Overview

The global COVID-19 pandemic has had, and will continue to have, significant implications for businesses involved in international commerce.

Steptoe has recently received various questions on the impact of COVID-19 on a range of international trade issues. On our COVID-19 International Trade Resource Page, we will post and provide answers to these questions. Our trade team will update this page on a regular basis, and we hope you find these insights helpful to you and your business. Please contact our International Trade group if you are interested in exploring any of these questions or other issues in greater depth.

Steptoe’s cross-disciplinary team of lawyers can help with these new international trade issues and the countless legal and policy issues that companies are now navigating due to the COVID-19 pandemic. For more information, please visit our COVID-19 Resource Center.

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How is COVID-19 affecting the US-China trade dispute?

Purchase Commitments Under the US-China Phase One Trade Agreement
A key feature of the Phase One Agreement was a commitment by the Chinese government to purchase a substantial quantity of agricultural, energy, and other manufactured products, as well as services, from the United States over the next two years. This agreement was reached in January 2020, prior to the onset of the most severe consequences of COVID-19 in China.

In subsequent weeks, officials in both countries have made numerous comments suggesting that China would still comply with its purchase commitments under the deal’s “Expanding Trade” chapter. Although the parties appear to be making progress in implementing some of the regulatory aspects of the agreement, there is a growing concern that the significant depressing effect that COVID-19 has had on China’s economy will prevent China from meeting the purchase commitments. Furthermore, the pandemic’s impact on the United States is now calling into question whether the United States will be able to deliver sufficient goods and services to meet those thresholds, particularly if US factories and transportation facilities are idled.

The Phase One Agreement contains a force majeure clause that states that “In the event that a natural disaster or other unforeseeable event outside the control of the Parties delays a Party from timely complying with its obligations under this Agreement, the Parties shall consult with each other.” To date, China has not invoked this clause, but given that the purchase targets were viewed as highly aggressive even without a pandemic-related economic slowdown, China may seek some type of renegotiation of these purchase commitments.

Tariff Exclusions

In response to the COVID-19 pandemic, the United States has temporarily exempted a range of Chinese health/medical products from Section 301 duties. These exclusions were granted in three separate batches – two on March 10, and one on March 12. The March 12 exclusion and one of the March 10 exclusions affected products on List 4a, which, prior to the exclusion, faced an ad valorem tariff of 7.5%. The second March 10 exclusion affected products on List 3, which, prior to exclusion, faced an ad valorem tariff of 25%.

On March 20, 2020, the Office of the United States Trade Representative (USTR) “opened a docket for members of the public, businesses, and government agencies to submit comments” advocating the exclusion from the Section 301 duties on China of “products subject to the tariff actions and relevant to the medical response to the coronavirus.” USTR noted that “this comment process does not replace the current exclusion process and supplements that process.” The docket will be open until at least June 25, 2020. A USTR Federal Register notice subsequently expanded upon the comment process, adding that comments “must identify the particular product of concern and explain precisely how the product relates to the response to the COVID-19 outbreak. For example, the comment may address whether a product is directly used to treat COVID-19 or to limit the outbreak, and/or whether the product is used in the production of needed medical-care products.”

Greater Tariff Relief Requested

While press reports suggested that the Trump Administration was considering a 90-day deferral of certain duty payments (namely, those related to normal ad valorem duties), on April 3, 2020, National Economic Council Director Larry Kudlow stated that for reasons of administrability, the United States would not be deferring these payments.

However, other than granting an increased number of exclusions for medical products, the administration has rejected calls for a wider roll-back of the Section 301 tariffs against China. President Trump, in a March 18 press conference, suggested he was not considering tariff relief as a possible economic stimulus: “China pays us billions and billions of dollars in tariffs and there’s no reason to do that.” President Trump added that China had not requested the suspension of any tariffs, and that he “can’t imagine Americans asking for that.”

Tariff Relief by China

While China has not granted tariff exemptions for general imports of medical supplies to fight COVID-19, on February 1, 2020, it did grant temporary exclusions from both general duties and its duties imposed in response to the US Section 301 and 232 duties for medical supplies which are donated or procured by certain government agencies.

