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The EY logo consists of the letters 'EY' in a bold, white, sans-serif font. A yellow chevron shape is positioned above the 'Y'.

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US finalizes tariffs on steel and aluminum; multiple retaliatory actions taken



The US has taken action to finalize the 25% duties on steel products and 10% duties on aluminum products with very limited permanent exemptions granted and, in the case of exemptions, has imposed absolute quota limits on a number of the subject articles, which effectively will limit total imports from those countries. Exemptions apply only to imports from Argentina, Australia, Brazil (steel only) and South Korea (steel only).

The US action has triggered retaliatory moves by a variety of countries, including China, the EU, Canada, Mexico and Turkey. Other countries have threatened similar action. The retaliatory actions place duties on a wide range of US imports, in part selected to put political pressure on the US officials from key geographic regions involved in producing the products.

Background

As reported in the March edition of *TradeWatch*, the additional duties on steel and aluminum were first announced by President Trump on 8 March following the US Department of Commerce's investigations and recommendations to the President under Section 232 of the Trade Expansion Act of 1962, as amended, which concluded that imports of certain steel and

aluminum products "threaten to impair the national security of the United States." The effective date for the tariffs was 23 March. Prior to the effective date, temporary exemptions pending further negotiation were provided to Canada, Mexico, the EU, Argentina, Australia, Brazil and South Korea.¹

On 30 April 2018, President Trump signed two presidential proclamations extending the exemption status, until 1 June 2018, for the duties applicable for subject steel and aluminum goods imported into the US from the EU, Canada and Mexico. Under the same proclamations, Argentina, Australia and Brazil were granted permanent exemption only from the additional steel tariffs. The exemptions provided for the EU, Canada and Mexico allowed time for the US to negotiate key trade provisions and amendments to agreements, such as the North American Free Trade Agreement (NAFTA) with Canada and Mexico, or to seek reductions in tariff barriers, such as automobile tariffs in the EU.

In the latest proclamations (dated 31 May 2018), the US has determined that sufficient time was provided for discussions regarding the effect of imports of steel mill and aluminum articles on national security with the EU Member States,

¹ A detailed list of the products subject to the tariffs may be found in the article, "US President Trump imposes tariffs on steel and aluminum products – Mexico and Canada excluded," in the March edition of *TradeWatch*.



Canada, Mexico, Argentina, Australia and Brazil. The Administration engaged in these discussions with each country, noting that they have security relationships with the US. The proclamations further note that the US has now reached agreement on a range of measures with Argentina, Australia and Brazil to reduce excess steel production and excess steel capacity, increase capacity utilization in the US and prevent the transshipment of steel articles and import surges that impact the domestic market.

The latest proclamations also provide the details of the agreements between the US and each country on the exemption list, including specific import quota and volume limitations for some. The quotas will be based on imports since 1 January 2018 and specifically apply to certain tariff subheadings of subject products. The effectiveness of the quotas from each country will be closely monitored, and the President has noted specifically in the proclamations, however, that if the satisfactory alternative means necessary to finalize the agreement are not achieved in a reasonable time period, reimposition of the tariffs is possible.

The latest proclamations do not adjust the prior restrictions applied for US Foreign-Trade Zone (FTZ) admissions and US duty drawback program restrictions. Specifically, US FTZ admissions of articles subject to Section 232 duties at the time of import are restricted to the applicable additional duty rates regardless of resultant manufacturing. However, it should be noted that merchandise produced in an FTZ from non-subject articles but bearing a tariff number subject to Section 232 at the time of withdrawal and entry from the FTZ are not subject to the additional duties. For manufacturers, this means that value-added processes conducted in a US FTZ on non-subject goods will not result in a punitive duty cost for manufactured items ultimately entered into the US, as well as items intended for re-export from the US after manufacture regardless of inputs being subject to the tariffs, and should therefore be considered.

Still in place is the inclusion of a restriction on using the US duty drawback program for any article of steel or aluminum subject to additional duties under the Section 232 orders. Importers that also have export operations will need to evaluate the impact of this restriction for articles ultimately exported from the US to other markets.

Retaliatory actions taken by country

China

USD3 billion of US origin exports will be subject to tariffs at varying rates of 15% on 120 products and 25% on 8 products, including wine, fruit, pork, modified ethanol and seamless steel pipes.²

Canada

USD6.6 billion in tariffs on US goods proposed to be implemented 1 July. Rates are set at 25% and 10% depending on the type of product.³

Mexico

Wide-ranging tariffs will be applied to US goods as of 5 June. US-produced steel and aluminum products are included (Mexico is the largest export destination for US steel and aluminum products). Other products include lamps, pork products, food preparations, apples, grapes, blueberries and cheese. Mexico has indicated that the list is intended to “carousel,” so that products may change over time.⁴

² China's list of affected items is available at <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201803/20180302723376.shtml>.

³ The full Canadian list may be found at <https://www.fin.gc.ca/activty/consult/cacsap-cmpcaa-eng.asp>.

⁴ The full Mexican list can be found at http://www.dof.gob.mx/nota_detalle.php?codigo=5525036&fecha=05/06/2018.



European Union

As of 20 June, 25% duties applied to US goods with a second phase of duties of 10% to 50% as of 21 March 2021. Details are included in a companion article in this issue of *TradeWatch*, “EU counters US additional aluminum and steel tariffs with possible imposition of significant import duties on various US products.”

Turkey

As of 21 June, duties between 5% and 40% will be imposed on a variety of US products totaling USD266.5 million. The duties will be charged on 22 different US items, including coal, paper, walnuts, almonds, tobacco, unprocessed rice, whiskey, automobiles, cosmetics, machinery, equipment and petrochemical products.⁵

Recommended actions

While the latest proclamations establish permanent country exemptions and quotas, importers should consider that the original presidential proclamations acknowledged that for certain articles of steel and aluminum, there is a lack of sufficient US production capacity of comparable products and provided a process for the Commerce Secretary to exclude import restrictions on those steel articles as necessary based on requests by affected domestic parties. However, this process has seen a significant number of requests, exceeding 10,500, with only a small number having being processed and posted for requisite public comments.

Many businesses that import steel and aluminum from the EU, Canada and Mexico have counted on exemptions being extended or made permanent; these businesses in particular will need to develop contingency plans with a very short lead time. It may be difficult for many companies to adjust supply chains or sourcing patterns

quickly, if they can be adjusted at all, and, consequently, companies may incur significant excess costs. Sourcing from the “exempt” countries also needs to consider quotas, which may effectively restrict supply. With limited sourcing options available, many US importers will want to consider planning to mitigate the impact of the duties, including customs valuation planning opportunities, such as first sale, appropriate transfer pricing, and duty deferral mechanisms, such as FTZs.

The retaliation lists announced by China, the EU, Canada, Mexico and Turkey are quite extensive and involve a large variety of products. US exporters will want to carefully review the list against trade data and then map supply chains to determine the impact of targeted items. The number of countries taking retaliatory measures may grow, and the retaliatory lists may not remain static, as Mexico and other countries may choose to “carousel” products, changing the lists frequently. Consequently, all US exporters should map end-to-end supply chains to be able to understand consequences and have the data to make agile changes if necessary.

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⁵ Turkey’s full list of goods can be found at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=245272,244985,243640,241597,240044,239544,238039,237441,237119,236654&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=True.

EU counters US additional aluminum and steel tariffs with possible imposition of significant import duties on various US products



On 17 May 2018, the European Commission (the Commission) issued Commission Implementing Regulation (EU) 2018/724, allowing the European Union (EU) to suspend the World Trade Organization (WTO) concessions on import tariffs for imports of certain US goods. As the US has applied additional duties against imports of EU goods into the US, the Commission will apply additional ad valorem customs duties as of early July 2018 on the import of various US goods into the EU. This first stage of duties will apply at a rate of 25% and are imposed on the imports of goods from the US with commodity nomenclature (CN) codes listed in Annex 1 of the Regulation. From 23 March 2021, the second stage of ad valorem duties may apply on the products in Annex II, ranging from 10% to a maximum of 50%.

Background

On 8 March 2018, US President Trump announced a tariff increase on imports into the US of certain steel and aluminum products following a US Department of Commerce investigation that concluded that certain steel and aluminum imports threaten the national security of the United States.⁶ These tariff increases became effective on 23 March 2018, and the US has withdrawn the exemption as of 1 June 2018 for EU products.

According to the Commission, the US measures constitute safeguard measures and are contradictory to the concessions and obligations resulting from the WTO Agreement and the preceding General Agreement on Tariffs and Trade (GATT). As such, the WTO Agreement on Safeguards allows the suspension by a WTO member affected by the safeguard measures of another WTO member of the application of substantially equivalent concessions, once consultations between these two parties have failed. As the consultations have not been successful, the EU has the right to impose commercial policy measures consisting of the suspension of the tariff concessions laid down in the WTO Agreement and the imposition of additional import duties on US products.

According to the Commission, the EU measures may be exercised as long as, and to the extent that, the US applies or reapplies its safeguard measures in a manner that would affect products from the EU. If the US does not extend the exemption of the safeguard measures for EU products, the EU measures of imposing additional duties on US products may become applicable.

⁶ See the article, "US President Trump imposes tariffs on steel and aluminum products – Mexico and Canada excluded," in the March issue of *TradeWatch*. See also, "US finalizes tariffs on steel and aluminum; multiple retaliatory actions taken," in this issue of *TradeWatch*.



