WHITE & CASE

US & Multilateral Trade Policy Developments

Japan External Trade Organization

December 2019

Contents

Free Trade Agreement Highlights

US-Japan Trade Agreement and US-Japan Digital Trade Agreement Approved by Japanese Diet; Entry Into Force by January 1, 2020 Within Reach

On December 4, 2019, the upper house of the Japanese Diet approved the US-Japan Trade Agreement and the US-Japan Digital Trade Agreement, which were signed by the parties in October and passed the lower house of the Japanese parliament last month. The parliamentary approval in Japan paves the way for the two bilateral agreements to enter into force on January 1, 2020, provided that the United States completes its implementation process in a timely manner.

The Trump administration is expected to begin the implementation process next week by issuing a Proclamation to implement the agreements.[1] Democratic members of the House Ways and Means trade subcommittee have criticized the administration's handling of the negotiation with Japan, alleging that the administration did not sufficiently consult with Congress regarding the negotiation, but these concerns appear unlikely to dissuade the administration from implementing the two agreements unilaterally. US Trade Representative Lighthizer on December 4 stated that he expects the President "to sign the implementing proclamation for the United States next week," and that "[t]he United States is preparing for the U.S.-Japan Trade Agreement and the U.S.-Japan Digital Trade Agreement to go into effect on January 1, 2020."

The Abe administration also faced some domestic obstacles but pushed through its own ratification process. Minority parties in the Japanese Diet pressed the administration to clarify the economic effects of the US-Japan Trade Agreement, given that the administration relied on a projection – a 0.8% increase of Japanese real GDP – that was premised on the future elimination of US auto tariffs. Similarly, questions on the "substantially all the trade" requirement of GATT Article XXIV were raised, given that the administration's explanation of US tariff commitments – which it described as covering 92% of total trade value – also was premised on future auto tariff reductions, without which the coverage would be much smaller. The Abe administration claimed that its projections were justified by paragraph 7 of Annex II to the US-Japan Trade Agreement, but this provision states only that "[c]ustoms duties on automobile and auto parts will be subject to further negotiations with respect to the elimination of customs duties."

The Abe administration's swift and relatively forceful push through the ratification process may shed some light on the United States' "national security" investigation of automotive goods under Section 232 of the Trade Expansion Act. The joint statement released by President Trump and Prime Minister Abe in September of this year states that "[w]hile faithfully implementing [the US-Japan Trade Agreement and the US-Japan Digital Trade Agreement], both nations will refrain from taking measures against the spirit of these agreements and this Joint Statement." According to the Abe administration, this statement represents a commitment by the United States not to impose Section 232 tariffs on Japanese autos. However, there have been some questions as to the status of the Section 232 investigation, as the White House made no official announcement regarding the status of the investigation at the 180-day deadline (*i.e.*, November 13, 2019) for completing trade agreement negotiations under the law. Japan's rapid ratification of the US-Japan agreements shortly after the deadline may be an indication that the Section 232 investigation has ended, at least for Japan.

Outlook

Once the agreements between the United States and Japan have entered into force, the two governments are expected to begin preparing for a second phase of bilateral negotiations. The September 2019 joint statement indicates that this second phase of negotiations will begin following a consultation period, which the parties "intend" to complete within four months after the US-Japan Trade Agreement enters into force. Thus, if the agreement enters into force as anticipated on January 1, 2020, the new negotiations could begin in May 2020.

During the four-month consultation period, the United States and Japan will likely discuss the scope of the planned negotiations for a broader FTA. The Abe administration will likely face pressure from Japanese stakeholders to

---

[1] The administration has indicated that it intends to implement the US-Japan Trade Agreement unilaterally pursuant to Section 103(a) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA), which authorizes the President to enter into agreements regarding tariff barriers and modify US tariff rates without submitting implementing legislation to Congress, subject to certain limitations. The administration also has indicated that it intends to unilaterally enter into the US-Japan Digital Trade Agreement (which it considers to be an "Executive Agreement").

ensure that the talks cover the elimination of US tariffs on automobiles and auto parts, which are among Japan's top exports to the United States. However, Japan's leverage in the second-phase negotiation may be diminished as it has already conceded significant agricultural market access (which is perhaps Japan's largest bargaining chip) to the United States.

Despite Recent Progress, New Obstacles Threaten USMCA Vote by Year-End

Negotiations between House Democrats and the Trump administration on potential changes to the US-Mexico-Canada Agreement (USMCA) have continued to advance in recent weeks, but new obstacles have emerged that could prevent a House vote on the Agreement before 2020. Following Speaker Pelosi's November 25 announcement that an agreement with the Trump administration was "within range" pending "progress in writing from the Trade Representative for final review", USTR has begun negotiations with Mexico and Canada to seek their acceptance of the commitments envisioned in its tentative agreement with House Democrats. However, the Mexican government and private sector this week have rejected key elements of a US proposal for enhanced enforcement of USMCA's labor provisions, and reportedly have rejected a new US demand to tighten rules of origin for steel and aluminum products utilized in the automotive sector. Though negotiations are ongoing and could soon yield a result, these and potentially other unfinished terms have delayed agreement on the final package of changes to the USMCA that Democrats have demanded in exchange for agreeing to vote on the USMCA implementing legislation. These delays raise serious doubts as to whether a vote on USMCA implementing legislation can occur by December 20, when the House is scheduled to adjourn for the year, and a 2020 vote could be further complicated by the presidential elections. This alert summarizes recent developments regarding the USMCA and the potential obstacles that remain.

Status of negotiations

Since Speaker Pelosi's optimistic announcement, USTR has held negotiations with Canada and Mexico with the goal of quickly finalizing additional texts on labor, dispute settlement, pharmaceutical IP, and the environment, hoping that the package will, after being converted into a written agreement, secure Speaker Pelosi's approval for the submission of the USMCA implementing legislation to the House and Senate. It therefore appears that, after several months of negotiations, USTR and the House Democrats' Working Group have agreed on at least the broad outlines of acceptable changes and/or additions to the USMCA. However, as explained below, the negotiations between the United States and Mexico have encountered significant obstacles, particularly on labor and rules of origin, and other important issues remain unsettled:

- **Labor.** This week, the Mexican business community, along with Mexican President Andrés Manuel López Obrador and members of the Mexican Senate, expressed strong opposition to certain elements of the United States' proposal on labor enforcement. The proposal reportedly is modeled on language proposed by Senators Sherrod Brown (D-OH) and Ron Wyden (D-OR), which would authorize binational teams of inspectors to investigate Mexican factories for alleged labor violations, and would permit the United States to block imports originating from those facilities where violations are found to exist. Prominent US labor groups, including the AFL-CIO, have called for the inclusion of such a mechanism in the USMCA. However, Mexico's Deputy Foreign Minister Jesús Seade has stated repeatedly this year that Mexico would not accept such a mechanism, which it believes would infringe upon its national sovereignty and would place Mexican exporters at a competitive disadvantage, even with respect to exporters from countries such as China that do not have a trade agreement with the United States.

  On December 3, the Business Coordinating Council of Mexico (Consejo Coordinador Empresarial, "CCE") also expressed opposition to the US proposal, stating that "there are some [US] demands, on labor matters, that are extreme in nature and completely unacceptable…[t]he sovereignty of Mexico is non-negotiable." On the same day, President Obrador publicly rejected the proposal, stating that, while Mexico accepts the use of state-to-state dispute settlement to address alleged violations of the USMCA's labor rules, "[w]e do not accept inspectors[.]" He added that the Mexican Senate, which already has ratified the USMCA, would be consulted before Mexico signs any addendum to the Agreement. Mexico's Senate Majority Leader Ricardo Monreal stated on December 4 that the US labor demands were "unacceptable for national sovereignty" and that "[a]llowing the U.S. to deploy verifiers in production plants and Mexican companies would affect the competitiveness of the country and the region as a whole[.]"