How is COVID-19 affecting pending US trade remedy proceedings?

US International Trade Commission

On March 12, the US International Trade Commission (ITC) announced that it would cancel in-person hearings and preliminary phase staff conferences in any antidumping and countervailing duty proceeding for at least the next 60 days (i.e., until May 12, 2020, or later, should the ITC choose to extend the postponement). In lieu of in-person hearings, the ITC is accepting written testimony, and will respond by issuing questions to parties in writing. All in-person group meetings, seminars, and conferences scheduled to take place at the ITC building in the next 60 days will be similarly canceled or postponed, and during this period, the ITC will conduct all antidumping and countervailing duty votes by notation.
On March 18, 2020, the ITC announced that, until further notice, it would be “temporarily waiving and amending certain of the Commission’s rules that require the filing of paper copies, CD-ROMs, and other physical media” in both Section 337 investigations and import injury investigations. The ITC will, for the time being, “require electronic filing for all documents filed with the Commission.” The ITC has not yet provided official guidance on the service of documents among parties to these proceedings.

The steps the ITC has taken in response to the COVID-19 pandemic are outlined on its website.

US Department of Commerce

The US Department of Commerce (Commerce) has not issued any overall guidance as to the conduct of its trade remedy proceedings. In many cases, Commerce has approved requests for extensions of certain filing deadlines, but has done so on an ad hoc basis rather than by tolling all deadlines. In these approvals, Commerce has noted that it is required under trade remedy law to complete its investigations within a statutorily defined timeline, and that it retains the authority to rely on adverse facts available when information requested from respondents is not provided in a timely fashion.

Commerce has issued guidance that service of documents containing business proprietary information will be effected through Commerce’s own ACCESS website in lieu of requiring service among parties.

COVID-19-related travel restrictions have prevented Commerce personnel from conducting on-site verifications. In such cases, it appears that Commerce will be relying on the unverified information on the record to make its determinations.

Commerce has not formally canceled its hearings, but has enacted a policy prohibiting meetings or hearings with more than 10 people in attendance.

How is COVID-19 affecting US international trade negotiations? US-UK

A March 12, 2020 press release by the UK Department of International Trade (DIT) signaled that the United States and United Kingdom would proceed with the negotiations: “The government is expected to begin negotiating a UK-US free trade agreement this month.” However, a USTR spokesperson said that “Both the United States and the United Kingdom are committed to starting trade negotiations as soon as possible…At the present time, both our governments are rightfully focused on stemming the spread of the coronavirus, protecting the health and safety of our citizens, and finding innovative solutions to combat this outbreak.” The spokesperson added that the United States and United Kingdom “will begin active trade negotiations at an appropriate time in the near future,” noting that “both sides remain in regular contact on when to proceed with the negotiations as the developing situation with the coronavirus becomes clearer.”

US-China

After signing the Phase One Trade Agreement, USTR indicated its intention to begin negotiating a Phase Two agreement promptly. Shortly after that announcement, both countries – first China, then the United States – were impacted by COVID-19, and these negotiations do not appear to have progressed. However, it is unclear whether the lack of progress in these talks is a result of the pandemic, or of a lack of mutual desire to engage on these more intractable issues.

US-EU

There is no evidence of any ongoing talks between the United States and the European Union with respect to a bilateral trade deal. More specifically, there is no evidence of any talks to resolve the aircraft dispute, which under any circumstances are unlikely to commence until a World Trade Organization (WTO) arbitration panel issues its decision later this year on the amount of duties that the European Union can impose on US imports as a result of a compliance panel finding that a Washington state tax measure is inconsistent with WTO rules.

US-Kenya

On March 17, 2020, USTR issued a press release announcing that it had notified Congress of its intent to negotiate a free trade agreement with Kenya, pursuant to the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA Act). In accordance with the TPA Act, USTR will publish objectives of the negotiations with Kenya at least 30 days before formal trade negotiations begin. USTR wrote in its notification that it would not begin negotiations with Kenya for at least 90 days from the date of the notification, putting the earliest start date in mid-June 2020. Neither the USTR press release nor the letters notifying the congressional leadership mentioned the COVID-19 pandemic.