EU commercial policy measures

According to the Regulation, the EU will be allowed to apply additional import duties on certain US products by a separate implementing act, should the US apply or reapply its safeguard measures in a manner that would affect EU products. The EU measures will then consist of two stages:

1. The first stage will comprise the imposition of an ad valorem import duty at a rate of 25% on all products in Annex I to the Commission Implementing Regulation (EU) 2018/724 and will apply as of 20 June 2018. Among others, it concerns the following products: (frozen) corn, peanut butter, fruit juices, whiskies, tobacco products, makeup, (cotton or denim) clothing, (stainless) steel products, aluminum products, motorcycles, sailboats and motorboats.
2. The second stage of measures will, in principle, apply from 23 March 2021 and will comprise additional ad valorem import duties at rates varying from 10% to a maximum of 50%. The second stage measures will be imposed on US products included in Annex II. Among others, it concerns the following products: cranberries, whiskies, textile fabrics, (cotton or denim) clothing, footwear, ceramic tableware, certain glass, various electrical machines (e.g., washing machines), motorcycles and boats.

Products listed in the Annexes to the EU Regulation, for which an import license with an exemption from or a reduction of duty has been issued prior to 17 May 2018, shall not be subject to additional duties. Also, affected products that have been exported from the US to be imported into the EU prior to this date shall not be subject to additional import duties.

Recommended actions

Businesses involved in US-EU trade will want to carefully review the EU list of targeted items against their EU import data. Those that may be negatively impacted by the additional EU duties, if applied, may want to prepare for a contingency. This includes manufacturers, distributors, importers and consumers, all of which should map their complete, end-to-end supply chain to fully understand the extent of products impacted, potential costs and alternative sourcing options and to assess any opportunities to mitigate impact, such as customs valuation planning.

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US to impose USD34 billion in tariffs on China-origin goods effective 6 July 2018; additional USD16 billion to follow



The United States (US) has taken major steps toward imposing additional tariffs on USD50 billion⁷ worth of imported goods from China per year.⁸ The US action is being taken unilaterally under Section 301 of the Trade Act of 1974 (Section 301),⁹ which allows the US Trade Representative (USTR) to impose duties or import restrictions upon a determination that an act, policy or practice of a foreign country violates, or is inconsistent with, a trade agreement (including the WTO), or is “unjustifiable and burdens or restricts United States Commerce.” A proposed list was announced on 3 April 2018 targeting approximately 1,300 unique US tariff lines that span 18 chapters of the Harmonized Tariff Schedule of the United States (HTSUS). The USTR’s final list, reduced to 818 tariff lines and covering USD34 billion worth of imports from China per year, was published on 15 June, and US Customs and Border Protection (CBP) will begin collecting the additional duties of 25% ad valorem (calculated in addition to normal most favored nation duties) on 6 July 2018.¹⁰

A second list of 284 tariff lines covering USD16 billion worth of Chinese imports has been proposed and will undergo a notice and comment period.

China has retaliated by announcing suspension of commensurate tariff concessions and has released its own proposed list of 106 products subject to additional tariffs. While the US and China have recently held meetings to address the root causes of the dispute, no agreement has been reached. Contemplated actions on both sides have the potential to significantly disrupt companies, wherever located, that are involved in trade between the two nations, as well as consumers.

Overview of US actions pursuant to Section 301

The USTR Section 301 investigation of China’s acts, policies and practices related to technology transfer, intellectual property and innovation began in August 2017. The USTR report found Chinese coerced transfers and theft of US intellectual

⁷ One billion is defined as one thousand million.

⁸ “Statement on Steps to Protect Domestic Technology and Intellectual Property from China’s Discriminatory and Burdensome Trade Practices,” 29 May 2018. See <https://www.whitehouse.gov/briefings-statements/statement-steps-protect-domestic-technology-intellectual-property-chinas-discriminatory-burdensome-trade-practices/>.

⁹ 19 U.S.C. §2411 et. seq.

¹⁰ “USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices,” 15 June 2018. See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products>.



property significantly damaged the US economy, and, on 22 March 2018, the US President ordered the USTR to propose a list of products from China that would be assessed an additional 25% duty upon importation into the US to offset the damage.¹¹ The US also filed a formal complaint with the World Trade Organization (WTO) shortly thereafter alleging that China had violated its commitments under the Agreement on Trade-Related Aspects of Intellectual Property Rights.

The USTR published its proposed list of Chinese articles subject to the additional tariffs on 3 April 2018.¹² The US tariff lines targeted by the USTR, approximately 1,300 in total and defined at the HTSUS 8-digit subheading level, encompass several sectors of materials, intermediate goods and finished goods. Tariff lines were targeted to burden products believed to benefit from Beijing's industrial policies, including the "Made in China 2025" initiative. Targeted products include, but are not limited to, various products made from rubber, steel, iron and aluminum; aerospace and marine vessels and equipment; health care products and equipment; motor vehicles; information and communication products; and many types of industrial equipment and parts therefore. While the list spans several chapters of the HTSUS, Chapter 84 contains the largest quantity of covered products.

The USTR explained its methodology for selecting products, specifying that in addition to targeting products related to the "Made in China 2025" policy, the list¹³ was designed to minimize the impact on US consumers and target products that have commercially feasible alternative sourcing options. As a result, the proposed list specifically excludes major categories of consumer goods, such as footwear, apparel, smartphones and consumer electronics, such as computers and computer monitors.

Since releasing the product list, public comments on the proposed tariffs were collected through 11 May, a public hearing was held at the US International Trade Commission from 15 to 17 May, and post-hearing rebuttal comments were collected through 22 May.

Hearing transcripts from all three days of testimony have been released, as well as 3,154 public comments from interested parties.

Impact on the global trade community

Public comments and hearing testimony highlighted potential winners and losers across the trade community and came from multinational corporations headquartered in the US, China and other countries, various trade and industry associations from the US and China, as well as several US government agencies. Some companies were interested in using the US actions to restrict competition from Chinese companies through support or expansion of the existing product list, while companies that rely on imported Chinese products were either opposed to the tariffs or seeking to remove specific products from the list.

Questions from US officials highlight interest in displacement of Chinese production

Government questions during public hearings focused on ascertaining the capability of US industries to displace Chinese production, the feasibility and potential country locations of alternative sourcing for products on the list, the impact of additional tariffs on consumers and the unintended consequences on global trade stakeholders. Officials also asked probing questions regarding the use of US Foreign-Trade Zones (FTZs) to avoid the additional tariffs. Government questions and responses from the trade community revealed that additional tariffs are likely to shift production of listed products from China to other locations, as most industries in the US, with the exception of the steel industry, do not have the excess capacity or cost competitiveness to assume the displaced production. As such, speakers testified that additional tariffs would result in shifts of production to low-cost countries, such as Thailand.

¹¹ "Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation," 22 March 2018. See <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/>.

¹² Office of the United States Trade Representative, Docket No. USTR-2018-0005, Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (3 April 2018).

¹³ The USTR's proposed product list can be viewed at <https://ustr.gov/sites/default/files/files/Press/Releases/301FRN.pdf>.



Commenters warn of decreased demand, job loss and termination of operations

Testimony opposing additional tariffs was numerous and included industry and trade associations from the US and China, multinational companies from the life sciences sector, machine and automotive parts distributors, electronic components and equipment manufacturers, sellers of flat panel televisions, as well as footwear and apparel retailers, among others. Companies that rely on imported Chinese products for US production operations, such as manufacturers of elevators and chemicals, as well as companies manufacturing within FTZs, testified that increased costs would result in immediate job losses. Other speakers estimated that arranging for new suppliers outside of China could take between six months to five years, depending on the particular industry, and reemphasized that certain operations, such as the production of certain flat panel televisions or manufacturing of certain automotive parts in the US, is not commercially feasible. Companies that have invested heavily to develop robust global supply and manufacturing value chains testified that additional tariffs would severely impair their operations and could result in exits from the US market or, in the case of Chinese retaliation, cessation of distribution in China.

Regardless of whether companies can source from other countries, several speakers testified that the cost of

additional tariffs would ultimately be born by consumers. Some even predicted that companies would raise prices across several product lines, including products not subject to additional tariffs, to recoup the additional cost. Price increases are predicted to lower consumer demand and potentially result in lost jobs and termination of operations.

For these reasons, several commenters argued for the removal of specific products from the list. Notable exclusion requests included life sciences and health care products, including active pharmaceutical ingredients, intermediates and medical devices, flat panel televisions and certain flat panel displays, electrical components, filters and pumps, various aluminum products, certain vehicle parts/components, various types of industrial equipment and parts/components therefore, among others.

Finally, several commenters are concerned over retaliatory measures from China, including its list of 106 products subject to additional tariffs announced on 4 April that could severely curtail US imports into China of beef, agricultural products, planes, cars, whiskey and chemicals, among other products.

Proponents argue for expansion of the product list

Several commenters sought expansion of the product list to protect US industry from Chinese competition or to otherwise spur investment in US manufacturing. Supporters of additional tariffs also noted that retailers intentionally shifted product

sourcing from US suppliers to overseas Chinese suppliers to increase their profits instead of passing cost savings to their customers. Additional tariffs, they argued, would therefore offset this practice and level the playing field between US and Chinese suppliers, creating incentives to buy from US companies once again.

Commenters requested the final list to include various steel products, solar cells, wiring, cables, several fabric products, metal safes, construction materials, such as ceramic tiles, doors and wood products, among other products.

What to expect next

On 15 June, the USTR issued a press release and published two lists of US tariff lines subject to the additional duties that cover 1,102 product lines and approximately USD50 billion worth of imports from China.¹⁴ The first set of products subject to additional duties is a final list of 818 tariff lines, covering USD34 billion worth of imports from China per year, while the second set of products is a proposed list of 284 tariff lines covering USD16 billion worth of imports from China per year. CBP will begin collecting additional duties on imported products covered by the USTR's final list as of 6 July 2018.

¹⁴ See footnote 10.