Minister Seade has met with USTR Lighthizer this week in an effort to reach a compromise on labor enforcement, but the discussions thus far appear to have made little progress and to have been quite contentious. Though the bilateral negotiations are ongoing, they are likely to remain difficult, given that House Democrats and important Democratic constituencies (*i.e.*, organized labor) appear to be conditioning their support for a USMCA vote on Mexico's acceptance of a mechanism resembling the Wyden-Brown proposal. Speaker Pelosi on Thursday evening reiterated her view that the USMCA cannot yet advance because "we're not in a place that has enforcement."

- **Steel and aluminum.** The United States also has proposed new language that reportedly would further tighten the USMCA's automotive rules of origin (in particular, the requirement set forth in Article 6 of the Appendix to Annex 4B, which provides that vehicles will be considered originating only if the producer can certify that, during the previous year, at least 70% of the producer's North American purchases of steel and aluminum qualify as originating.) The United States reportedly has proposed that, for purposes of this requirement, the definition of "originating" steel and aluminum should be modified so as to include only steel and aluminum that is "melted and poured" within the USMCA region, thus excluding steel that is processed in North America from raw steel and aluminum imported from non-NAFTA countries. The proposal reportedly is intended to appease US labor unions, who have argued that Article 6 as currently written is inadequate because it does not include the "melted and poured" standard. For example, the Labor Advisory Committee in its report on the USMCA stated that, although the provision "includes a helpful requirement that automakers purchase 70% of the steel and aluminum they use from North American sources, it does not require those purchases to be originating by requiring a 'melted and poured' standard for steel or a similar standard for aluminum. The lack of robustness in this standard will result in some automakers continuing to use steel and aluminum from North American producers who import steel slabs or semi-finished aluminum from China and elsewhere[.]" The Mexican government and Mexican business groups reportedly have opposed USTR's proposal.

- **Biologics.** Mexico has been more receptive to the United States' proposal to reduce the USMCA's required level of intellectual property rights protection for biologic medicines. However, there currently are conflicting reports regarding the details of the US proposal: some indicate that the United States has offered to eliminate the USMCA's 10-year data exclusivity requirement for biologics entirely, whereas others state that the proposal would shorten the exclusivity requirement or introduce a "negative ratchet" mechanism, whereby future action by the US Congress to shorten the exclusivity period required under US law would trigger a matching reduction of the USMCA requirement. Even members of the House USMCA Working Group tasked with negotiating changes to the USMCA biologics provision have recently appeared uncertain about the nature of USTR's recent proposal to Canada and Mexico: Rep. Jan Schakowsky (D-IL), a Member of the Working Group, stated on December 4 that "I've heard both that they are going to reduce the years, I've heard that it is going to come out. I don't know[.]"

  Proposals to scale back the USMCA's provisions on biologics are likely to be acceptable to Canada and Mexico, who accepted US demands for a 10-year exclusivity period under USMCA but did not advocate the inclusion of such provisions in the Agreement. Congressional Republicans, who previously have insisted that US trade agreements match or come close to the 12-year exclusivity period required by US law, have expressed concern about USTR's reported proposals to weaken or remove the provision. However, despite vocal opposition to this change from the US pharmaceutical industry, few congressional Republicans appear likely to vote against the USMCA on these grounds alone.

- **Dispute settlement.** USTR appears to have reached agreement with House Democrats on language that would prevent a USMCA party from blocking the formation of a dispute settlement panel and thereby frustrating enforcement of the Agreement. Minister Seade reported last week that language eliminating the ability to block a dispute settlement panel has "already been agreed to" and would be included in an "addendum" to the USMCA. It appears likely that Canada and Mexico would accept such changes, given that both countries supported updating the NAFTA so as to prevent panel blocking and already have agreed to similar language in the TPP.

- **New demands regarding intermediary liability protections.** On December 4, Speaker Pelosi announced that she also is seeking the removal of provisions of the USMCA that mirror Section 230 of the Communications Act of 1934, enacted as part of the Communications Decency Act of 1996 (CDA). This provision of US law generally protects online service providers (*e.g.*, social media services) from being held liable for transmitting or taking down user-generated content. Article 19.17 of the USMCA requires a Party to incorporate a similar standard into its domestic law. However, this USMCA provision has engendered bipartisan opposition, given that Section 230 recently has become the subject of debate among Members of Congress. For example, House Energy and Commerce Committee Chairman Frank Pallone (D-NJ) and Ranking Member Greg Walden (R-OR) stated in an August letter to USTR Lighthizer that "the effects of Section 230 and the appropriate role of such a liability shield have become the subject of much debate in recent years…we find it inappropriate for the United States to export language mirroring Section 230 while such serious policy discussions are ongoing. For that reason, we do not believe any provision regarding intermediary liability protections of the type created by Article 19.17 are ripe for inclusion in any trade deal going forward." A spokesman for Speaker Pelosi issued a similar statement on December 4, noting that "[t]here are concerns in the House about enshrining the increasingly controversial…liability shield in our trade agreements, particularly at a time when Congress is considering whether changes need to be made in U.S. law[.]"

  Speaker Pelosi's demand to remove Article 19.17 from the USMCA appears unlikely to engender significant opposition from Canada or Mexico, and may be intended to assuage the concerns of certain Democratic constituencies who oppose Section 230 as currently written. However, by adding a new demand for changes to the USMCA at this late stage, it may further complicate efforts to finalize the agreement quickly, particularly given that prominent US technology companies support the USMCA provision and are advocating its preservation.

Outlook

With just eight legislative days remaining before the House is scheduled to adjourn for the year, the disagreements between the United States and Mexico over labor and rules of origin continue to prevent USTR from finalizing the changes to USMCA that House Democrats have demanded. Given this delay, and the procedural steps that must still take place before a House vote can occur, the window of opportunity for a USMCA vote in 2019 is now extremely limited, if not closed altogether. Even if the United States, Mexico, and Canada are able to come to agreement on all outstanding issues promptly, their commitments would need to be converted into a formal, legal text and presented to Speaker Pelosi for approval, after which legislation to implement the USMCA (and the new commitments) would need to be finalized and submitted to Congress. House Democrats also intend to hold hearings (*i.e.*, "mock markups") that could result in demands for changes to the implementing legislation prior to its official submission to Congress. Moreover, while some observers have stated that the new commitments will not require the re-opening of the USMCA text (and instead will take the form of an "addendum" that is complementary to, and approved alongside the USMCA), it is expected that some of the new commitments will need to be ratified by Mexico and possibly Canada. The House may be unwilling to advance the implementing legislation until the newly-negotiated commitments are ratified by the other USMCA parties (in particular Mexico), which may result in further delays. Thus, while a House vote on the USMCA this year still cannot be ruled out, it appears more likely that a potential vote will be delayed until next year, at which point the presidential election may further deter consideration of the Agreement.