UK-EU (Brexit)
The second round of Brexit negotiations, planned for the third week of March, had to be cancelled due to the COVID-19 outbreak. Both the United Kingdom and the European Union chief negotiators are currently respecting a self-quarantine period. As a result, talks have been put on hold with no indication of when they would resume. These developments will significantly delay the already tight schedule of negotiations. The UK government said in a statement that “Both sides remain fully committed to the negotiations and we remain in regular contact with the European Commission to consider alternative ways to continue discussions.” The UK government furthermore expressed its intention to stand by its plan to begin trading on WTO terms with EU Member States effective January 1, 2021 should the parties fail to reach an agreement. However, the press has reported a growing number of requests by stakeholders to extend the negotiating period in light of the COVID-19 crisis.

United States-Mexico-Canada Agreement (USMCA)

The USMCA will take effect “on the first day of the third month” after all three parties have notified one another that they have completed the internal procedures required for the entry into force of the agreement. Although the Trump Administration has indicated that it would like to see the agreement take effect on June 1, 2020 the parties would have had to complete the relevant procedures and notify one another of those procedures’ completion by the end of March in order to achieve that goal, which they did not do. Accordingly, July 1 is now the earliest date USMCA could enter into force, per the procedure outlined in the USMCA Protocol. However, USTR Lighthizer is reportedly exploring the possibility of a pre-July 1 implementation, despite the rules detailed in the Protocol.

In a March 21 tweet, Mexican President Andrés Manuel López Obrador said he proposed accelerating USMCA implementation in a call with President Trump that day, arguing that it would help both countries’ economies bounce back from COVID-19-related downturns. Mexican Economy Minister Graciela Márquez Cón said on March 25 that the three parties were working together, and “advancing very, very quickly to have all of the procedures ready for entry into force,” including the preparation of internal legislation, customs procedures, and uniform regulations. On April 2, Canada notified the US and Mexico of its completion of the necessary internal procedures.

In contrast to this push to accelerate implementation, a number of major industry groups and US lawmakers, including a bipartisan majority of the Senate Finance Committee, expressed opposition throughout March to a June 1 implementation date. A particular focus of their concerns was the implementation of new auto regulations. In remarks on the Senate floor on March 18, Senate Finance Committee Chairman Chuck Grassley said that he was “eager” to see USMCA kick in, but stressed that he was “especially concerned that June 1 presents unique challenges for the auto industry when it’s already facing significant supply chain disruptions due to COVID-19.” It remains to be seen whether the lawmakers and businesses that expressed opposition to a June 1 start date will ask for a further delay after July 1. However, the wording of the requests does seem to suggest that those parties would likely view a July 1 implementation date as similarly premature.

How is COVID-19 affecting other USTR proceedings?

On March 18, USTR announced that it would postpone its scheduled April 7 and April 9, 2020, field hearings, in Florida and Georgia, respectively, consistent with recommendations from the US Centers for Disease Control and Prevention (CDC). The hearings, to be co-hosted by the US Departments of Commerce and Agriculture, were part of an administration effort to consider the possibility of providing relief to seasonal producers who allege that they have been harmed by trade-distorting practices, especially from Mexico. USTR also postponed the March 26, 2020, deadline for interested parties to submit comments and information ahead of the hearings.

On the other hand, USTR was able to complete and publish on schedule its annual National Trade Estimate Report on Foreign Trade Barriers.

How is COVID-19 affecting pending WTO proceedings?

The WTO has suspended all meetings through the end of April, restricted access to its premises, and told “all WTO Secretariat staff (except on-site critical staff)” to work remotely through the end of March.

The WTO has also indefinitely postponed its 12th Ministerial Conference, which had been scheduled to take place from June 8-11, 2020, in Nur-Sultan, Kazakhstan. No new date has yet been announced. Many parties had hoped to make progress on the longstanding WTO fisheries negotiations at the ministerial.