The 15 June final list removes 515 tariff lines that previously appeared on the USTR's original 3 April 2018 proposed list of products. Notably, all tariff lines falling within the following HTSUS chapters noted in the tables that appeared on the 3 April list are removed from the final list.

It is worth noting that some new proposed tariff lines from HTSUS Chapters 38 (chemical products), 73 (articles of iron and steel), 76 (aluminum and articles thereof), 84 (machinery and mechanical appliances) and 85 (electrical machinery and equipment) appear on the 15 June proposed list of products.

The final list includes tariff lines under HTSUS Chapters 28, 40, 84, 85, 86, 87, 88, 89 and 90.

Tariff chapter	Tariff chapter description
29	Organic chemicals
30	Pharmaceutical products
38	Miscellaneous chemical products
72	Iron and steel
73	Articles of iron or steel
76	Aluminum and articles thereof
83	Miscellaneous articles of base metal
91	Clocks and watches and parts thereof
93	Arms and ammunition; parts and accessories thereof
94	Furniture...prefabricated buildings

Tariff chapter	Tariff chapter description	No. of tariff lines on 3 April list	No. of tariff lines excluded on final list	No. of tariff lines remaining on final list
28	Inorganic chemicals; organic or inorganic compounds of precious metals...	4	3	1
40	Rubber and articles thereof	8	6	2
84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	537	120	417
85	Electrical machinery and equipment and parts thereof...	241	55	186
86	Railway or tramway locomotives...	17	0	17
87	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof	48	7	41
88	Aircraft, spacecraft and parts thereof	16	1	15
89	Ships, boats and floating structures	11	1	10
90	Optical...measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof	164	35	129
Grand total			228	818



The USTR's second set of products (15 June proposed list) covering 284 proposed tariff lines and approximately USD16 billion worth of imports from China will be subject to a public notice and comment period, including a public hearing and further deliberation by the interagency Section 301 Committee, before a final determination is made as to whether additional duties will be levied on the products listed. The deadline for submitting comments is 20 July 2018, while the deadline for filing requests to appear at the public hearing is 29 June 2018. Post-hearing rebuttal comments are due on 31 July 2018.

The 15 June proposed list spans 13 HTSUS chapters, with the majority falling in Chapter 39 (plastics and articles thereof), followed by Chapters 84 (machinery and mechanical appliances) and 85 (electrical machinery and equipment).

Tariff chapter	Tariff chapter description
27	Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes
34	Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing or scouring preparations, candles and similar articles, modeling pastes, "dental waxes" and dental preparations with a basis of plaster
38	Miscellaneous chemical products
39	Plastics and articles thereof
70	Glass and glassware
73	Articles of iron or steel
76	Aluminum and articles thereof
84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof
85	Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles
86	Railway or tramway locomotives, rolling-stock and parts thereof; railway or tramway track fixtures and fittings and parts thereof; mechanical (including electro-mechanical) traffic signaling equipment of all kinds
87	Vehicles other than railway or tramway rolling stock, and parts and accessories thereof
89	Ships, boats and floating structures
90	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof



Notable products on the proposed list include lubricating oils, greases, preparations and certain related additives from Chapters 27, 34 and 38; semiconductor manufacturing equipment from Chapter 84; engines, motors and generators from Chapters 84, 85 and 87; certain electronics and electronic parts/components, including integrated circuits from Chapter 85; as well as various vehicles, tractors and vessels from Chapters 84, 86, 87 and 89.

After appearing to reach a consensus in Washington, DC in May, in which China would significantly increase its imports of US agricultural and energy goods and services to shrink the US trade deficit with China, the US subsequently announced its intention to implement investment restrictions and enhanced export controls applicable to Chinese persons and entities by 30 June 2018 and reaffirmed its commitment to seek protection from China's alleged violations of US intellectual property rights through the WTO's dispute mechanism.¹⁵ The Spokesman for China's Ministry of Commerce condemned the US actions shortly after the White House and USTR announcements, stating that China "will immediately introduce taxation measures of the same scale and the same strength" and that the economic and trade achievements previously reached by the two parties will be invalid at the same time." While not referencing a specific list of tariff lines, a proposed list of items covering 106 items with a trade value of USD50 billion of US imports, including soybeans, automobiles, chemicals and aircrafts, was previously published by China on 4 April 2018 in response to the USTR's publication of the proposed list of items the day before. While an implementation date has not been published, additional duties on US imports into China are expected to take effect on or around 6 July 2018, which is the day that the US will implement additional duties on its final list of products covering USD34 billion worth of imports.

On 5 April 2018, the US President stated that the US may target an additional USD100 billion worth of imports from China, and the President's 15 June announcement reaffirmed that threat, stating "[t]he United States will pursue additional tariffs if China engages in retaliatory measures, such as imposing new tariffs on United States goods, services, or agricultural products; raising non-tariff barriers; or taking punitive actions against American exporters or American companies operating in China."

Other roadblocks to an agreement exist. The trade dispute has been bundled with other issues, such as national security and US foreign policy. For example, the US and China continue to negotiate US actions against certain major Chinese companies for sanctions violations, and China's filing of two WTO complaints against the US regarding US Section 301 actions and US imposition of punitive tariffs on steel and aluminum imports.¹⁶ With tensions between the two nations escalating, companies should prepare themselves for major changes to the trade landscape.

Actions for businesses

Businesses involved in trade between US and China, especially those with China-origin imports into the US, should prepare for the impact of additional duties. Since the Section 301 action is focused on industrially significant technology related to Beijing's "Made in China 2025" initiative, the final product list is not anticipated to differ materially from the products initially targeted by the USTR. Companies exporting US goods to China, as well as Chinese companies that rely on imported US goods, should also prepare for similar retaliatory duties from China that would likely take effect on or around the implementation date of US tariffs.

¹⁵ Ibid.

¹⁶ The European Commission filed a WTO action on Section 301 in 1998. The WTO panel found that Section 301 is not inconsistent with WTO commitments, based largely on US undertakings when the WTO was adopted that Section 301 would be applied consistently with WTO rules, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm.



Companies involved in US/China trade are encouraged to identify the potential impact of additional duties and develop duty avoidance or mitigation strategies. Immediate actions for such companies could include:

- ▶ Mapping their complete end-to-end supply chain to fully understand the extent of products impacted, potential costs and alternative sourcing options and to assess any opportunities to mitigate impact
- ▶ Identifying strategies to defer, eliminate or recover the excess duties, such as bonded warehouses, FTZs, or substitution drawback and their equivalent under China Customs regulations
- ▶ Exploring strategies to minimize the customs value of imported products subject to the additional duties, re-evaluating current transfer pricing approaches and, for US imports, considering US customs strategies, such as First Sale for Export

In light of the US announcement to prevent the transfer of industrially significant US technology and intellectual property to Chinese persons and entities through the implementation of enhanced export controls, companies should understand their existing screening processes and systems, including whether they can be quickly adjusted to address the stricter rules.

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US launches second Section 232 investigation: automobiles and automotive parts targeted



Just a week before the Trump Administration took its final actions on imposing steel and aluminum tariffs against a majority of countries that ship a wide range of metal articles to the US, President Trump formally requested that Secretary of Commerce Wilbur Ross consider initiating a Section 232 of the Trade Expansion Act of 1962, as amended¹⁷ (Section 232) investigation into imports of automobiles, including trucks, and automotive parts to determine their effects on America's national security. President Trump's statement notes that, "Core industries such as automobiles and automotive parts are critical to our strength as a Nation."¹⁸

Shortly thereafter, the Department of Commerce proceeded with initiating an investigation under Section 232 to determine whether imports of automobiles, including sport utility vehicles (SUVs), vans and light trucks, and automotive parts into the United States threaten to impair national security, as defined in Section 232.

In the announcement, Secretary Ross stated that, "There is evidence suggesting that, for decades, imports from abroad have

eroded our domestic auto industry. The Department of Commerce will conduct a thorough, fair, and transparent investigation into whether such imports are weakening our internal economy and may impair the national security."¹⁹

The Department's notice explains that the basis for initiating the investigation is due to a study of impact to the industry over the past 20 years which showed that "imports of passenger vehicles have grown from 32 percent of cars sold in the United States to 48 percent" while "...from 1990 to 2017, employment in motor vehicle production declined by 22 percent, even though Americans are continuing to purchase automobiles at record levels."

In looking at the ownership of vehicle and auto part manufacturers' roles in global research and development in the automobile sector, the statement notes that only 20% of the industry is comprised of American owner vehicle manufacturers, while American-owned auto part manufacturers account for 7%.

¹⁷ 19 U.S.C. §1862.

¹⁸ "Statement from the President on Potential National Security Investigation into Automobile Imports," 23 May 2018, available at <https://www.whitehouse.gov/briefings-statements/statement-president-potential-national-security-investigation-automobile-imports/>.

¹⁹ "U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports," 23 May 2018, available at <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.



The Department of Commerce's investigation objectives are clearly defined to be consideration of whether the decline of domestic automobile and automotive parts production threatens to weaken the internal economy of the United States. The investigation will also include research to determine if the threat is being caused by potentially reducing research, development and jobs for skilled workers in connected vehicle systems, autonomous vehicles, fuel cells, electric motors and storage, advanced manufacturing processes and other cutting-edge technologies.

The announcement has been met with significant opposition by many industry groups, as well as legislators from states having significant automobile parts production and supplier industries as well as those having large automobile manufacturing facilities. While the top US imports of vehicles are from Canada, Mexico, Japan, Germany and South Korea, domestic production is strong and represents significant exports of US-produced automobiles.