House Democratic Leadership Endorses USMCA after Changes Accepted by Mexico and Canada; House Vote Expected Next Week

Today, House Speaker Nancy Pelosi (D-CA) announced that House Democrats have reached agreement with the Trump Administration on changes to the US-Mexico-Canada Agreement (USMCA) in the areas of labor, the environment, intellectual property, and dispute settlement. Shortly thereafter, trade ministers for the United States, Canada, and Mexico signed an addendum to the USMCA that incorporates the commitments envisioned in the new agreement between the Trump administration and House Democrats. Now that Canada and Mexico have accepted the changes sought by House Democrats, the House Democratic leadership and key US labor unions have endorsed the revised USMCA, and it appears likely that Congress will soon approve legislation to implement the Agreement, eschewing the remaining procedural rules that typically guide US trade agreements through Congress (and that many House Democrats demanded). In fact, the House of Representatives is expected to hold a floor vote on the USMCA implementing legislation next week, though Senate action on the Agreement is likely to be delayed until January, given the limited time remaining on the legislative calendar. We provide below an update on the new agreement and the next steps in the US implementation process.

Agreement on Changes to USMCA

The new agreement on changes to the USMCA comes after difficult negotiations between House Democrats, the Trump administration, and Mexico, particularly on issues related to labor, enforcement, and rules of origin. As of the time of this report's publication, the legal text of the changes agreed to by the three countries has not yet been made public. However, a summary document published today by House Ways and Means Committee Chairman Richard Neal (D-MA) states that House Democrats secured the following changes to the USMCA:

- **Dispute settlement.** The document states that the revisions to USMCA (1) "[r]emoved language allowing a responding party to block the formation of a dispute settlement panel"; and (2) "[f]or the first time in a trade agreement, created rules of evidence – rules that will help the United States successfully litigate labor, environmental, and other fact-intensive disputes."
- **Labor.** On labor, the document states the revisions have achieved the following:
  - A "new and enhanced labor-specific enforcement mechanism" that (1) "[p]rovides for facility-based enforcement of labor obligations in the agreement within a rapid timeframe"; (2) "[r]equires verification of compliance by independent labor experts"; and (3) [l]eads to penalties on goods and services that are not produced in compliance with the freedom of association and collective bargaining obligations."
  - A new mechanism that "[e]stablished key benchmarks for Mexico's labor reform implementation process", failure to comply with which "will lead to enforcement action under the agreement[.]"
  - Changes to certain obligations in the USMCA labor chapter (*e.g.*, creating "a presumption that a labor violation affects trade and investment and will require the other government to prove otherwise[.]"
- **Pharmaceutical IP.** The document states that, among other changes, the revisions will remove the following provisions from the USMCA Intellectual Property Chapter:

- The provision requiring the Parties to provide at least 10 years of exclusivity for biologics;
- The provision requiring the Parties to confirm that patents would be available for new uses of known products; and
- The provision requiring three additional years of exclusivity for clinical information submitted in connection with new uses of previously-approved pharmaceutical products.

- **Environment.** According to the document, the revisions have, among other changes:
  - Created a presumption that an environmental violation affects trade and investment and will require the other government to prove otherwise;
  - Added commitment that all Parties will adopt, implement, and maintain seven multilateral environment agreements (MEAs), and additional language that allows all Parties to agree to add to the list of covered MEAs;
  - Restored a provision in the old NAFTA that prioritizes MEA commitments when implementing MEA and trade agreement obligations; and
  - Removed language in order to allow the Montreal Protocol to be covered in the Agreement.

The document does not state whether the final agreement includes changes recently proposed by the United States that would further tighten the USMCA's automotive rules of origin (in particular, the requirement set forth in Article 6 of the Appendix to Annex 4B, which provides that vehicles will be considered originating only if the producer can certify that, during the previous year, at least 70% of the producer's North American purchases of steel and aluminum qualify as originating.) The United States reportedly has proposed that, for purposes of this requirement, the definition of "originating" steel and aluminum should be modified so as to include only steel and aluminum that is "melted and poured" within the USMCA region, thus excluding steel and aluminum that is processed in North America from raw steel and aluminum imported from non-NAFTA countries. Press reports indicate that Mexico has agreed to the revised standard for steel, which will not take effect for 7 years, but has not accepted the revised standard for aluminum.

Key congressional Democrats and labor organizations already have endorsed the revised USMCA and described it a model for future US trade agreements. Speaker Pelosi stated today that "[w]ith the transformative changes we won, Democrats have achieved a [USMCA] agreement that is infinitely better for American workers than what was originally proposed by the Trump administration[.]" House Ways and Means Committee Chairman Richard Neal (D-MA) stated that "[t]his revised agreement is a win for the U.S. economy and American families, and it will serve as the new standard for all future U.S. trade deals[.]" AFL-CIO President Richard Trumka also endorsed the agreement, stating that "now we have secured an agreement that working people can proudly support…Working people have created a new standard for future trade negotiations." The AFL-CIO's support, which up until today had been in question, was widely viewed as pivotal in determining whether the House Democratic leadership would support a USMCA vote.

Congressional Republicans and certain US business groups have been less enthusiastic about the USMCA changes, but the vast majority of Republican Members are expected to support the Agreement nonetheless. For example, House Ways and Means Committee Chairman Kevin Brady (R-TX) stated this week that Republican Members urged USTR not to eliminate the USMCA's provision on biologics, and groups representing the US pharmaceutical industry today strongly criticized the removal of the provision. Senate Finance Committee Chairman Chuck Grassley (R-IA) acknowledged today that this and other changes may have lessened Republican "enthusiasm" for the USMCA, but are unlikely to impede congressional approval of the Agreement. To date, only one Senate Republican, Sen. Pat Toomey (R-PA), has announced that he intends to vote against the USMCA due to the removal of the biologics provision, as well as the agreement's 16-year "sunset" clause, automotive rules of origin, and scaling back of investor-state dispute settlement.

Next steps

Despite today's announcements, Congress cannot proceed to consideration of the revised USMCA until legislation to implement the Agreement is finalized and introduced in Congress. To date, the implementing bill has not been finalized, though it reportedly is largely complete and could be finalized quickly. Moreover, now that House Democrats' political agreement with the Trump administration has been converted into legal text and signed by Canada and Mexico, the House Democratic leadership appears prepared to advance the USMCA implementing legislation quickly after its introduction. Indeed, even though the implementing legislation and the legal text of the revised agreement have not yet been made public or shared with Members, Speaker Pelosi reportedly told Members today that she expects to bring the legislation to the House floor for a vote next week, before the House adjourns for the year and long before the "fast track" deadlines for congressional consideration of a trade agreement under Trade Promotion Authority (TPA). To facilitate this rapid consideration of the Agreement, the House Ways and Means Committee reportedly will forego a "mock markup" of the implementing legislation, which House Democrats previously insisted would occur before a final vote and has been standard practice during congressional consideration of prior FTAs. Thus, while congressional Democrats historically have insisted on stringent transparency and consultation requirements to ensure that Members and the public have adequate time to review the legal texts of proposed trade agreements and their implementing legislation before any vote, the current House Democratic leadership appears prepared to vote on the revised USMCA just days after its text and implementing bill are published.

By contrast, the Senate appears unlikely to vote on the USMCA implementing legislation before the end of the year. Senate Majority Leader Mitch McConnell (R-KY) stated today that it is "not possible" for the Senate to vote on the USMCA this year given the limited time remaining on the legislative calendar, and Chairman Grassley has indicated that he wants to consider the USMCA under normal procedures (including by holding a mock markup in the Senate Finance Committee). Thus, while the Senate appears likely to approve the USMCA, such a vote will probably not occur until at least January. In this context, Speaker Pelosi's decision to rapidly bring the USMCA to a vote before the end of the year appears to reflect largely political considerations (*i.e.*, a desire to show voters that Democrats are willing to compromise with the Trump administration and are not focused solely on impeachment, and a concern that securing House Democrats' support for USMCA may be far more difficult next year due to the presidential election). Given this approach, however, uncertainties remain regarding the substance of the agreement and legislation on which Members of Congress may vote as soon as next week, and on how the rules and legislative framework set forth in TPA will apply to the USMCA's implementing legislation, as well as future bills implementing US trade agreements.

