Overview
In response to the United States Trade Representative’s (USTR) investigation into Chinese trade practices under Section 301 of the Trade Act of 1974, today the Trump Administration announced plans to 1) impose additional 25% tariffs on various Chinese imports, 2) initiate a new WTO dispute against China, and 3) limit Chinese investments into the US. If fully implemented, these could be the most economically significant international trade actions taken by the Trump Administration to date.

Unlike recent US investigations and actions under Section 201 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962, this case and the imminent actions pertain to China only. In addition, unlike other trade actions taken by the Trump Administration to date, these measures follow determinations that US companies face barriers to doing business in China as opposed to determinations that US industries have been harmed by import surges.

In this alert, we discuss Section 301 procedures, the Chinese trade practices under investigation in this case, and details of the administration’s findings and forthcoming trade actions. We also provide our thoughts on the administration’s potentially strategic use of Section 301 and options for companies concerned about the impact of additional trade and investment restrictions.

Summary of Proposed Actions Against China

<table>
<thead>
<tr>
<th>Measures</th>
<th>Trade</th>
<th>Investment</th>
</tr>
</thead>
<tbody>
<tr>
<td>25% tariffs on approximately 1,300 articles imported from China</td>
<td>New restrictions on Chinese investment into the US</td>
<td></td>
</tr>
<tr>
<td>Proposed list of subject articles and “intended tariff increases” to be published within 15 days (by April 6, 2018)</td>
<td>Treasury Department to propose new restrictions or otherwise report progress in developing investment proposals within 60 days</td>
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</tr>
<tr>
<td>Tariffs will become effective after a 30-day public comment period and public hearing</td>
<td>To be determined</td>
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</tr>
</tbody>
</table>
Background on Section 301 and the Current Investigation

Section 301 of the Trade Act of 1974 authorizes USTR to investigate foreign trade practices to determine whether or not they are “unreasonable or discriminatory,” or “[burden] or [restrict] US commerce.” If USTR determines that the foreign trade policies in question do have the above effects, the USTR may take action to “obtain the elimination of that act, policy, or practice.” In the 1980s and 1990s, merely instituting Section 301 investigations and threatening trade action was an effective method of achieving favorable terms of trade for US industries in foreign markets.

In this recent investigation, USTR reviewed Chinese “acts, policies, and practices” that force US companies to transfer intellectual property and sensitive technologies to Chinese companies in exchange for investment approvals and business licenses. As part of this inquiry, USTR considered new Chinese laws that may jeopardize US intellectual property by requiring some companies to save data on Chinese servers and submit information and communication technologies (ICT) for government inspection and approval. USTR also investigated trends in Chinese investment into the US and Chinese efforts to hack US cyber systems to steal trade secrets. USTR self-initiated this case upon direction from the president to consider such an investigation.

USTR concluded that certain investment requirements, investment approval processes, and processes for obtaining business licenses in China facilitate the transfer of US technologies to Chinese companies. In addition, the investigation found that “China forces US companies seeking to license technologies to Chinese entities to do so on non-market based terms.” Last, USTR concluded that the Chinese government supports outbound investments aimed at acquiring US technology as well as hacking efforts to steal US intellectual property.

Based on these findings, the US can now take broad action against Chinese trade, and the measures imposed need not relate to the sectors implicated in this investigation. Under Section 301, the US can restrict imports through virtually any method, withdraw trade agreement benefits provided to a trade partner, or take any other “appropriate and feasible action within the power of the president.”

Section 301 and the World Trade Organization

Before this case, the US had not unilaterally acted under Section 301 since before the establishment of the World Trade Organization (WTO) in 1995.

Section 301 procedures, in some respects, run parallel to WTO dispute settlement procedures. Before taking action to counter a foreign trade practice under Section 301, the US must consult with the defending country to try and resolve the matter. If the practice is regulated by a trade agreement between the parties and a solution is not reached in initial consultations, the US must “request proceedings on the matter” within the dispute settlement system set up by that trade agreement. Consultations and litigation over a practice covered by the WTO agreements would take place within the WTO dispute settlement system. After the WTO rejected the idea of unilateral Section 301 action involving trade practices covered by WTO agreements, the US committed not to impose Section 301 measures on such practices without WTO authorization to do so.