Trade groups representing foreign and domestic auto manufacturers note that the auto industry in the US, a major provider of jobs, is a leading exporter of manufactured goods from the US and the additional tariffs are likely to hurt consumers and ultimately make the US auto industry less competitive.²⁰

The investigation is expected to take up to 270 days to be completed. Should the report find a national security concern with imported vehicles or parts, the President will have 90 days to make a final determination and take actions he determines appropriate to address the national security findings. Presidential discretion to take action under Section 232 is quite broad. Like the steel and aluminum order, actions could include tariffs or could address imports through other means, such as quotas on vehicles and parts.

Companies involved in the automotive or auto parts manufacturing or supply sectors should monitor the progress of the investigation and evaluate the impact to their operations in consideration of the US announcement. Understanding the overall impact of potential increased duties will provide companies the ability to implement supply chain adjustments, procurement changes and procedures needed to meet any new restrictions or impediments introduced by actions taken by the President following conclusion of the investigation.

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²⁰ "Auto groups slam Trump administration's imports investigation, possible tariffs," 24 May 2018, available at <https://abcnews.go.com/Politics/auto-groups-slam-trump-administrations-imports-investigation-tariffs/story?id=55419352>.

Brazil

Recent decisions of the Brazilian higher courts



Recently, the Brazilian higher courts adjudicated two controversial matters of interest to importers: the increase of the Siscomex fee levied on all of the imports into Brazil and the inclusion of terminal handling charges in the customs value of imported products. In both cases, the court ruled in favor of the importers.

Siscomex fee increase declared unconstitutional

Import transactions in Brazil must be registered through the Integrated Foreign Trade System (Sistema Integrado de Comércio Exterior, Siscomex). This system is regulated under Law no. 9,716/1998, which also requires a system user fee.

This fee is levied on all of the Import Declarations (Declaração de Importação, DI), calculated as a fixed value per DI and according to the number of Harmonized Tariff Schedule (HTS) classifications in each DI. Payment is due upon DI registration.

In 2011, Ordinance MF 257 introduced a fee increase of over 500% (the exact increase depends on the number of HTS codes registered on each DI).

Companies felt that the increase significantly exceeded the limits allowed by law and challenged the increase in the Supreme Federal Court. The court ruled in favor of the taxpayers, deciding that the increase is unconstitutional because it exceeds the official monetary correction indexes.

As a result of this decision, importers may file a request for refund with the court. To increase the likelihood of obtaining a refund, importers need to calculate the overpaid amounts and submit their request as soon as possible and not later than five years from the DI registration date for each import transaction.

Terminal handling charges to be excluded from the customs value of imported goods

A recent Superior Court decision will allow importers to exclude terminal handling charges from the customs value of imported goods. At this time, according to Normative Instruction SRF no. 327/2003, terminal handling charges for the unloading of imported goods must be included in the customs value.



The customs authorities have justified this inclusion on the basis of Article 8, item 2 of the General Agreement on Tariffs and Trade (GATT) (implemented into national law by Article 77 of Decree No. 6,759/09), which allows each GATT signatory to include in the customs value any transportation, loading, unloading and handling costs to the port or place of importation:

In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:

- (a) *The cost of transport of the imported goods to the port or place of importation*
- (b) *Loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation*

And

- (c) *The cost of insurance*

However, the Superior Court ruled that the expression “to the port or place of importation” limits the inclusion of such expenses up to the arrival of the goods at the port, thus not authorizing the inclusion of expenses with handling, transportation, loading and unloading of goods after arrival at the port or place of importation.

The Brazilian Superior Court of Justice has already adjudicated several appeals in favor of excluding terminal handling charges from the customs value and has determined that the inclusion of such expenses in the customs value is unlawful.

The court's most recent decision, published on 15 March 2018, is important as it establishes legal certainty on this matter and encourages taxpayers to recover overpaid taxes where the terminal handling charges were included in the taxable base and to avoid future overpayments.

Importers may benefit by applying for refund for past overpayments and from excluding future terminal handling charges incurred after the ship's arrival at the port of destination. This applies both to import transactions during the last five years and to future imports.

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Canada

Comprehensive and Progressive Agreement for Trans-Pacific Partnership is signed: a Canadian perspective



The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (formerly, the 11-member Trans-Pacific Partnership agreement, or TPP-11) was signed by its member states, including Canada, on 8 March 2018. The agreement covers a market of 495 million people with a combined GDP of CAD13.5 trillion,²¹ (approximately USD10.57 trillion) or nearly 13.5% of global GDP.

Tariff liberalization commitments under the CPTPP cover over 100,000 tariff lines and over 200 pages of tariff-rate quota commitments for agricultural products. These commitments are expected to provide Canadian exporters with tariff savings of CAD428 million (approximately USD335 million) per year.

Under the CPTPP, the rules of origin for automotive products are generally less restrictive than those under the North American Free Trade Agreement (NAFTA). In addition, Canada has agreed to provide duty-free in-access quotas for certain poultry, egg products and dairy imports under the Tariff Rate Quota regime.

Impact on the Canadian automotive industry

All CPTPP countries will remove tariffs on motor vehicles and motor vehicle parts. Canada will remove its 6.1% most-favored-nation tariff duty on imports of passenger vehicles over four years through five annual reductions.

Most CPTPP countries will completely remove their tariffs on motor vehicles upon entry into force of the agreement, except for Malaysia and Vietnam, which will phase out their tariffs over 12 years.²²

For motor vehicle parts, Canada and several other CPTPP countries will remove their tariffs (of up to 8.5% for Canada) upon entry into force of the agreement; however:

- ▶ Malaysia and Vietnam will eliminate their tariffs of up to 50% within 10 years.
- ▶ Australia will eliminate tariffs of up to 5% within 3 years.
- ▶ New Zealand will eliminate tariffs of up to 10% within 7 years.
- ▶ Brunei will eliminate tariffs of up to 10% within 7 years.²³

²¹ A trillion is defined as one million million.

²² "What does the CPTPP mean for the automotive sector?" Government of Canada, 7 February 2018, available at <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/sectors-secteurs/auto.aspx?lang=eng>.

²³ Ibid.



Under the CPTPP, motor vehicles will be subject to a 45% regional value content (RVC) requirement to acquire originating status. The RVC requirement for motor vehicle parts ranges from 35% to 45%. NAFTA's 62.5% RVC requirement for the automotive sector is calculated on a different base (with products not on the tracing list deemed originating), but, in general, the CPTPP rules for automotive goods are less restrictive than those in NAFTA and would allow more goods to qualify as originating.

Canadian producers may benefit from the CPTPP by gaining access to new sourcing opportunities in the Asia-Pacific region. However, Canadian producers selling into the United States (US) market will be incentivized to source a high percentage of their parts from within North America to meet NAFTA rules of origin and avoid significant duty costs at the US border.

Canada and Japan have agreed to incorporate a transitional safeguard measure for originating automotive imports that either party deems to cause serious injury or to facilitate adjustment. For the 12 years following the entry into force of the CPTPP, either party may apply safeguard measures on the other party's originating motor vehicles for a period not exceeding three years. The safeguard measures may be extended by two years if certain requirements are met.²⁴

Impact on the Canadian agricultural industry

Concerning agriculture, Canada has agreed to phase in duty-free in-access quotas for several dairy, egg and poultry products that are CPTPP originating.²⁵

Product	Length of phase (in years)	Year 1	Final year	Unit of measurement
Milk	19	8,333	56,905	Metric tons
Cream	14	500	734	Metric tons
Skim milk powders	19	1,250	11,014	Metric tons
Milk powders	14	1,000	1,138	Metric tons
Cream powders	14	100	114	Metric tons
Concentrated milk	19	333	2,587	Metric tons
Yogurt and buttermilk	19	1,000	7,762	Metric tons
Powdered buttermilk	14	750	970	Metric tons
Whey powder	11	1,000	Unlimited	Metric tons
Products consisting of natural milk constituents	19	667	4,552	Metric tons
Butter	19	750	5,121	Metric tons
Industrial cheese	19	1,329	9,076	Metric tons
Mozzarella and prepared cheese	19	483	3,300	Metric tons
Cheeses of all types	19	604	4,126	Metric tons
Ice cream and mixes	14	1,000	1,138	Metric tons
Other dairy	14	1,000	1,138	Metric tons
Broiler hatching eggs and chicks	19	166,667	1,138,093	Dozen eggs equivalent
Chicken	19	3,917	26,745	Metric tons, eviscerated product basis
Turkey	19	583	3,983	Metric tons, eviscerated product basis
Eggs	19	2,783,333	19,006,158	Dozen eggs equivalent

²⁴ Appendix B to Canada's Tariff Schedule to Annex 2-D (Appendix between Japan and Canada on Motor Vehicle Trade).

²⁵ Consolidated TPP Text – Appendix A to Tariff Schedule of Canada – (Tariff Rate Quotas) available at: <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tpa/text-texte/02-ad-03.aspx?lang=eng>.



Importers must apply for an import license to benefit from the in-access quotas. The quotas will be allocated to importers on an annual basis. Unlike under the Canada-European Union Comprehensive and Economic Trade Agreement, applicants that have not previously imported these products will be able to apply for quota access.²⁶

Removal of non-tariff and technical barriers to trade

The CPTPP aims to reduce barriers to trade and promote harmonization of standards by incorporating and expanding on the provisions of the Technical Barriers to Trade Agreement, an international agreement administered by the World Trade Organization that seeks to eliminate undue trade barriers posed by standards, technical regulations and conformity assessments enacted by national laws. As such, Chapter 8 of the Trans-Pacific Partnership (TPP) (as incorporated) establishes general non-discrimination, transparency and regulatory cooperation between the CPTPP parties in order to reduce cross-border redundancies in the technical barriers space and to increase regulatory predictability for importers and exporters. Furthermore, the CPTPP provides specific negotiated outcomes in matters of technical barriers to trade for the following industries:

- ▶ Wine and distilled spirits
- ▶ Information and communications technology products
- ▶ Pharmaceuticals
- ▶ Cosmetics
- ▶ Medical devices
- ▶ Proprietary formulas for prepackaged foods and food additives
- ▶ Organic products

Suspended provisions

The CPTPP's provisions draw directly from the original TPP text. However, under the CPTPP, certain original provisions or portions thereof have been suspended. Suspended provisions will enter into force at future dates, whenever all CPTPP parties agree to end one or several suspensions. Virtually no tariff reduction provision under the CPTPP is affected by these suspensions.