US Trade Actions

Section 301

USTR Proposes Tariffs on French Goods and Possible Restrictions on Services in Section 301 Investigation of France's Digital Services Tax

On December 2, 2019, the Office of the US Trade Representative (USTR) announced its determination that France's Digital Services Tax (DST) is "unreasonable or discriminatory and burdens or restricts U.S. commerce" and is therefore actionable under Section 301 of the Trade Act of 1974.[2] Based on this determination, and in response to the acts, policies, and practices covered by the Section 301 investigation, USTR has proposed to impose tariffs "of up to 100 percent" on a list of French-origin goods with an annual import value of $2.4 billion, and "is considering whether to impose fees or restrictions on services of France." The latter proposal represents the first time that the Trump administration has formally proposed to restrict services imports in response to "unfair" foreign government practices. USTR is inviting public comments on these proposed trade restrictions by the following deadlines:

- **December 30, 2019:** Due date for submission of a request to appear at the public hearing and a summary of testimony.
- **January 6, 2020:** Due date for written comments.
- **January 7, 2020:** The Section 301 Committee will convene a public hearing in the main hearing room of the US International Trade Commission, 500 E Street SW, Washington DC 20436 beginning at 9:30 am.
- **January 14, 2020:** Due date for submission of post-hearing rebuttal comments.

This alert provides an overview of USTR's determination, the next steps in the Section 301 investigation, and the status of discussions at the OECD regarding taxation of digital services.

Determination on the Acts, Policies, and Practices under Investigation

Based on the information obtained during the investigation, USTR has determined that "the act, policy, or practice covered in the investigation, namely the French DST, is unreasonable or discriminatory and burdens or restricts U.S. commerce, and is thus actionable under section 301(b) of the Trade Act." In particular, USTR determined that:

(1) The French DST "is intended to, and by its structure and operation does, discriminate against U.S. digital companies, including due to the selection of services covered and the revenue thresholds."

(2) The French DST's retroactive application "is unusual and inconsistent with prevailing tax principles and renders the tax particularly burdensome for covered U.S. companies."

(3) The French DST's application to revenue rather than income "contravenes prevailing tax principles and is particularly burdensome for covered U.S. companies."

(4) The French DST's application to revenues unconnected to a physical presence in France "contravenes prevailing international tax principles and is particularly burdensome for covered U.S. companies."

(5) The French DST's application to a "small group of digital companies contravenes international tax principles counseling against targeting the digital economy for special, unfavorable tax treatment."

[2] USTR's Federal Register notice on the proposed actions is available **here**.

USTR has provided further details on the findings of its investigation in a publicly available report on its website, available **here**. Notably, although the report concludes that "[a] range of tools may be appropriate to address these serious matters, including intensive bilateral engagement, WTO dispute settlement, or 'imposing duties, fees, or other import restrictions'", USTR's proposed action (discussed below) contemplates only unilateral measures, as opposed to WTO dispute settlement, in response to the DST. Although this unilateralism would raise serious questions regarding the actions' consistency with the United States' own obligations under the WTO Agreements, such concerns did not deter the Trump administration from taking similar unilateral action under Section 301 to combat alleged Chinese trade practices.

Proposed Action to be taken in the Investigation

In a Federal Register notice, USTR has proposed to respond to the French DST by imposing tariffs "of up to 100 percent" on a list of products of France with an annual import value of approximately $2.4 billion, including dairy products, cosmetics, sparkling wine, and leather goods. In addition, and "[i]n light of the fact that the actionable act, policy, or practice of France involves a tax on U.S. service providers," USTR "is considering whether to impose fees or restrictions on services of France." This element of the proposed action is noteworthy, as it represents the first time that the Trump administration has proposed to retaliate against "unfair" foreign government trade practices by restricting US imports of services, rather than goods. The dispute over the French DST therefore has the potential to disrupt the supply of services from France to the United States, which totalled approximately $17.5 billion in 2017.

USTR is requesting public comments on both aspects of its proposed action, as explained below.

Tariffs

With respect to the proposed tariffs on French goods, USTR has specifically invited comments on the following issues:

- The specific products to be subject to increased duties, including whether products listed in the Annex should be retained or removed, or whether products not currently on the list should be added.
- The level of the increase, if any, in the rate of duty.
- The level of the burden or restriction on the US economy resulting from the DST.
- The appropriate aggregate level of trade to be covered by additional US duties.

Moreover, USTR asks that comments on the inclusion or removal of particular products on the preliminary tariff list also address (1) whether imposing increased duties on a particular product would be practicable or effective to obtain the elimination of France's acts, policies, and practices; and (2) whether imposing additional duties on a particular product would cause disproportionate economic harm to US interests, including small- or medium-size businesses and consumers.

Fees or restrictions on services

With respect to potential fees or restrictions on French services, USTR seeks comments on the following issues:

- Which services would be covered by a fee or restriction.
- If a fee is imposed, the rate (flat or percentage) of the fee, and the basis upon which any fee would be applied.
- If a restriction is imposed, the form of such restriction.

- Whether imposing fees or restrictions on services of France would be practicable or effective to obtain the elimination of France's acts, policies, and practices.

The lack of additional details on this proposed action (*e.g.*, potential services to be restricted) contrasts with the tariff proposal and may indicate that USTR is not prepared to implement such measures at this stage.

Outlook

USTR's proposal to retaliate unilaterally against the DST, including through potential restrictions on services trade, may run afoul of the United States' WTO obligations, which require Members to use WTO dispute settlement, not unilateral actions, to address any perceived violations of the WTO Agreements. Nevertheless, the Trump administration's Section 301 actions against China, and recent statements from Congress on the DST, indicate little concern within the US government about using the threat of unilateral trade actions to deter foreign government practices that are perceived to disadvantage US interests. Indeed, Senate Finance Committee Chairman Chuck Grassley (R-Iowa) and Ranking Member Ron Wyden (D-Ore.) have issued a statement praising USTR's latest action, stating that "[w]e welcome this step from USTR on behalf of US companies being unfairly targeted and harmed by the French tax[.]"

Groups representing US digital services companies, such as the Information Technology Industry Council (ITI), also have praised USTR's finding and willingness "to prepare a strong trade response should the measure remain in place." However, the ITI and similar groups, such as the Internet Association, have continued to urge the United States and France to reach a negotiated solution in the context of the ongoing discussions at the OECD regarding digital services taxation, rather than resorting to unilateral trade restrictions.

As part of its Base Erosion and Profit Shifting ("BEPS") project, which aims to "tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment," the OECD has been working towards providing a consensus solution to the taxing of digital services, adopting a Programme of Work with a goal of agreement by the end of 2020. The OECD's Secretariat has proposed a "Unified Approach" setting forth key nexus, threshold, and allocation features at a general level. A public consultation document has been released describing those features and seeking comment on policy, technical, and administrative issues raised by the proposal, and the OECD has held a public consultation meeting. This proposal has not yet been adopted by the members of the OECD Inclusive Framework on BEPS.