The WTO “is reviewing alternatives for arranging virtual meetings to enable members to participate remotely.” The Australia trade policy review was held virtually on March 11 and March 13, 2020, and a fisheries negotiations meeting was scheduled to be conducted similarly on March 20, 2020. That fisheries meeting, which would have been the first instance of a digitally-conducted WTO negotiation, was canceled due to a combination of technical difficulties and Swiss health-related restrictions on human travel and gatherings. Ambassador Santiago Wills, the chair for the Doha Rules negotiating group, proposed on March 19 the continuation of work on the fisheries issue by written exchange, suggesting a “written procedure for an exchange of views on the new proposals from India and the LDC (least-developed countries) group.” No other WTO meetings are currently scheduled to be conducted digitally.
On March 24, WTO Director General Roberto Azevêdo called on members to notify to the WTO any trade-related actions they take in response to the COVID-19 pandemic. He called on G20 leaders to do the same during the March 30 virtual G20 summit.

**What export restrictions have governments imposed as a result of COVID-19?**

In response to the massive surge in demand for medical equipment and supplies, several governments have imposed export controls on a variety of health/medical products needed to fight the COVID-19 pandemic.

While Article XI of the GATT 1947 generally prohibits the imposition of export controls, Article XX contains an exception from these commitments for actions taken that are “necessary to protect human...life or health,” subject to the proviso that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...”

According to a March 23, 2020, report by Global Trade Alert, 54 countries have imposed export controls on some sort of medical equipment, medicine, or medical ingredient. Countries restricting pandemic-related exports include India, France, Germany, South Korea, Russia, Bulgaria, Morocco, Ukraine, Turkey, and the Czech Republic.

In the immediate aftermath of the outbreak of the crisis in Europe, some EU Member States took drastic actions to impose export restrictions on protective equipment and respirators, even for sale to other EU countries. The European Commission has in the meantime taken measures to have these restrictions lifted, as we noted in our International Compliance Blog post. Germany, which was one of the Member States that imposed a temporary export ban, has already lifted its ban.

Regarding trade with non-EU countries, the European Commission issued an Implementing Regulation requiring that exports of specified personal protective equipment, whether or not originating in the European Union, to non-EU countries, be subject to authorization. As specified in a newer Guidance note, this includes all non-EU countries, including the United States and the European Union’s preferential trade partners, with the exception of the four member states of the European Free Trade Association (Iceland, Liechtenstein, Norway, and Switzerland), certain overseas countries and territories listed in Annex II of the Treaty on European Union, as well as the Faeroe Islands, Andorra, San Marino, and Vatican City. The United Kingdom is considered to be an EU country in this context.

In the Guidance note, the Commission clarifies that exports should not be restricted any more than absolutely necessary, and the EU also wishes to uphold the principle of international solidarity in this situation of global pandemic.

Export authorizations for the specified personal protective equipment shall be granted by the competent authorities of the EU Member State where the exporter is established and shall be issued in writing or by electronic means. The new authorization requirement will be valid for six weeks.

European Commission President Ursula von der Leyen also called on EU Member States to “help each other by producing more, keeping it in the European Union and sharing with each other so we can protect our health workers and patients and contain the spread of the virus.” However, because Member States are allowed to rely on derogations related to public health and protection of human life, the modalities for implementing these authorizations remain at the discretion of the Member States and are regulated by national law.

EU Trade Commissioner Phil Hogan defended the EU’s move to restrict medical exports during the March 30 virtual G20 summit, while also urging others to ensure that “any domestic emergency measures aimed at protecting health” are “targeted, proportionate, transparent and temporary.”

In contrast to the EU and many other countries, the United States has thus far imposed no similar measures. In an April 2 briefing, President Trump noted that the Defense Production Act provides his administration with the authority to block exports of equipment needed to fight the COVID-19 pandemic, but pointed to two examples of export orders he allowed to be fulfilled regardless.

On March 16, Senate Finance Committee Chairman Chuck Grassley urged President Trump to refrain from imposing COVID-19-related export controls, and to work with world leaders “on a coordinated response to the pandemic before we see a future domino effect from export restrictions that leaves everyone worse off.” Georgia Congressman Doug Collins, on the other hand, urged the Trump Administration in a March 24 letter “to impose a temporary ban on all exports of coronavirus testing and diagnostic equipment, personal protective equipment, respirators, pharmaceutical supplies, and any other medical supplies necessary to American hospitals as they fight the ongoing coronavirus outbreak.”

