

International Trade Update: A Long Hot Summer of Trade Disturbances

by Lawrence Ward, Dave Townsend, and T. Augustine Lo

The Administration has been fully occupied this summer in its ongoing disputes with America's major trading partners. The U.S. Government is at least nominally resuming high level trade negotiations with China after months of stalled talks, and the Office of the U.S. Trade Representative (USTR) has created a portal for U.S. importers to seek relief from List 3 of the Section 301 punitive tariffs announced in 2018 on thousands of categories of products made in China. The Administration is also weighing how to proceed against Huawei Technologies, the Chinese telecommunications firm that it has added to the Entity List and is pursuing in two separate criminal indictments in Brooklyn and Seattle and a related extradition case in Vancouver, British Columbia. The White House also seems to be opening two new fronts by threatening to impose punitive tariffs on goods originating in the European Union (EU) and, separately, because of a new French digital services tax affecting large American service providers, by opening a new Section 301 investigation that could potentially lead to new U.S. tariffs on imports of goods from France. Finally, the Administration is still seeking to rally political support from both parties on the Hill for the U.S.-Mexico-Canada Agreement (USMCA) that requires approval by both houses of Congress.

- **Section 301 Tariffs on Chinese Goods.** Using its authority under Section 301 of the Trade Act of 1974, beginning in 2018, the Administration imposed 25% punitive tariffs covering roughly \$250 billion in annual imports from China under Lists 1, 2 and 3. The Administration also proposed a List 4 to apply 25% punitive tariffs on another \$300 billion in annual imports of Chinese goods, which would have applied to substantially all other Chinese imports that were not already covered under Lists 1, 2 and 3. However, working from a nebulous "ceasefire" arranged by Presidents Trump and Xi on June 29 while they were both attending the G-20 meeting in Osaka, Japan, the Administration has postponed again the imposition of the List 4 tariffs. It is still far from certain how the latest round of trade negotiations between the United States and China will end, and so it is still quite possible that the announced List 4 might yet ultimately impose new tariffs on many more U.S. company supply chains and average Americans because so many more consumer goods would become subject to these tariffs. (In late 2018, China and the United States had also agreed to a similar pause before resuming new tariff measures against each other.)

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Having already received tens of thousands of exclusion requests from American importers for items covered by List 1 and List 2, the USTR has now started a tariff relief process for importers of Chinese goods impacted by the 25% tariffs under List 3, which covers about \$200 billion in annual imports of Chinese goods. This new tariff relief process has been open since June 30 and will end on September 30. Adversely affected importers have the opportunity to request that the USTR exclude their imports from the List 3 tariffs just as U.S. importers have already done under Lists 1 and 2. If granted by USTR, the tariff relief under List 3 would be retroactive to September 24, 2018, the date when List 3 first came into effect, and would be effective for one year from the date of publication.

- **Sanctions against Huawei.** On May 15, the Bureau of Industry and Security (BIS) added Huawei Technologies and 68 of its subsidiaries around the world to the BIS Entity List under the Export Administration Regulations (EAR). Huawei is the world's largest telecommunications equipment producer and, before being named to the Entity List, the parent company in China and its various subsidiaries had purchased up to \$11 billion annually in U.S.-origin parts, components and software for its diverse array telecommunications products. As a result of adding these firms to the Entity List, U.S. exporters must first obtain BIS export licenses before those exporters can supply any U.S.-origin items to any listed company. Moreover, BIS publicly announced it would apply a "policy of denial" for license applications involving Huawei, meaning BIS would have a legal presumption of denying any such application unless any applicant could persuade BIS to act otherwise. Immediately after imposing the export ban on Huawei with little warning, BIS provided a limited interim authorization through a "temporary general license" to allow certain exports to Huawei and its various named affiliates to continue only until August 19, 2019. Several major U.S. suppliers are known to have approached BIS privately to seek further relief from the Entity List barrier and to resume supplying some U.S.-origin parts, components and software to Huawei. They have also reportedly received BIS guidance about being able to continue supplying some parts, components and software that originate from outside the United States and have less than a certain percentage of U.S.-origin content. There have been several signs of the unusual nature of the Huawei situation and the unique nature of these export control measures. For example, President Trump has repeatedly hinted that he could restore Huawei's ability to purchase American technology goods and services as one element in the settlement of the larger U.S.-China trade disputes that led to the Administration's imposition of 301 tariffs and China's own counter-tariffs on U.S.-origin goods, especially American agricultural products. More recently, he invited the executives of several leading U.S. suppliers to Huawei to come to meet with him personally at the White House to discuss how the Administration can strike a proper balance in punishing Huawei for its alleged misdeeds, protecting U.S. national security interests and yet preserving these substantial income streams for major American firms who had been selling their products to Huawei. It is rather doubtful that any prior President has ever held such talks with U.S. industry leaders to discuss if and how their companies could continue to do business with anyone that BIS had placed on the Entity List. Nonetheless, in spite of this sort of unprecedented meeting, it appears that the White House only committed that BIS would handle any export license applications filed by affected U.S. suppliers in a timely manner, indicating these cases would continue to be adjudicated on a case-by-case and ad hoc basis rather than through any broader new general license or other rule.
- **Criminal Prosecutions.** Adding yet further complexity, if not mystery, to the whole Huawei saga, the U.S. Department of Justice (DOJ) has filed criminal charges against Huawei and some of its subsidiaries and key management personnel in two separate indictments that were unsealed simultaneously on January 28, 2019, in Brooklyn and

Seattle.