With respect to BEPS as well as the Programme of Work, the US has been a proponent of a multilateral consensus and, as a result, has been supportive of the OECD's efforts to seek a consensus position with respect to jurisdictional taxing of digital services. However, as to the specifics of the Programme of Work, the US Treasury issued a letter to the OECD on December 4 stating that the US has "serious concerns" regarding the Secretariat's proposal as a departure from traditional transfer pricing and nexus standards that could undermine expectations based on those standards. The Treasury letter suggested that the proposal be used as a "safe-harbor" regime that would allow companies to opt out.

Though these discussions at the OECD may ultimately yield a negotiated solution on digital services taxation, this outcome is far from guaranteed and the discussions could be long and drawn-out. It is uncertain whether agreement will be reached before the end of 2020. Moreover, USTR has provided only a short window for interested parties to comment on its proposed action, and has stated that it intends "to proceed expeditiously" after the public comment period concludes in mid-January. Given these circumstances and the Trump administration's propensity to utilize trade restrictions as "leverage" in discussions with trading partners, there is a significant possibility that USTR will take some form of unilateral action – most likely new tariffs on French goods – under Section 301 in response to the DST. The European Commission already has signaled that it will retaliate should the United States implement unilateral measures in response to the DST.

Given these risks, interested parties may wish to provide comments on USTR's proposed actions in the Section 301 investigation, and to monitor any EU retaliation proposals.

United States and China Announce "Phase One" Agreement, Averting December 15 Tariff Increase

On December 13, 2019, the United States and China announced that they have reached a "Phase One" trade agreement, and that the additional tariffs each side had scheduled to take effect on December 15 will therefore be cancelled.[3] The two sides have not yet signed the Phase One agreement, but have indicated that the text of the agreement is largely complete and that they intend to sign the agreement in early January following completion of a legal review. However, the details of the agreement have not yet been made public, and the parties have released only general summaries of its contents. Thus, while the cancellation of the December 15 tariff increase has been confirmed, other aspects of the deal, including the precise timing of other announced tariff reductions, remain unclear. We provide below an overview of today's announcements regarding the Phase One agreement and related changes to the United States' Section 301 tariffs.

Modification of Section 301 tariffs

The Trump administration announced today that, as a result of the Phase One agreement, the United States will: (1) cancel the imposition of a 15% additional duty on "List 4B" goods ($160 billion) that had been scheduled to take effect on December 15; and (2) reduce to 7.5% (from the current rate of 15%) the additional duty it has imposed on "List 4A" goods ($120 billion) since September 1, 2019. According to the Office of the US Trade Representative (USTR), the United States will not reduce the Section 301 tariff rate on Lists 1-3 ($250 billion), which will remain at 25%. Though Chinese officials suggested in a press conference this morning that the United States would reduce the remaining tariffs in stages, USTR Lighthizer stated today that the United States has not agreed to do so, and suggested that China's statement referred to potential tariff reductions that might be agreed in "future phases" of the negotiation.

USTR already has taken action to cancel the imposition of the List 4B tariff, but it is currently unclear when the reduction of the tariff rate on List 4A goods will take effect. USTR on Friday afternoon issued a Federal Register notice "suspending, until further notice," the additional tariff on List 4B, but the notice does not modify the tariff rate on List 4A. Rather, it states only that "in light of the progress in the negotiations, the U.S. Trade Representative expects to issue in the near future a notice reducing the rate of additional duty applicable to [List 4A]." The notice does not specify whether the tariff reduction on List 4A will be contingent upon any other action, such as the signing or entry into force of the Phase One agreement. China has indicated that it will implement a commensurate reduction of its retaliatory tariffs on US goods when the United States implements the tariff reduction on List 4A.

The chart below illustrates the effect of the Phase One agreement on the United States' Section 301 tariffs, based on the statements issued today by USTR and President Trump:

Tariff List	Section 301 Tariff Before Phase One Agreement	Section 301 Tariff with Phase One Agreement
List 1 ($34 billion)	25%	25%
List 2 ($16 billion)	25%	25%
List 3 ($200 billion)	25%	25%
List 4A ($120 billion)	15%	7.5%

[3] USTR's Federal Register notice is available here.

List 4B ($160 billion)	15% as of December 15, 2019	Cancelled

Substance of the Agreement

In a fact sheet released today,[4] USTR described the Phase One agreement as "an historic and enforceable agreement…that requires structural reforms and other changes to China's economic and trade regime[.]" The Phase One agreement also "includes a commitment by China that it will make substantial additional purchases of U.S. goods and services in the coming years." According to USTR, the agreement consists of the following chapters and commitments:

- **Intellectual Property.** The Intellectual Property chapter "addresses numerous longstanding concerns in the areas of trade secrets, pharmaceutical-related intellectual property, geographical indications, trademarks, and enforcement against pirated and counterfeit goods."
- **Technology Transfer.** According to USTR, China "has agreed to end its long-standing practice of forcing or pressuring foreign companies to transfer their technology to Chinese companies as a condition for obtaining market access[.]" Separately, China "further commits to refrain from directing or supporting outbound investments aimed at acquiring foreign technology pursuant to industrial plans that create distortion." USTR states that the obligations in this chapter are "binding and enforceable[.]"
- **Agriculture.** The Agriculture Chapter purportedly addresses "[a] multitude of non-tariff barriers to U.S. agriculture and seafood products…including for meat, poultry, seafood, rice, dairy, infant formula, horticultural products, animal feed and feed additives, pet food, and products of agriculture biotechnology."
- **Financial Services.** The Financial Services Chapter "addresses a number of longstanding trade and investment barriers to U.S. providers of a wide range of financial services," including foreign equity limitations and "discriminatory regulatory requirements."
- **Currency.** This chapter requires "high-standard commitments to refrain from competitive devaluations and targeting of exchange rates, while significantly increasing transparency and providing mechanisms for accountability and enforcement."
- **Expanding Trade.** According to USTR, China has committed "to import various U.S. goods and services over the next two years in a total amount that exceeds China's annual level of imports for those goods and services in 2017 by no less than $200 billion." China's commitments "cover a variety of U.S. manufactured goods, food, agricultural and seafood products, energy products, and services."
- **Dispute Resolution.** USTR states that the Dispute Resolution Chapter "establishes strong procedures for addressing disputes related to the agreement and allows each party to take proportionate responsive actions that it deems appropriate."

Though USTR's fact sheet illustrates the general scope of the agreement, it provides little detail about the specific commitments that will be undertaken by the parties. For example, while USTR claims to have secured commitments from China on some "structural" issues, the precise nature and extent of these commitments are unclear, as is the architecture of the dispute resolution mechanism through which such commitments would be enforced. Moreover, many questions remain about China's commitments to increase purchases of US goods and services, particularly given that (1) such commitments are unusual in modern trade agreements; (2) China reportedly has resisted committing to specific, dollar-figure targets for such purchases, and has not confirmed their inclusion in the

[4] USTR's fact sheet on the agreement is available **here**.

agreement; and (3) USTR Lighthizer indicated today that the list of specific products benefiting from such commitments will remain "classified".

Outlook

The Phase One agreement is an important development that appears to have averted further escalation of the US-China trade dispute, at least for the time being. However, as noted above, it appears that the agreement will provide only limited relief from the existing tariffs that the two sides have imposed. Indeed, Section 301 duties will not be fully eliminated for any currently-subject product as a result of the agreement, and the majority of imports subject to such duties (*i.e.*, Lists 1-3) will not see any reduction from the current rate of 25%. Moreover, the agreement itself may prove to be more modest than the initial US statements indicate. While the United States claims to have secured commitments from China on some "structural issues", the extent of these commitments remains in question, particularly given that the recent negotiations reportedly have focused on China's commitment to purchase US agricultural products and other goods and services.