In this Section 301 investigation, the US did not first complain about Chinese policies at the WTO or receive WTO authorization to impose these measures. The US maintains that generally, the policies under investigation are not covered by WTO agreements and therefore the United States is not required to litigate these issues at the WTO. This issue of whether or not the policies and practices subject to this investigation are in fact covered by WTO agreements would be a central point of debate if the measures were to be challenged at the WTO.

To be sure, USTR did announce plans today to initiate a WTO dispute into some Chinese practices assessed in this investigation — China’s allegedly discriminatory regulations pertaining to the licensing of technology from US (or non-Chinese) firms to Chinese firms.

Trade Action Against China

The pursuit of a new WTO dispute aside, the administration plans to broadly target imports from China and Chinese efforts to invest in the US. However, these restrictions are not immediately effective. USTR intends to first solicit public comments for 30 days. Further, potential investment restrictions are not yet final; proposals for new restrictions on Chinese investment will be developed by the Treasury Department, according to today’s announcement.
As it stands, the proposed 25% tariffs would target between $50 billion and $60 billion worth of imports from China. Specifically, the White House proposes the imposition of tariffs on “certain products that are supported by China’s unfair industrial policy” and used the Made in China 2025 industrial plan as the basis for sectors to target. The Made in China 2025 plan involves 10 sectors including ICT, aerospace, robotics, new energy vehicles, medical technologies, and emerging products in materials science. In addition to tariffs on articles in these categories, new tariffs may be imposed on basic consumer products such as footwear or toys, but precise details remain unclear. At the moment, the administration is reportedly planning new import restrictions on approximately 1,300 articles. As directed by the president, USTR will publish the complete, tentative list of imported items covered by these tariffs within 15 days.

The US also intends to further limit the ability of Chinese companies to invest in or acquire US-based businesses. As part of today’s decision, the Treasury Department is directed to issue further rules governing Chinese investment into the US. Generally, the interagency Committee on Foreign Investment in the United States (CFIUS) reviews major foreign purchases of US firms where such deals may have national security implications. However, it is plausible that the Treasury Department will propose additional conditions on Chinese investment that exceed the national security-based issues generally taken into account by CFIUS.

Responses from the US Business Community

US companies and industry organizations – including the US Chamber of Commerce – argued against broad tariffs in the days before this announcement. While supporting the Section 301 investigation in concept, US retailers and a variety of industry associations warned the administration that tariffs on Chinese goods would raise prices for US consumers and businesses and harm US employment. Industry representatives also expressed concern that USTR would impose trade restrictions without soliciting expert and stakeholder input; perhaps as a result, USTR has decided to delay implementation of its decision and will solicit public comments and hold a hearing.

Response from China

In the days before this announcement, Chinese Premier Li Keqiang suggested that China would reduce restrictions on US imports, ensure that there are “no mandatory requirements for technology transfer” in China, and increase investment opportunities for US companies. However, notwithstanding Chinese policy reforms, China may also decide to retaliate for this US decision. As we mentioned in an earlier alert, China recently initiated antidumping and countervailing duty investigations into one sensitive US agricultural export and is considering additional investigations as well. Today’s action by the US could prompt China to target additional politically sensitive US exports, or could lead China to take other actions against US economic interests.

Options and Considerations for Affected Companies

In the past, the US has used consultations under Section 301 coupled with the threat of eventual action to obtain favorable market access and enhanced intellectual property protection in foreign markets. In many such instances, the US ultimately stopped the investigation or deferred action against the trading partner in question after receiving market access commitments. The US plans to take action in this case, but it is possible that the US will eventually temper or withdraw these measures if it determines that China has reformed its treatment of US companies. Companies concerned about the potential adverse impact of these measures or the response from China would be wise to stay abreast of US-China trade and investment policy dialogs.

Similarly, domestic concerns about the impact of the measures on the US economy or concerns over Chinese retaliation might prompt modification or withdrawal of these actions before implementation. US companies concerned about this decision should use the public comment opportunity to state their positions on imminent tariffs and investment restrictions. We expect that public comment guidelines from USTR will be published in the Federal Register in the near future. To best prepare to submit comments, companies concerned about restrictions on specific items should review the full list of proposed tariffs once that list is released for public inspection.

We also believe it is critical for concerned US companies to ensure that their representatives on Capitol Hill are made aware of their concerns. We would also counsel companies to reach out to the Office of the US Trade Representative to ensure that their concerns and proposals are clearly heard.

Practices

Trade Policy & Negotiations

Trade Remedies