade Remedy Developments

US Department of Commerce Issues Affirmative Final Determinations in Anti-Dumping and Countervailing Duty Investigations of Quartz Surface Products from China

On May 15, 2019, the US Department of Commerce (DOC) announced its affirmative final determinations in the anti-dumping (AD) and countervailing duty (CVD) investigations of imports of quartz surface products from China. In its investigations, DOC determined that imports of quartz surface products from China received countervailable subsidies ranging from 45.32 to 190.99 percent, and were sold in the United States at dumping margins ranging from 255.27 to 336.69 percent.

The products covered by these investigations are certain quartz surface products, which consist of slabs and other surfaces created from a mixture of materials that includes predominately silica (*e.g.*, quartz, quartz powder, cristobalite) as well as a resin binder (*e.g.*, an unsaturated polyester). The subject merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheading:

6810.99.0010. Subject merchandise may also enter under subheadings 6810.11.0010, 6810.11.0070, 6810.19.1200, 6810.19.1400, 6810.19.5000, 6810.91.0000, 6810.99.0080, 6815.99.4070, 2506.10.0010, 2506.10.0050, 2506.20.0010, 2506.20.0080, and 7016.90.10.

The US International Trade Commission (ITC) is scheduled to make its final determination on or around June 24, 2019. If the ITC makes affirmative final determinations that imports of quartz surface products from China materially injure, or threaten material injury to, the domestic industry, DOC will issue AD and CVD orders. If the ITC makes negative determinations of injury, the investigations will be terminated.

In 2017, imports of certain quartz surface products from China were valued at an estimated \$468 million.

The DOC’s fact sheet on these investigations can be viewed [here](#).

²⁰ An English translation of President López Obrador’s letter in response is available here: <https://www.gob.mx/cms/uploads/attachment/file/465902/CartaTrumptrad.pdf>

US Department of Commerce Initiates Anti-Dumping and Countervailing Duty Investigations of Vertical Metal File Cabinets from China

On May 21, 2019, the US Department of Commerce (DOC) announced the initiation of anti-dumping (AD) and countervailing duty (CVD) investigations of imports of vertical metal file cabinets from China. DOC initiated the investigations in response to a petition filed by Hirsh Industries, LLC, a domestic producer of the subject merchandise. The petition alleges that imports of the subject merchandise from China were sold in the United States at dumping margins ranging from 121.75 to 198.50 percent and received countervailable subsidies in excess of *de minimis* levels.

The products subject to these investigations are freestanding vertical metal file cabinets containing two or more extendable file storage elements and having an actual width of 25 inches or less. The subject vertical metal file cabinets have bodies made of carbon and/or alloy steel and/or other metals. Additional information on the scope of the investigation is available in DOC's fact sheet on the investigation. The subject products are classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 9403.10.0020, and may also enter under HTSUS subheadings 9403.10.0040, 9403.20.0080, and 9403.20.0090.

The US International Trade Commission (ITC) is scheduled to make its preliminary injury determinations on or before June 14, 2019. If the ITC determines that there is a reasonable indication that imports of vertical metal file cabinets from China materially injure, or threaten material injury to, the domestic industry in the United States, the investigations will continue. DOC will then be scheduled to announce its preliminary CVD determination on July 25, 2019, and its preliminary AD determination on October 8, 2019, although these deadlines may be extended.

According to DOC, imports of vertical metal file cabinets from China in 2018 were valued at an estimated \$45.2 million.

DOC's fact sheet on the investigations is available [here](#).