In the New York case, DOJ obtained a 13-count indictment against Huawei, two of its subsidiaries (one in Plano, Texas, and one in Iran that DOJ alleges Huawei had sought to conceal and misrepresent as an independent contractor) and Huawei's Chief Financial Officer, Wanzhou Meng (the daughter of Huawei's founder). The multiple counts in that indictment include bank fraud, wire fraud and conspiracies to commit bank and wire fraud, conspiracy to obstruct justice, conspiracy to violate U.S. sanctions laws against trading with Iran and conspiracy to commit money laundering. The indictment alleges that Ms. Meng personally directed and took part in these illegal schemes to commit bank fraud, wire fraud and the conspiracies to commit bank and wire fraud and to obstruct justice, all to allow Huawei to buy and resell U.S.-origin goods to end users in Iran contrary to clear U.S. sanctions against Iran. Based on these charges against her individually in the New York indictment, the U.S. invoked its rights under the 1976 extradition treaty between the United States and Canada, causing the Royal Canadian Mounted Police (RCMP) to arrest her on December 1, 2018, in Vancouver, British Columbia. Huawei and Ms. Meng both deny any wrong-doing, and Ms. Meng is resisting extradition to face the charges against her in the New York case. Ms. Meng has been temporarily freed by a British Columbia court and placed under house arrest while she awaits a full trial on whether she can be lawfully extradited to the United States to be tried under that New York indictment. Her Canadian extradition trial is now scheduled to begin in January 2020 and will likely take until at least August 2020 to be concluded after which multiple appeals through the Canadian courts can be expected, regardless of which side prevails in that extradition case.

In the Seattle case, DOJ had obtained a 10-count indictment against two other Huawei subsidiaries, accusing them of conspiracy to steal trade secrets, attempted theft of trade secrets, obstruction of justice, and seven counts of wire fraud. The indictment accuses the Huawei entities of targeting and seeking to steal the trade secrets of T-Mobile USA, the large U.S. cellular phone service company based in Bellevue, Washington, and then obstructing justice when T-Mobile sued those Huawei entities to protect its own intellectual property. One key allegation made in the Seattle indictment was that Huawei had offered bonuses to its employees calibrated on the value of the confidential information they could steal from other businesses and send to an encrypted Huawei email address.

- **Section 301 Tariffs on E.U. Goods.** With respect to the EU, the USTR is contemplating imposition of up to 100% retaliatory tariffs on certain EU-origin goods because of the EU's subsidies for Airbus. The USTR has said it will move forward with retaliation after a pending ruling by the World Trade Organization (WTO) that will determine the level of permissible U.S. retaliation under WTO rules. The USTR has already conducted hearings on a proposed initial list covering \$21 billion in annual imports of EU goods. On July 1, 2019, the Administration further upped the ante by publishing a second list of EU-origin goods that also could become subject to such retaliatory tariffs.
- **New Section 301 Investigation Against France.** In addition, on July 10, the USTR announced that it is launching a new Section 301 investigation to determine if France's proposed imposition of a 3% tax on digital services discriminates against U.S. businesses. If so, the USTR would consider the imposition of a retaliatory tariff against France for that new tax. Interested persons may provide comments and testimony to USTR for the hearing scheduled for August 19, 2019. The deadline to request to appear at the hearing is August 12, and written comments are due August 19. There is also an opportunity to submit post-hearing comments by August 26.
- **USMCA.** Finally, in other summer news concerning America's trade relations, the USTR and other Administration officials are continuing to push for Congressional approval of the USMCA that was signed in November 2018 by the leaders of the

three countries. Upon its entry into force, the USMCA would replace the existing North American Free Trade Agreement (NAFTA), which has been the underpinning of North American cross-border trade and investment since the mid-1990s. Mexico has already ratified the new agreement, so U.S. and Canada must now also ratify the agreement to bring it into effect. (Canada formally began its own ratification process at the end of May 2019.) While many U.S. industries support the USMCA, some Congressional Democrats (who control the House) have been withholding support for the USMCA to date because of residual labor and enforcement concerns.

At this point, the Administration has not begun withdrawing from NAFTA (despite earlier threats to do so). Thus, NAFTA apparently will remain in effect until the Canadian Parliament and both houses of the U.S. Congress decide whether to approve the USMCA. (Under the U.S. Constitution, only the Senate's approval is normally needed to ratify a treaty, but, because the USMCA also sets some tariffs, which are a form of tax, the House also must vote on the implementing legislation, because all tax measures must originate in that chamber.)

U.S. companies concerned about international trade will also want to keep in mind that the United Kingdom is still embroiled in its efforts to withdraw from the EU, and the impending deadline is October 31 either to have a new "soft" exit agreement that both the UK and the EU can live with or to have a "no-deal" withdrawal that many analysts have suggested would result in economic and logistical chaos. With Boris Johnson taking office as the new UK Prime Minister who is pledged to a "do-or-die" Brexit, meaning with or without a negotiated deal, by October 31, and all of the myriad of American trade and export control disputes with its various trading partners, world markets may face considerable uncertainty and turbulence in the next few months.

Dorsey's attorneys at its offices in the United States, Canada, London, and Greater China can assist companies with assessing the potential impacts of the above trade disputes, and with assessing potential mitigation measures. For additional information, please feel free to contact the attorneys listed below, or see Dorsey's website, at www.dorsey.com.