The suspensions relate to certain provisions (or portions thereof) affecting:

- ▶ Intellectual property protection, especially in the pharmaceuticals, life sciences and digital industries
- ▶ Investment, including investor-state agreements and the investor-state dispute settlement arbitration
- ▶ Procedural fairness in government procurement and in approvals for reimbursement of new pharmaceuticals and medical devices by public health care institutions
- ▶ International digital transmissions and resolution of telecommunications disputes
- ▶ Facilitation of competitive and efficient international parcel delivery services, including commitments respecting express customs processing and duty elimination on low-value shipments
- ▶ Starting dates of certain commitments by Brunei Darussalam and Malaysia

Regarding intellectual property, certain TPP obligations relating to patents and pharmaceuticals have been suspended, including patent term adjustment, which required TPP members to adjust the patent term to compensate for “unreasonable” patent office delays, as well as the TPP obligation on patent term restoration for marketing approval delays. Certain TPP obligations on copyright and related rights were also suspended, including on term of protection. Under this suspension, Canada maintains the flexibility to provide a copyright

²⁶ <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/02-ad-03.aspx?lang=eng>.

term of “life of the author plus 50 years,” which is consistent with multilateral standards.

The suspension of provisions related to investment agreements and investment authorizations prevents foreign investors from bringing forward a case under investor-state dispute settlement when an investment contract has been breached or when authorization to invest is amended or revoked by government under the Investment Canada Act. The application of investor-state dispute settlement has been suspended in the Minimum Standards of Treatment provisions in the Financial Services chapter of the agreement.

For any of these provisions to return into force, all CPTPP members must agree to do so unanimously.

Side letters

Several side letters were signed between the CPTPP parties. Side letters involving Canada address specific goods or services, including:

- ▶ Culture
- ▶ Beef
- ▶ Forestry
- ▶ Agricultural chemical products
- ▶ Motor vehicles
- ▶ Wines and distilled spirits
- ▶ Geographical indications
- ▶ E-commerce

Next step: entry into force

No official date has been set for the entry into force of the CPTPP. According to article 3 of the CPTPP, the agreement may enter into force 60 days after at least six (or 50%) of the CPTPP signatories have provided written notification of the completion of their applicable legal procedures.

As trade tensions continue between Canada and the US over NAFTA and US trade protectionist measures (e.g., softwood lumber), the CPTPP opens new markets for Canadian importers and exporters. In addition, the US withdrawal from the CPTPP provides an opportunity for Canadian businesses to acquire a larger market share in CPTPP countries. As the CPTPP countries commence finalizing legal procedures to implement the agreement, Canadian importers and exporters should begin considering how they can best leverage sourcing and supply provisioning opportunities under CPTPP rules of origin. Indeed, such planning is all the more imperative given the context of current developments in Canada and ongoing US trade relations. The CPTPP could provide diversification options in a world where North American supply chains across various industries are threatened by political and economic uncertainties.

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United States

US withdraws from Iran nuclear deal



On 8 May 2018, US President Trump announced unilateral withdrawal of the United States (US) from the Joint Comprehensive Plan of Action (JCPOA) Iran non-proliferation agreement. In turn, the Department of the Treasury, US Office of Foreign Assets Control (OFAC) announced reinstatement of certain Iran sanctions over short 90- and 180-day time frames. These decisions will impact both US and non-US companies and may require immediate action to meet OFAC deadlines.

JCPOA background

The JCPOA is a multilateral non-proliferation agreement between the US, the European Union, the United Kingdom, France, Germany, Russia, China and Iran, primarily aimed at halting and dismantling Iran's nuclear arms program. The JCPOA, referred to as the Iran nuclear deal, was implemented on 16 January 2016. Pursuant to the JCPOA, the US relaxed economic sanctions against Iran in certain ways.

Post-JCPOA, primary economic sanctions continued to generally prevent US entities from transacting (or facilitating transactions) with Iran, its government and government-controlled entities. But OFAC issued General License H (GL-H), which authorized non-US subsidiaries of US entities to conduct business with Iran if conditions were met. OFAC also issued statements of licensing policy and general licenses fostering US-Iran aviation commerce.

Post-JCPOA, the US also relaxed extraterritorial secondary sanctions that would impose penalties on non-US companies transacting with Iran in certain industries.

Further, the US removed over 400 individuals and entities from the OFAC proscribed party lists, including the Specially Designated Nationals (SDN), Non-SDN Iranian Sanctions Act and Foreign Sanctions Evaders lists. US secondary sanctions had remained and continue in place that target dealings by non-US persons with Iranian persons and entities remaining on the SDN list (e.g., Iran's Islamic Revolutionary Guard Corps).



Presidential executive action: directive to wind down JCPOA-authorized activities

The President's National Security Presidential Memorandum (NSPM) effectively directs relevant US agencies, including the US State Department (State) and OFAC, to unwind the sanctions relief provided under the JCPOA. Some forms of sanctions relief will be unwound over a 90-day period; others will be unwound over a 180-day period. The 90-day period ends on 6 August 2018, and the 180-day period ends on 4 November 2018. OFAC has published updated information both in a statement – frequently asked questions (FAQ) – and archived JCPOA documentation and FAQ (Guidance) on its Iran Sanctions program page.²⁷ Relevant portions of the FAQ are indicated below.

Sanctions to be re-imposed after the 90-day wind-down period: 8 May 2018 through 6 August 2018

OFAC has announced that effective 6 August 2018, the following sanctions will be re-imposed (these primarily impact secondary extraterritorial sanctions on non-US persons, as such activities would already be unlawful for US entities):

- i. Sanctions on the purchase or acquisition of US dollar banknotes by the Government of Iran
- ii. Sanctions on Iran's trade in gold or precious metals
- iii. Sanctions on the direct or indirect sale, supply or transfer to or from Iran of graphite; raw, or semifinished metals, such as aluminum and steel; coal; and software for integrating industrial processes

- iv. Sanctions on significant transactions related to the purchase or sale of Iranian rials or the maintenance of significant funds or accounts outside the territory of Iran denominated in the Iranian rial
- v. Sanctions on the purchase, subscription to or facilitation of the issuance of Iranian sovereign debt
- vi. Sanctions on Iran's automotive sector

Further, by 6 August 2018, the following JCPOA-related authorizations will be revoked, and all related activities or engagement concerning the following need to be wound down (these primarily impact US entities, or foreign subsidiaries of US entities, particularly in the aerospace sector):

- i. The importation into the US of Iranian-origin carpets and foodstuffs and certain related financial transactions pursuant to general licenses
- ii. Activities undertaken pursuant to specific licenses issued in connection with the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services (JCPOA SLP) (no new licenses and specific licenses issued prior to 8 May 2018 will be revoked; wind-down authorizations will be issued instead)
- iii. Activities undertaken pursuant to General License I (GL-I) (which previously authorized certain transactions related to the export or re-export to Iran of commercial passenger aircraft and related parts and services)

OFAC intends to replace related general licenses and authorizations with more narrowly scoped provisions, allowing wind-down of activity lawfully entered into during the period authorized by the JCPOA.

²⁷ Available at: <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>.



Sanctions to be re-imposed after the 180-day wind-down period: 8 May 2018 through 4 November 2018

OFAC has announced that effective 4 November 2018, the following sanctions will be re-imposed:

- i. Sanctions on Iran's port operators and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines, South Shipping Line Iran or their affiliates
- ii. Sanctions on petroleum-related transactions with, among others, the National Iranian Oil Company, Naftiran Intertrade Company and National Iranian Tanker Company, including the purchase of petroleum, petroleum products or petrochemical products from Iran
- iii. Sanctions on transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions under Section 1245 of the National Defense Authorization Act for Fiscal Year 2012
- iv. Sanctions on the provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions described in Section 104(c)(2)(E)(ii) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA)
- v. Sanctions on the provision of underwriting services, insurance or reinsurance
- vi. Sanctions on Iran's energy sector

Most of the above primarily impact secondary extraterritorial sanctions on non-US persons, as such activities would already be unlawful for US entities.

The withdrawal of GL-H may have critical impact on US entities that have foreign subsidiaries. Under US law, US companies, as well as US-owned or controlled foreign entities, are prohibited from engaging in transactions with Iran. However, pursuant to the JCPOA, OFAC issued GL-H, which authorized a foreign entity that is owned by a US parent to engage in transactions with Iran, subject to the restrictions within the text of the license. To the extent that a foreign subsidiary of a US company has been using GL-H to transact with Iran, such conduct immediately becomes unlawful on 4 November 2018. OFAC will revoke GL-H and replace it with more narrowly scoped authorizations to allow US persons and, as appropriate, US-owned or US-controlled foreign entities to engage in wind-down transactions.

Sanctions involving denied or blocked persons or entities

Entities that were delisted from OFAC proscribed party lists, including the SDN, Non-SDN Iranian Sanctions Act and Foreign Sanctions Evaders lists, pursuant to the JCPOA will be re-listed. Persons engaging in the activity with these entities should take the steps necessary to wind down activity either by 6 August 2018 or 4 November 2018, in accordance with the period for which the related activity applies, to avoid exposure to sanctions or an enforcement action under US law.