USTR Lighthizer stated today that the United States and China expect to sign the Phase One agreement in early January, and that the agreement will enter into force 30 days after it is signed. According to President Trump, negotiations for a "Phase Two" agreement will begin "immediately." While China has confirmed that it is willing to participate in a second stage of negotiations, it appears doubtful that a Phase Two agreement, which purportedly would address more difficult structural issues than those covered by Phase One, can be concluded quickly. Thus, existing US and Chinese tariffs that are not eliminated by the Phase One agreement may remain in place for the foreseeable future.

US Trade Representative Requests Comments on Possible One-Year Extension of "List 1" China Tariff Exclusions Set to Expire in March 2020

On December 30, 2019, the Office of the US Trade Representative (USTR) announced that it will initiate a process for considering whether to extend for up to twelve months certain Section 301 tariff exclusions that were granted by USTR in March 2019 and are set to expire in March 2020. This process will allow interested parties to file comments supporting or opposing the extension of the 33 exclusions, which provided US importers relief from the 25% additional tariff imposed on $34 billion in annual imports from China ("List 1") pursuant to Section 301. USTR in October established a similar extension process for a prior tranche of List 1 exclusions that were set to expire on December 28, 2019, and the agency on December 23 decided to extend certain of those exclusions for an additional 12 months. USTR's decision to establish an extension process for the second tranche of List 1 exclusions, combined with its recent announcement that the "Phase One" US-China agreement will not eliminate the 25% Section 301 tariff on List 1 goods, suggests that USTR will likely establish similar extension processes for subsequent tranches of List 1 exclusions.

USTR's notice contains the following information about the new extension process:

Key Dates

Beginning on **January 15, 2020 at 12:01 a.m. ET**, USTR will open a docket (Docket Number USTR-2019-0024) for public comments on the possible extension of particular exclusions granted to List 1 goods. (USTR will not be using the new Section 301 Exclusion Portal that the agency opened for List 3 and List 4A tariff exclusions.) To be assured of consideration, written comments must be submitted by **February 15, 2020**.

Exclusions Eligible for Extension

USTR is requesting comments regarding the possible extension of particular product exclusions granted in USTR's Federal Register notice of March 25, 2019 (84 FR 11152). On that date, USTR granted exclusions from the List 1 tariff (initially imposed on July 6, 2018) for 33 different products, which are listed in the Annex to the Federal Register notice (available **here**). These product exclusions are currently scheduled to expire on March 25, 2020. USTR's new Federal Register notice states that, "[a]t this time, USTR is not considering comments concerning possible extensions of exclusions granted under any other product exclusion notice."

Criteria for Granting Extensions

USTR is inviting public comments on whether to extend particular exclusions granted in the March 2019 notice "for up to 12 months." USTR will evaluate the possible extension of each exclusion "on a case-by-case basis." According to USTR, the focus of the evaluation will be whether, despite the first imposition of the additional duties in July 2018, the particular product remains available only from China. In addressing this factor, USTR states that commenters should address specifically:

- Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Any changes in the global supply chain since July 2018 with respect to the particular product, or any other relevant industry developments.
- The efforts, if any, the importers or U.S. purchasers have undertaken since July 2018 to source the product from the United States or third countries.

In addition, USTR will continue to consider "whether the imposition of additional duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests."

Procedures for Submitting Requests

USTR "strongly encourages" parties submitting comments to do so using **Form A**, which is attached to the Federal Register notice and requests information regarding (1) the organization submitting comments; (2) the exclusion request and product at issue; (3) whether the products covered by the exclusion "or comparable products" are available from non-Chinese sources; and (4) the commenter's rationale for supporting or opposing the exclusion. USTR will post completed the Form A on the public docket.

In addition, USTR states that "commenters who are importers and/or purchasers of the products covered by the exclusion should complete **Form B**," which also is attached to the FR notice. Form B requests business confidential information (BCI), and will not be posted on the public docket. Form B requires commenters who are importers and/or purchasers of the products covered by the exclusion to provide the following information:

- Efforts undertaken since July 2018 to source the product from the United States or third countries.
- The value and quantity of the Chinese-origin product covered by the specific exclusion request purchased in 2018, the first half of 2018, and the first half of 2019, and whether these purchases are from a related company (and, if so, the name of and relationship to the related company.)
- Whether Chinese suppliers have lowered their prices for products covered by the exclusion following the imposition of duties.
- The value and quantity of the product covered by the exclusion purchased from domestic and third country sources in 2018, the first half of 2018 and the first half of 2019.
- If applicable, the commenter's gross revenue for 2018, the first half of 2018, and the first half of 2019.

- Whether the Chinese-origin product of concern is sold as a final product or as an input.
- Whether the imposition of duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests.

Given the relatively short timeframe for submitting comments and the volume of information requested by USTR, parties seeking to comment on the extension of exclusions expiring on March 25, 2020 should begin preparing to do so as soon as possible.

Outlook

The exclusions that are the subject of the new proceeding represent only a small share of the exclusions that USTR has granted for List 1. Additional List 1 exclusions were granted and are set to expire on the following dates:

Exclusion Round	Expiration
Exclusions Granted April 18, 2019	April 18, 2020
Exclusions Granted May 14, 2019	May 14, 2020
Exclusions Granted June 4, 2019	June 4, 2020
Exclusions Granted July 9, 2019	July 9, 2020
Exclusions Granted September 20, 2019	September 20, 2020
Exclusions Granted October 2, 2019	October 2, 2020

USTR has not confirmed whether it will establish similar processes allowing parties to request the extension of the above exclusions (or the exclusions that USTR has granted for other Section 301 tariff lists) before they expire. However, the new USTR notice indicates that USTR will likely establish similar processes as the other exclusions' expiration dates approach – particularly given that the "Phase One" US-China agreement set to be signed on January 15 will not eliminate the Section 301 tariffs on Lists 1-3, and that a potential "Phase Two" agreement appears unlikely to be completed in the near future. Given that the Section 301 tariffs on Lists 1-3 appear likely to remain in place for the foreseeable future, parties interested in the extension of product exclusions that are not covered by the new process should monitor future announcements by USTR.

Section 232

President Trump Announces Decision to Impose Section 232 Tariffs on Steel and Aluminum from Argentina, Steel from Brazil

On December 2, 2019, President Trump announced via Twitter that he intends to impose Section 232 tariffs on steel and aluminum imports from Argentina and Brazil. The full text of the President's announcement is as follows:

> Brazil and Argentina have been presiding over a massive devaluation of their currencies.{sic} which is not good for our farmers. Therefore, effective immediately, I will restore the Tariffs on all Steel & Aluminum that is shipped into the U.S. from those countries. The Federal Reserve should likewise act so that countries, of which there are many, no longer take advantage of our strong dollar by further devaluing their currencies.

> This makes it very hard for our manufactures & farmers to fairly export their goods. Lower Rates & Loosen - Fed!