Exceptions for outstanding consideration owed non-US, non-Iranian persons after the close of an applicable wind-down period

OFAC has indicated that the general US government policy will be to allow non-US, non-Iranian persons to receive payment for those goods or services or repayment for loans or credits according to the terms of a written contract or written agreement entered into prior to 8 May 2018, provided that such activities were consistent with US sanctions in effect at the time the delivery of goods or services occurred or loans or credits were extended.

Implications

Companies must revise policies, procedures and systems allowing activities under GL-H.

Successful response means the ability to quickly evaluate operations, risks and controls to create actionable, documented work plans for related business, procedural and system changes necessary for the orderly, documented withdrawal of activity from Iran.

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GSP update



In the March 2018 issue of TradeWatch, we discussed the pending status for renewal of the US Generalized System of Preferences (GSP). On 23 March 2018, the Consolidated Appropriations Act, 2018 (Pub. L. 115-141)²⁸ reauthorized the GSP program and made a number of modifications. The GSP program is reauthorized through 31 December 2020, retroactive to 1 January 2018. The renewal of the GSP program makes, once again, the importation of some 5,000 tariff items from 120 designated beneficiary countries and territories eligible for duty-free importation.

Background

The GSP is the largest and oldest US trade preference program. It was established under the Trade Act of 1974²⁹ to promote economic growth and development in developing and least developed designated countries. In addition, the preference program provides cost savings and tariff elimination to US businesses and consumers across the country. Many US importers depend on GSP duty savings to reduce their import costs to remain competitive in the global market.

GSP renewal, refund of tariffs paid and modification

The Consolidated Appropriations Act, 2018 (the Act) renews GSP through 31 December 2020, as well as provides for refunding duties paid on GSP-eligible goods from 1 January 2018 through the reinstatement date.

In addition, the Act changes the annual review announcement date for exclusion of items exceeding the GSP imposed quantitative ceiling, known as Competitive Need Limitations (CNLs), from 1 July 2018 to 1 November 2018. The Act also amends the time frame for determining an exclusion from CNL requirements of GSP articles not produced in the US from 1 January 1995 to a requirement that the GSP product has not been produced in the US “in any of the preceding three calendar years.”³⁰ For the 2017/2018 Annual Review, this period includes calendar years 2015 through 2017. Parties petitioning for CNL waiver will need to indicate whether there was production of a like or directly competitive product in the US during the previous three calendar years.

²⁸ H.R. 1625 – Consolidated Appropriations Act, 2018, available at <https://www.congress.gov/bill/115th-congress/house-bill/1625/text> .

²⁹ 19 U.S.C. 2461, available at https://waysandmeansforms.house.gov/uploadedfiles/02.08.18_-_gsp_extension.pdf.

³⁰ H.R. 1625 – Consolidated Appropriations Act, 2018, available at <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>.



The Act requires the US Trade Representative to submit an annual report to the trade committees on country eligibility criteria.

Lastly, the Act includes new reporting requirements to improve the effectiveness of Congressional oversight of the GSP eligibility criteria enforcement.

GSP-eligible articles subject to Section 232 punitive measures

As of 23 March 2018, GSP-eligible goods that are subject to Section 232 duties (steel and aluminum products) are ineligible for GSP duty preference in accordance with 19 USC 2463(b)(2). Imports subject to Section 232 duties should be entered under column 1 (general) duty rates and the GSP Special Program Indicator (SPI) code should not be used.

Argentina and Brazil, both GSP beneficiary countries, have been exempted from Section 232 punitive measures and therefore may claim GSP preferential treatment.

Implications for importers

Importers of GSP-eligible goods that flagged their imports with the applicable A, A+ or A* SPI code between 1 January 2018 and the reinstatement of GSP will receive an automated duty refund through the Automated Broker Interface (ABI). GSP-eligible non-ABI filers and ABI filers that did not include the applicable SPI code on the entry summary may submit a duty

refund request to US Customs and Border Protection no later than 19 September 2018 through Post Summary Corrections (PSCs). However, if an entry has already liquidated, the refund request should be submitted as a protest. In addition, interested parties may submit petitions, by 16 April 2018, to modify or remove the status of GSP-eligible products and beneficiary countries, submit petitions requesting CNL waivers, submit petitions to deny de minimis waivers or petition to re-designate an excluded product.³¹

Importers should pay close attention to the annual reports issued by the US Trade Representative, which may impact the future eligibility of current GSP beneficiary countries and products.

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³¹ Generalized System of Preferences (GSP): Notice of Revisions to the 2017/2018 Annual GSP Product and Country Practices Review; Deadline for Filing Petitions; GSP Renewal and Technical Modifications (83 Fed. Reg. 14540, 4 April 2018) available at https://www.gpo.gov/fdsys/pkg/FR-2018-04-04/pdf/2018-06783.pdf?utm_campaign=subscription%20mailing%20list&utm_source=federalregister.gov&utm_medium=email.

China

Customs compliance: a challenge for cross-border supply chains



China's economic growth coupled with an aging population is driving demand in the pharmaceutical and medical device industries. The potential of China's market is attracting an influx of new companies, alongside established multinational corporations (MNCs) in China, all trying to capture market share in the early stages of the growth curve.

The industry is also highly regulated, however, and strict controls have been imposed with respect to pricing and safety and quality standards through a variety of pricing and trade compliance measures (e.g., registrations and licensing). The practices of relevant authorities are evolving to align with the regulatory and market developments. Among various considerations, customs valuation (determination of the import price) and trade compliance issues represent a huge challenge for importers.

This article highlights some of these recent developments.

Import pricing and adjustments

The issues surrounding import pricing and adjustments between related parties apply to all MNCs with local subsidiaries in China, but considerations unique to the industry place additional challenges on pharmaceutical and medical device companies with import operations.

Pricing controls

In regard to the pharmaceuticals industry, the government used to restrict the profit margin earned by distributors to a "reasonable" range. Although there have been changes to the previous restrictions in recent years, increased transparency requirements have placed additional pressures on MNCs to find the balance between their import price and corresponding domestic sales price (e.g., given the requirement to disclose pricing at each step in the supply chain, distributors might be asked to further reduce their bid price if considered unreasonably high in comparison to their import price).

Scrutiny on local marketing and advertising expenditures

Pharmaceuticals and medical device companies usually incur considerable marketing and advertising expenditures to generate local sales and grow market share in China. Similar to the trend with other government authorities, such expenditures also increasingly attract close scrutiny from customs, particularly in regard to the nature and "appropriateness" of these costs when the importer tries to support their import price from the China side (e.g., through the subtractive/deductive valuation method, similar to a transfer pricing resale minus approach).



Profit margin variance

Related to the above, it is typical for distinct products to earn different profit margins, and pre- and post-market specialist or technical support services may also need to be factored into the product pricing (especially for medical devices and consumable products). However, the profit margin variance between different products and categories remains a challenge when having valuation discussions with customs.

Business model changes

We have seen some MNCs switch their import and distribution arrangements from third-party to related-party distributors (or vice versa) for various commercial and compliance reasons (e.g., to ensure that their distributor has a current Good Supply Practice license). Associated with the import or distribution model change, any increase or decrease to the import price means that customs may impose an additional assessment on the importer, if they cannot provide supportable justification for the import price adjustment.

Also, with greater localization, there is a trend for pharmaceutical companies to send products in bulk for local production in China. Customs may question a significant reduction to the import price because the reduction may not be fully supportable, especially when the production moved to China is limited to minor processing (e.g., repacking). Customs authorities are increasingly looking at the functions and risks of the Chinese subsidiaries from both a customs and transfer pricing perspective. Where a change in business model takes place, e.g., onshoring of functions and risks, and documentation of the change is required for transfer pricing purpose, it is important to bear in mind that China Customs will scrutinize the report to examine

if the price reductions are reasonable. We have seen greater need for alignment between customs valuation and transfer pricing, and there are many cases where the inconsistencies have triggered an immediate customs audit.

Annual update requirement

Many major pharmaceutical and medical device companies that have previously had a customs valuation discussion with customs are now required to provide customs with an annual update on their financial results and keep customs informed of any changes to their import pricing arrangements. This increases the importer's compliance burden and the risk of mismanaging the customs valuation appraisal (a sensitive topic in China) on an ongoing basis.

From the importer's side, many companies review their financial results when closing the fiscal year, which may result in a need for a year-end "true-up" or "true-down" of their import transactions in the previous 12 months. In situations where a true-up is required, this will lead to an outstanding duty and/or import value-added tax (VAT) liability that must be settled with customs.

Equally important, the importer will also have to obtain the import declaration documents corresponding to the true-up adjustment to support the overseas payments. To date, customs does not have an established mechanism to facilitate this year-end adjustment process, resulting in the potential for "trapped cash" in China; but, we note that (on a trial basis), there have been discussions between customs and importers to explore ways to set up a formal program to satisfy this need.



In addition to the above, customs recently restructured its customs clearance administration by creating Tariff Collection and Administration Centers to centralize the monitoring of import declarations nationwide. The centers segregate responsibilities based on tariff chapters to take an industry-focused approach. Consequently, this reform has and will continue to result in more inquiries being received by importers because this change allows customs to assess the import data and information for pharmaceutical and medical device companies in different ports throughout China, thereby establishing industry benchmarks that will be applied nationwide.

On a positive note, customs has implemented an Advance Ruling program that enables importers to apply for a formal ruling on customs valuation. Thus, successful applicants may gain more certainty about their import pricing arrangements, duty costs and customs compliance risks, given the abovementioned import pricing issues facing many MNCs. However, this is a new initiative, and it may take some time to observe its effectiveness.

Clinical trials

Clinical trials is a complicated customs valuation topic unique to the pharmaceutical industry. Before any pharmaceutical product can be introduced into the Chinese market, it must first undergo a clinical trial in China.

For the importation of clinical trial materials, there are many considerations that need to be addressed to ensure smooth customs clearances. These considerations include, among others, licensing issues and customs valuation.

Taking customs valuation as an example, clinical trial materials are not yet commercialized (i.e., no sales price), so the transaction value method (the preferred customs valuation method that is most commonly used to value imported goods) may not be used. Therefore, both the importer and customs have to assess a reasonable customs value for clinical trial materials. This may be achieved by using one of the other customs valuation methods, but the actual application of an alternative method tends to be more complicated to implement in practice (e.g., in particular, how to determine a reasonable research and development cost for inclusion in the dutiable value, or whether it is appropriate to reference another country's import price for assessment purposes).

The above has created challenges for many pharmaceutical companies attempting to introduce new products into the Chinese market.

The two invoice system

This is a hot topic for high-value medical device and consumable companies. The two invoice system has been implemented by the government for the purposes of removing superfluous tiers of distributors from the supply chain, so as to reduce the price paid by consumers and patients.

For imported medical device and consumable companies, the two invoice requirement means that there are only two transaction layers before the products are sold to hospitals and/or medical service providers (i.e., importer or national distributor to regional distributor to hospital).

This is very different from traditional supply chain models that generally involved multiple layers of distributors because of the high demand for pre- and post-market support (e.g., specialist or technical support services). This change requires MNCs to strategically revisit their current cross-border transaction arrangements and, also, the associated import pricing structure. Once again, any business model change should have the functional and risk profile changes reflected in the prices and margins of the respective related parties.

Conclusion

While the large and lucrative Chinese market presents abundant opportunities for MNCs, customs' administration at the border also brings numerous challenges for the importers' cross-border business operations.

The importation of life sciences products is a particularly sensitive area being carefully scrutinized by customs. As such, companies need to be proactive and diligent with respect to evaluating and developing strategies for addressing existing risks for both customs valuation and trade compliance.

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China Customs updates certain entry and exit requirements



On 21 November 2017, the General Administration of Customs issued Notice [2017] No. 56, updating the requirement for means of entry and exit transport (vessels, aircrafts, etc.) and also the cargo manifest information necessary for facilitating supervision. The new requirements mainly include additional information of consignors and consignees for shipments both imported into and exported from China. As per Notice [2017] No. 56, these requirements are rolled out for exit and entry security and risk control purposes.

This Notice introduces additional compulsory requirements for shipping companies and freight-forwarders to provide the following information in the manifest declared to China Customs for import and export shipments:

- ▶ Importation – the Unified Social Credit Identification (USCI) number of the actual consignee in China and the relevant identification (ID) number of the consignor in the exporting country (employer identification number (EIN) or central index key (CIK) number for exporters from the US, value-added tax (VAT) number or company number for exporters from UK, etc.)
- ▶ Exportation – the USCI number of the actual consignor in China and the relevant ID number of the consignee in the importing country

Note that if the bill of lading is marked “to order” and the importer of record is unknown, then the ID number of the notifying party is to be provided instead.

The Notice took effect on 1 June 2018. It requires businesses to have the additional information ready for shipments into or out of China as of that date to avoid possible supply chain interruptions.

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India

Indian tribunal holds AMP expenses part of transaction value declared for customs purposes



Transfer pricing aspects of Advertisement, Marketing and Promotion (AMP) expenditures incurred by Indian entities for the sale and marketing of goods using trademarks or brand names owned by a foreign Associated Enterprise (AE) has been a controversial issue with the Indian tax authorities. The Indian tax authorities have often declared that such expenditures incurred by the Indian affiliate is for the benefit of the foreign AE and is, therefore, a provision of an intra-group service, which needs to be compensated under arm's-length principles, separate from the operating profit earned by the Indian affiliate from the sale of goods.

In the recent case of an athletic footwear and apparel company, the Delhi Customs, Excise and Service Tax Appellate Tribunal (CESTAT) upheld the addition of AMP expenses to the transaction value declared for customs purposes.

Facts

At the time of the case, the appellant was a subsidiary of an English multinational company and imported goods from the latter on a regular basis. The appellant entered into a distribution agreement with its English parent, under which it had an obligation to incur advertisement and promotion expenditures of not less than 6% of the total invoice value.

The appellant was also required to submit a marketing and business plan and advertising budget and, as reported in the CESTAT order, was required to provide a draft of any endorsement or promotion contract exceeding a certain value vetted by its principal.

CESTAT's ruling

CESTAT observed that the parent, i.e., the English company, controlled every aspect of the advertisement expenditure and, therefore, the expenditure was incurred not only for the promotion of the specific goods imported by the appellant but also for the group's brand as a whole.

As per Rule 10(1)(e) of India's Customs Valuation Rules (CVR), 2007, the transaction value of goods imported by the buyer from the seller shall include any payment made or to be made as a precondition of sale by the buyer to the seller or by the buyer to any other third party to discharge any obligation of the seller to the extent such payment has not been included in the transaction value of the imported goods.



Further, the Interpretative Note of Rule 3(2)(b) of the CVR, 2007 states that if any expense, such as advertising, marketing or promotion, is undertaken by the buyer of imported goods on its own account even though by an agreement with the seller, such expenses shall not be included in the transaction value of imported goods.

CESTAT categorically stated that it was evident from the facts of the case that the expense was not incurred by the buyer on its own account, but to discharge the obligation of the seller. Hence, Interpretive Note of Rule 3(2)(b) of the CVR, 2007 was not considered to be applicable in this case.

CESTAT distinguished the present case from the case of Samsonite [2015 (327) ELT 528 Tribunal-Mumbai] stating that in Samsonite, expenses were charged to the account of M/s Samsonite by its principal as a share of the global expenditure. However, the instant case was considered to have a different fact pattern and reliance on this judgment was rejected. Therefore, the tribunal concluded that the advertising and promotion expenses were incurred as a condition of sale and on behalf of the seller and accordingly considered as satisfying the obligation of the seller.

Implications

The ruling highlights the importance of careful planning for both transfer pricing and customs law on the controversial issue of treatment of AMP expenses. While the definition of “transaction value” under customs law and of “international transaction” under transfer pricing law operates on a different plane, the interpretations of these definitions by the authorities could lead to positions that could place a taxpayer in “double jeopardy,” adverse results for both income tax and customs. In light of this case, taxpayers should consider the terms of their intercompany agreements and evaluate the implications of the ruling on their tax and customs positions.

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Thailand

One-Stop Service Program for disclosure and settlement of duty and tax liability



The Customs Department posted a notice on its website on 18 April 2018 to announce the One-Stop Service Program as part of the Department's policy to foster good relationships with business operators. With this program, honest business operators with outstanding duty and tax payments or those that are not certain that they have correctly paid duty and tax could notify the Post Clearance Audit Bureau (PCAB) in writing and request settlement of the underpaid duty and tax.

The key operating principles of this program are as follows:

- ▶ It allows customs officers to audit business operators that are ready to settle underpaid duty and tax, focusing on the issues(s) notified in the request letter submitted to PCAB.
- ▶ Business operators are required to submit supporting documents/evidence to PCAB promptly and in no case later than 30 days from the date of submission of the request letter. Requests for extensions of time can be submitted in writing to PCAB, with approval considered on a case-by-case basis.
- ▶ Provided that there is no evidence of fraudulent intent, PCAB will consider waiving penalties for business operators that participate in this program.
- ▶ PCAB is responsible for handling the underpaid duty and tax collection; as such, business operators are not required to undertake further customs formalities to correct and settle duty and tax payments at the respective ports of entry.
- ▶ The program does not apply to any of the following business operators:
 - ▶ Operators that have imported goods by smuggling or with fraudulent intent and where there appears to be clear evidence of duty and tax avoidance
 - ▶ Operators that have imported prohibited or restricted goods or goods that violate intellectual property rights
- Or
- ▶ Operators that are subject to an ongoing post-clearance audit, investigation or prosecution for customs offenses by relevant government authorities, such as the Department of Special Investigations or the Economic Crime Suppression Division



This program is available from 1 April 2018 to 30 April 2019.

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Africa Continental Free Trade Area

Forty-four African countries sign Continental Free Trade Area agreement



On 21 March 2018, 44 of Africa's 55 countries signed the Africa Continental Free Trade Area (FTA) agreement in Kigali, Rwanda during an African Union summit. Nigeria, Tanzania and Burundi are some of the countries that did not sign the agreement during the summit. The Continental FTA agreement seeks to eliminate barriers to trade and investment.

This article highlights the objective of the Continental FTA agreement and some potential benefits it provides to the signatories.

Objective of the FTA

Countries generally are not self-sufficient and may require trade with other countries to take advantage of the other country's competitive and/or comparative advantages. These may be natural resources, expertise or even size or geographical coverage. The process of countries seeking to benefit from another economy's (or economies') comparative advantages leads to economic integration, under one or more of the following formats:

1. Preferential trade area
2. Free trade area
3. Customs union
4. Common market
5. Monetary union
6. Political federation

An FTA, the second form of economic integration, seeks to remove barriers to the exchange of goods that exist between countries. Normally, there are import duties of some sort as goods move from one country to the other and levels of other local taxes, such as value-added tax (VAT) and excise duties that often differ from country to country. The aim, therefore, of an FTA is to reduce barriers to exchange so that trade can grow as a result of specialization, division of labor and, most importantly, via comparative advantage. The theory of comparative advantage provides that in an unrestricted marketplace (in equilibrium), each source of production will tend to specialize in that activity where it has a comparative (rather than absolute) advantage. Consequently, the net result will be an increase in income and ultimately wealth and well-being for everyone in the FTA.