As of the time of this report's publication, however, the Trump administration has not published a formal announcement or proclamation regarding the President's decision, and US Customs and Border Protection (CBP) has not issued any official guidance regarding a modification of the Section 232 action with respect to steel and aluminum imports from Argentina and Brazil. Thus, key details of the President's decision – including the timing and operation of the additional duties and the legal authority for the President's action – remain unclear at this time. It is even possible that the President's tweet will not be converted into an executive order or proclamation, and that no material change will occur. It is difficult to interpret the lack of official guidance at this stage, which could reflect internal disagreement over the policy announced by the President or, alternatively, only a delay in issuing the precise implementing language. If the latter, we would expect the Trump administration to issue a formal proclamation over the next few days effectuating the President's decision and answering the many outstanding questions thereon. Interested parties may wish to wait for such guidance before altering their current business plans.

Background

Argentina and Brazil have been exempt from the 25% Section 232 duty on steel imports since the duty first took effect on March 23, 2018, and Argentina similarly has been exempt from the 10% Section 232 duty on aluminum imports. Instead, each country's imports have been subject to a "hard quota" limiting their volumes on a quarterly basis. Though President Trump initially determined on March 8, 2018 to impose tariffs on steel and aluminum "from all countries except Canada and Mexico", he decided two weeks later to temporarily exempt imports from Argentina and Brazil in light of "continuing discussions" with these countries "on satisfactory alternative means to address the threatened impairment to the national security[.]" On May 31, 2018, President Trump determined to exempt steel and aluminum products from Argentina and steel products from Brazil "on a long-term basis" because the United States had "agreed on a range of measures with [Argentina and Brazil], including measures to reduce excess [steel/aluminum] production and excess [steel/aluminum] capacity, measures that will contribute to increased capacity utilization in the United States, and measures to prevent the transshipment of [steel/aluminum] articles and avoid import surges." However, the Proclamations implementing these "agreements" also imposed quantitative restrictions (*i.e.*, quotas) that: (1) cap, on a product-specific basis, the annual volumes of steel and aluminum imports from Argentina and steel imports from Brazil that may enter the United States free from Section 232 duties; and (2) prohibit <u>any</u> imports above the applicable quota limits, regardless of duty rate, for the period at issue.

The Steel Proclamation and the Aluminum Proclamation are available **here** and **here**, respectively.

Outstanding Questions

As noted above, the lack of official guidance from the Trump administration on the President's announcement leaves several important questions outstanding:

- **Potential effect on Section 232 quota schemes.** President Trump's announcement does not clarify whether the forthcoming Section 232 tariffs on steel and aluminum from Argentina and steel from Brazil will replace the current quota limits on such imports or instead be applied to in-quota volumes. Though the former scenario appears more likely based on the President's announcement, it does not rule out the latter scenario. Nevertheless, applying tariffs to in-quota import volumes seems unlikely, as it would result in treatment of Argentine and Brazilian imports that is more restrictive than that applied to imports from other countries, such as China, that are not subject to Section 232 quotas.
- **Potential timing of any change to imports from Argentina and Brazil.** President Trump's announcement also does not clarify when the announced change will take effect, though it indicates that such action could occur soon. This timing could have a significant commercial impact on interested parties in the United States,

Argentina and Brazil who assumed before today that the Section 232 quota system would continue to operate for at least the next several months. For example, it is likely that subject goods are already in transit to the United States (or are already in a US foreign trade zone awaiting the January 1 opening of additional quota volumes) under the assumption that they would eventually be able to enter the United States free from Section 232 tariffs. If these goods are instead subject to Section 232 tariffs, rather than entering duty-free within the Section 232 quota volumes, US importers could face substantial and unexpected duty liability.

- **Potential legal justification.** Because the Trump administration has not issued a formal proclamation effectuating the President's announcement, the legal justification for the forthcoming modification of the Section 232 action is uncertain. Some legal scholars have argued that the new action is unlawful in light of the US Court of International Trade's recent ruling in *Transpacific Steel LLC v. United States*, in which the CIT found that strict timelines apply to "import adjustment" actions under Section 232, and that the President generally cannot modify such actions after the applicable deadlines have passed. However, the court also distinguished between the provisions of Section 232 that authorize import adjustment actions and a separate provision authorizing the President to negotiate trade agreements. The latter provision reads as follows:

> (3) (A) If—
>
> (i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and
>
> (ii) either—
>
> (I) (I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or
>
> (II) (II) 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 President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

Thus, although the Trump administration has yet to clarify how Section 232 allows the President to change the quotas on subject imports from Argentina and Brazil, they may seek to draft the new proclamation, and thus to defend the new action, by stating that (1) the Argentina-US or Brazil-US quota agreement "is not being carried out or is ineffective in eliminating the threat to the national security"; and (2) the President is therefore taking required "such other actions" (*i.e.*, the tariffs) to adjust imports and thereby remove the national security threat. Whether the relevant economic data support these conclusions, and whether a court would accept them, remain to be seen.

Outlook

As explained above, key details of the President's decision – including the timing of the new tariffs, the nature of any changes to the Section 232 quota regime, and the legal justification for such actions – remain unclear. Moreover, it remains possible that the President's announcement ultimately will not be converted into an executive order or proclamation, and that no material change will occur. Importers of products currently subject to the quotas should therefore monitor closely any official announcements regarding the new action, and wait for such announcements before implementing any changes to their current plans. On the other hand, the Trump administration typically implements President Trump's Twitter announcements shortly after he makes them, so importers may wish to begin exploring alternative arrangements in order to mitigate any potential commercial harms caused by this Section 232 decision.

Petitions and Investigations

US Department of Commerce Issues Affirmative Final Determination in Antidumping Investigation of Carbon and Alloy Steel Threaded Rod from Taiwan

On December 4, 2019, the US Department of Commerce (DOC) announced its affirmative final determination in the antidumping duty (AD) investigation of imports of carbon and alloy steel threaded rod from Taiwan. In its investigation, DOC determined that exporters from Taiwan have dumped carbon and alloy steel threaded rod in the United States at a margin of 32.26 percent. As a result of the decision, DOC instructed US Customs and Border Protection (CBP) to continue to collect cash deposits equal to the applicable final weighted-average dumping rate.

The petitioner in this investigation is Vulcan Threaded Products, Inc. (Pelham, AL). The merchandise covered by these investigations is carbon and alloy steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs of carbon or alloy steel, having a solid, circular cross section of any diameter, in any straight length. Steel threaded rod is currently classifiable under subheadings 7318.15.5051, 7318.15.5056, and 7318.15.5090 of the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may also enter under subheading 7318.15.2095 and 7318.19.0000 of the HTSUS.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determination on or around January 17, 2019. If the ITC reaches an affirmative final injury determination, DOC will issue an AD order. If the ITC reaches a negative final determination of injury, the investigation will be terminated and no order will be issued.

In 2018, imports of carbon and alloy steel threaded rod from Taiwan were valued at an estimated $156 million, according to DOC.

US Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determinations on Quartz Surface Products from India and Turkey

On December 5, 2019, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping duty (AD) investigations of imports of quartz surface products from India and Turkey. In its investigations, DOC preliminarily determined that exporters from these countries sold quartz surface products at less than fair value in the United States at the following rates:

- India: 2.62 to 5.05 percent
- Turkey: 0.00 percent to 4.88 percent

As a result of these decisions, DOC instructed US Customs and Border Protection to collect cash deposits from importers of quartz surface products from India and Turkey based on these preliminary rates.

The petitioner in these investigations is Cambria Company, LLC (Eden Prairie, MN). The merchandise covered by the investigations is certain quartz surface products. Quartz surface products consist of slabs and other surfaces created from a mixture of materials that includes predominately silica (e.g., quartz, quartz powder, cristobalite, glass powder) as well as a resin binder (e.g., an unsaturated polyester). The products subject to the scope are 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 7016.90.1050.

DOC is scheduled to announce its final determinations on or around February 19, 2020. If DOC's final determinations are affirmative, the US International Trade Commission (ITC) will be scheduled to make its final injury determinations on or around April 3, 2020. If DOC makes affirmative final determinations of dumping, and the ITC makes affirmative final injury determinations, DOC will issue AD orders. If DOC makes negative final determinations of dumping, or the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of quartz surface products from India and Turkey were valued at an estimated $69.5 million and $28 million, respectively, according to DOC.

US Department of Commerce Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations of Dried Tart Cherries from Turkey

On December 5, 2019, the US Department of Commerce announced its affirmative final determinations in the antidumping duty (AD) and countervailing duty (CVD) investigations of imports of dried tart cherries from Turkey. In its investigations, DOC determined that exporters from Turkey have sold dried tart cherries in the United States at dumping margins ranging from 541.29 percent to 648.35 percent. In addition, DOC determined that exporters from Turkey received countervailable subsidies at a rate of 204.93 percent.

The petitioner in these investigations is the Dried Tart Cherry Trade Committee, which includes Cherry Central Cooperative (Traverse City, MI), Graceland Fruit, Inc. (Frankfort, MI), Payson Fruit Growers Coop (Payson, UT), Shoreline Fruit, LLC (Traverse City, MI), and Smeltzer Orchard Co. (Frankfort, MI). The scope of these investigations covers dried tart cherries, which may also be referred to as, e.g., dried sour cherries or dried red tart cherries. The subject merchandise is currently classifiable under subheading 0813.40.3000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise may also enter under subheadings 0813.40.9000, 0813.50.0020, 0813.50.0060, 2006.00.2000, 2006.00.5000, and 2008.60.0060.

The US International Trade Commission (ITC) is currently scheduled to make its final injury determinations on or around January 21, 2020. If the ITC makes affirmative final injury determinations, DOC will issue AD and CVD orders. If the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of dried tart cherries from Turkey were valued at an estimated $1.2 million, according to DOC.

US Department of Commerce Issues Affirmative Preliminary Determinations in the Countervailing Duty Investigations of Imports of Wind Towers from Canada, Indonesia, and Vietnam

On December 9, 2019, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the countervailing duty (CVD) investigations of imports of utility scale wind towers from Canada, Indonesia, and Vietnam. In its investigations, DOC preliminarily determined that exporters from these countries received countervailable subsidies at rates of 1.09 percent, 20.29 percent, and 2.43 percent, respectively. As a result of these decisions, DOC instructed US Customs and Border Protection to collect cash deposits from importers of utility scale wind towers from Canada, Indonesia, and Vietnam based on these preliminary rates.

The petitioner in these investigations is the Wind Tower Trade Coalition, which includes Arcosa Wind Towers Inc. (Dallas, TX) and Broadwind Towers, Inc. (Manitowoc, WI). The merchandise covered by the scope of these investigations consists of certain wind towers, whether or not tapered, and sections thereof. Merchandise covered by these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7308.20.0020 or 8502.31.0000. Wind towers of iron or steel are classified under HTSUS 7308.20.0020 when imported separately as a tower or tower section(s). Wind towers may be classified under HTSUS 8502.31.0000 when imported as combination goods with a wind turbine (i.e., accompanying nacelles and/or rotor blades).

DOC is currently scheduled to announce its final CVD determinations on or around April 21, 2020. If DOC makes affirmative final determinations, the US International Trade Commission (ITC) will be scheduled to make its final injury determinations on or around June 4, 2020. If DOC makes affirmative final determinations in these investigations, and the ITC makes affirmative final injury determinations, DOC will issue CVD orders. If DOC makes negative final determinations, or the ITC makes negative final determinations of injury, the investigations will be terminated and no orders will be issued.

In 2018, imports of utility scale wind towers from Canada, Indonesia, and Vietnam were valued at an estimated $60.2 million, $37.4 million, and $21.4 million, respectively, according to DOC.

US International Trade Commission Issues Affirmative Final Determinations in Antidumping and Countervailing Duty Investigations Concerning Polyester Textured Yarn from China and India

On December 12, 2019, the US International Trade Commission (ITC) determined that a US industry is materially injured by reason of imports of polyester textured yarn from China and India that the US Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value. As a result of the ITC's affirmative determinations, DOC will issue antidumping and countervailing duty orders on imports of this product from China and India. DOC in November 2019 determined that imports of the subject merchandise from China and India were sold in the United States at dumping margins of 65.39% to 66.47% and 13.14% to 43.38%, respectively. In addition, DOC determined that imports of these products from China and India received countervailable subsidies valued at 32.18% to 473.09% and 4.29% to 21.83%, respectively.

Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the affirmative in this investigation. The ITC also made negative findings concerning critical circumstances with regard to imports of this product from China. As a result, imports of polyester textured yarn from China will not be subject to retroactive antidumping and countervailing duties.

The merchandise covered by these investigations, polyester textured yarn, is synthetic multifilament yarn that is manufactured from polyester (polyethylene terephthalate). The merchandise subject to these investigations is properly classified under subheadings 5402.33.3000 and 5402.33.6000 of the Harmonized Tariff Schedule of the United States (HTSUS). Merchandise subject to these investigations may also enter under HTSUS subheading 5402.52.00.

In 2018, imports of polyester textured yarn from China and India were valued at an estimated $45.5 million and $21.6 million, respectively, according to DOC.

US International Trade Commission Issues Negative Final Determinations in Antidumping and Countervailing Duty Investigations Concerning Magnesium from Israel

On December 18, 2019, the US International Trade Commission (ITC) determined that a US industry is not materially injured or threatened with material injury by reason of imports of magnesium from Israel that the US Department of Commerce (DOC) has determined are subsidized and sold in the United States at less than fair value. DOC in November 2019 had determined that imports of magnesium from Israel were being sold in the United States at a dumping margin of 218.98% and received countervailable subsidies valued at 13.77%. However, as a result of the USITC's negative determinations, no antidumping or countervailing duty orders will be issued. Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel voted in the negative.

US International Trade Commission Votes to Continue Investigations Concerning Forged Steel Fittings from India and Korea

On December 6, 2019, the US International Trade Commission (ITC) determined that there is a reasonable indication that a US industry is threatened with material injury by reason of imports of forged steel fittings from India and Korea that are allegedly sold in the United States at less than fair value and subsidized by the government of India. As a result of the ITC's affirmative determinations, the US Department of Commerce will continue with its antidumping and countervailing duty investigations concerning imports of these products from India and Korea, with its preliminary countervailing duty determination due on or about January 16, 2020, and its preliminary antidumping duty determinations due on or about March 31, 2020. Chairman David S. Johanson and Commissioners Rhonda K. Schmidtlein, Jason E. Kearns, and Amy A. Karpel voted in the affirmative. Commissioner Randolph J. Stayin did not participate in these investigations.

The merchandise covered by these investigations is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. Subject carbon and alloy forged steel fittings are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) 7307.92.3010, 7307.92.3030, 7307.92.9000, 7307.99.1000, 7307.99.3000, 7307.99.5045, and 7307.99.5060. They may also be entered under HTSUS 7307.93.3010, 7307.93.3040, 7307.93.6000, 7307.93.9010, 7307.93.9040, 7307.93.9060, and 7326.19.0010.

In 2018, imports of forged steel fittings from India and Korea were valued at an estimated $92.6 million and $67.6 million, respectively, according to DOC.