Currently, the signatories to the Africa Continental FTA are also members of other regional economic communities. For instance, Uganda and Kenya are signatories to the East African Community (EAC) Common Market, as well as the Common Market for Eastern and Southern Africa (COMESA) customs union. South Africa is a signatory to the Southern African Development Community (SADC) and South African Customs Union (SACU). Furthermore, another COMESA-EAC-SADC FTA agreement was signed and is in advanced stages of implementation and ratification by the member countries. Several deadlines toward implementation of the FTA have, however, been missed since 2015 when the agreement was sent for ratification by the signatories. Decisions on rules of origin criteria per trade bloc also have taken longer than expected.

Advantages of the FTA

With a combined gross domestic product of about USD2.5 trillion and 1.2 billion people, Africa currently trades more with continents or countries outside of Africa than with fellow African countries. Of the 55 African countries, 80% of exports are to other continents, and these are mainly raw or semifinished and undiversified exports. Free trade among the partner states would boost and increase trade for all countries involved. With a focus on comparative advantage, exports would be more diversified and would grow from raw or semifinished to finished products.

Transport and infrastructure are some of the impediments/barriers to trade among fellow African countries. If these countries work toward FTA collaborations, “one-stop” border posts could potentially improve trade between the countries.

The fact that the Continental FTA agreement could potentially be comprised of 55 countries promises more power and economies of scale than the EAC that has 6 member countries or SADC or COMESA with about 15 member countries.

However, on the flip side, an FTA only serves to eliminate some barriers to trade, whereas a customs union (such as SACU or COMESA) removes internal tariffs and creates a common external tariff to protect local industries of participating countries, and a common market advocates for free movement of labor, services, goods, capital and right of residence among member countries.

Next steps

The next step in the process of implementing the Continental FTA agreement will be for the signatories to ratify the agreement and then implement the provisions of the agreement. Critical areas to consider include rules of origin to qualify for preferential taxes on imports from member countries, as well as agreements of which physical barriers to trade are eliminated gradually.

The ultimate aim of the African Union is to become a political federation with one currency and one president across the whole continent.

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Angola

Angola approves new Customs Tariff



Angola's Presidential Legislative Decree no. 3/18, of 9 May 2018, approved the new Customs Tariff for imports and exports.

The new Customs Tariff introduces several changes to the regime, namely increasing the customs duties applicable for several types of goods, in order to protect and promote the Angolan productive sector. These include certain food and beverage items, among others. This is not a general standard rate increase. Goods must be reviewed individually to determine the applicable increase, if any.

This decree also amends the Consumption Tax rates applicable on the import and production of goods in Angola, which are now established in the Customs Tariff. Importers of certain goods produced in Angola, such as, for example, drinking water, will be paying significantly higher rate of tax than producers of the same items in Angola. Again, goods must be reviewed individually to determine the applicable increase, if any.

The new Customs Tariff will enter into force 90 days after its publication, 7 August 2018.

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European Union

UK and EU negotiators publish joint text of Brexit Withdrawal Agreement



In March 2018, the UK and the remaining European Union Member States (the EU27) acclaimed a joint text of the Withdrawal Agreement as a “decisive step” in negotiations. The published text follows negotiations and includes the proposals for a transition agreement ending in December 2020. During that transition period, the UK will remain subject to EU law, within the single market and the Customs Union. The UK will be able to negotiate, sign and ratify trade agreements during the transition period, and these will come into force at the end of the transition period, unless an earlier date is agreed with the EU.

However, as the subsequent months have shown, there remains a lot of work still to be done in finalizing the Withdrawal Agreement, and some significant issues are still to be resolved. These include the question of the Northern Ireland/Ireland border and, most particular, the concept of a “backstop” protocol to the Withdrawal Agreement, if no other agreement can be reached to avoid a hard Irish border. Related to this is the issue of what customs arrangements the UK and EU should put in place after Brexit. Discussions are ongoing within the UK Government on the UK’s proposed options of either a highly streamlined customs arrangement (or “max

fac” from “maximum facilitation”) or a customs partnership option. Once the UK’s position is finalized, it will still be necessary to reach an agreement with the EU27 negotiators. The question of governance of the Withdrawal Agreement and the role of the Court of Justice of the EU is also to be agreed (with the exception of its role in reviewing citizens’ rights).

The UK Government has pointed to the agreement of the joint text and transition period in March as providing time to allow businesses to prepare for new post-Brexit arrangements, but legal certainty on the Withdrawal Agreement and transition period will only come with legal ratification of the agreement, probably toward the end of 2018. The key challenge for businesses remains how to react to the transition agreement that is now in principle on offer and whether to adapt their plans to a December 2020 end date.

The joint text of the Withdrawal Agreement published on 19 March is color-coded: green for text that has been agreed in full, yellow for areas where there is political agreement, but not yet agreement on the detail, and white where further negotiations are required.



Some of the key points included in the joint text are:

- ▶ The transition agreement that is included in the text is to end on 31 December 2020. During this period, the UK will remain part of the single market and Customs Union.
- ▶ During the transition period, the UK may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the EU, provided those agreements do not enter into force or apply during the transition period, unless so authorized by the EU.
- ▶ There will be a binding backstop agreement (a Protocol) on the question of the Northern Ireland/Ireland border, but the terms of the backstop have to be agreeable to both parties. There is as yet no agreement on the right operational approach, but the negotiators agree to engage urgently in the process of examination of all relevant matters announced on 14 March and now underway. Both parties are committed to discussing all options, and there is agreed language that should a subsequent agreement be reached between the EU and the UK, the Protocol shall not apply.
- ▶ Agreement is still needed on the governance provisions of the Withdrawal Agreement (except for those addressing citizens' rights).
- ▶ The text covering citizens' rights and the financial settlement is agreed. Citizens arriving in the EU or the UK during the transition period will have the same rights as those arriving before.
- ▶ There is an explicit "good faith" clause that "The Parties shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardize the attainment of the objectives of this Agreement."
- ▶ As ever, "Nothing is agreed until everything is agreed." Legal certainty on the agreement only comes through the ratification process.

Meetings on the outstanding matters contained in the Withdrawal Agreement and on possible future trading arrangements have continued to be held since the March European Council summit. In the run up to the next European Council summit on 28 to 29 June, it seems that negotiation pressures and statements of public positions by both sides are increasing. It is not yet clear what progress will be reported to that meeting.

What now for businesses?

With Brexit readiness plans having been largely driven by a March 2019 end date, businesses continue to face a critical strategic choice:

- ▶ Work on the basis that the European Council summit on 22 to 23 March produced enough political certainty that a transition period to December 2020 will happen, risking disruption if the politics ultimately fail

Or

- ▶ Opt for business certainty, focus resources on current readiness plans working to the March 2019 deadline and potentially lose ground to competitors that chose to wait and see

This is a significant decision. The lead times needed for a number of key actions mean that, with less than one year to go to March 2019, businesses will now need to decide which strategic choice they will make – doing nothing may itself be making a choice.

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Republic of the Congo

Post-clearance monitoring and penalties for imports of ozone-depleting substances



Imports of certain chemicals and ozone-depleting substances (ODS) are increasingly being subject to post-clearance audits from the Republic of the Congo's customs services.

These audits may result in substantial fines under Articles 51 and 402/1 of the Economic and Monetary Community of Central Africa (Communauté Économique et Monétaire de l'Afrique Centrale, CEMAC) Customs Code, which provide as follows:

Article 51

"All goods whose importation or exportation is prohibited in any capacity, or subject to restrictions, rules of quality or packaging or special formalities shall be considered as prohibited."

"When importation or exportation is permitted only on presentation of an authorization, a license, a certificate, etc., the goods are prohibited if they are not accompanied by a regular title or if they are presented under the guise of a title which not applicable..."

Article 402/1

"A fine equal to three times the value of the goods shall be subject to any breach of the provisions of the laws and regulations which the Customs Department is responsible for applying where such irregularity relates to goods of the category of those which are prohibited at entry or exit and that it is not specifically suppressed by this Code."

These restrictions also apply to imports of chemicals and products containing ODS that are used in products of the food, oil, mining, beauty, health, automobile and other industries.

Background

Currently, the issue of ozone depletion resulting from the production of chlorofluorocarbons (CFCs) and other harmful substances is a global concern. This depletion increases ultraviolet solar radiation B (UV-B) to the surface of the earth, which has adverse effects on human health, food safety and biodiversity. Accordingly, the international community has adopted and signed in 1985 the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer in 1989 (the Protocol). In November 2004, the CEMAC countries also adopted in Libreville a joint regulation on the control of imports of ODS. As a result, any importation of a controlled substance, whether in isolation or in a mixture, must be authorized in accordance with the aforementioned texts and texts of application as provided for in each country that is signatory to the Protocol.



Under Article 51, the importer of any goods or products that are subject to import restrictions must, before any formalities, obtain an authorization or a license from the competent authorities. In practice, users do not always follow this procedure rigorously because of the time constraints and deadlines they must meet to dispatch their operations.

Failure to comply with this provision exposes users to the penalties provided for in Article 402/1.

Implications for importers

The drastic decline in oil revenues as a result of the decline of oil prices on the global market has resulted in budgetary difficulties for the oil-producing countries. The customs authorities are likely to use the penalties imposed on imports of the prohibited goods under Article 402/1 of the CEMAC Customs Code as a means to raise the public treasury revenue.

Thus, any company operating in the industries affected by the Protocol should comply with the regulations in force to avoid the consequences of post-clearance audits and, if applicable, obtain authorization from the competent ministry prior to any importation of chemicals and products containing ODS.

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