In addition to restrictions on exports of products needed to fight the COVID-19 pandemic, several countries have recently imposed restrictions on exports of certain food products. In the fourth week of March, Russia, for example, proposed restrictions on grain exports. During the March 30 G20 virtual summit, EU Trade Commissioner Phil Hogan told his counterparts that “There is no global supply shortage [of food] at this time and such measures are completely unjustified.”

The heads of the WTO, the UN Food and Agriculture Organization, and the World Health Organization issued a joint statement on March 31 calling on governments to minimize the impact of COVID-19 related border restrictions on trade in food, and warning that “Uncertainty about food availability can spark a wave of export restrictions, creating a shortage on the global market.”
How do the travel restrictions imposed by the US administration impact international trade?

The United States has imposed sweeping restrictions on international travel as a result of the COVID-19 pandemic, but has made clear that these bans are not intended to impact international trade in goods.

During his live March 11, 2020 address, President Trump announced certain travel restrictions between the United States and certain European countries, and inadvertently suggested that “these prohibitions will not only apply to the tremendous amount of trade and cargo, but various other things as we get approval. Anything coming from Europe to the United States is what we are discussing.” However, he clarified shortly thereafter, in a tweet, “that trade will in no way be affected by the 30-day restriction on travel from Europe. The restriction stops people not goods.” The president noted in his written proclamation, issued the same day, that “The free flow of commerce between the United States and the Schengen Area countries remains an economic priority for the United States, and I remain committed to facilitating trade between our nations.”

Subsequent to the announcement regarding travel from designated European countries, on March 14, 2020, President Trump announced similar travel restrictions for the United Kingdom and Ireland, noting, as he did in his proclamation regarding the Schengen Area, that “The free flow of commerce between the United States and the United Kingdom and the Republic of Ireland remains an economic priority for the United States, and I remain committed to facilitating trade between our nations.”

On March 18, 2020, President Trump announced via tweet that the United States and Canada had agreed to close their shared border to “non-essential travel.” President Trump specified that “trade will not be affected” by the measure. The final deal is expected to allow some commercial traffic — such as the movement of goods by truck drivers — to continue, but to bar crossings for shopping and touristic purposes. Special “trusted trader” programs between the United States and Canada will likely decrease the probability that enrolled companies’ abilities to trade across the border will be impacted by the border restrictions.

On March 20, 2020, the United States and Mexico announced a similar ban on non-essential travel. A fact sheet published that day by the White House covering the recent agreements with Canada and Mexico stated that “Trade and business travel will continue to operate across our borders, ensuring workers and goods are not impeded.” While these travel restrictions are not intended to affect trade in goods directly, analysts have noted that restrictions on non-essential human travel will have a direct dampening effect on US travel and professional services exports, as well as a secondary effect on the shipment of goods for trade, because passenger aircraft routinely carry significant amounts of cargo.

What other impacts will the COVID-19 pandemic have on US trade policy?

White House Trade and Manufacturing advisor Peter Navarro said on March 15 that President Trump will sign an executive order aimed at promoting the development of domestic pharmaceutical and medical supply chains. The executive order will leverage a three-pronged strategy to this end: (1) imposing new “Buy American” requirements on the departments of Defense, Veterans Affairs, and Health and Human Services, (2) relaxing Federal Drug Administration and Environmental Protection Agency regulations to make it easier to begin manufacturing pharmaceutical and other medical products in the United States, and (3) directing government funding towards advanced manufacturing, including continuous manufacturing and 3-D printing, of such products.

In a March 17 press conference, Chinese Foreign Ministry spokesman Geng Shuang criticized the White House reshoring plan. He said, based on an informal translation, that: “The formation and development of the global industry chain supply chain is the result of the combined effect of market laws and corporate choices...It is neither realistic nor wise to try to artificially cut off the global industrial chain and supply chain, or even touting ‘transfer’ and ‘decoupling,’ by any excuse or in any way.”

US Trade Representative Robert Lighthizer alluded in his March 30 remarks during the G20 virtual summit to the Trump Administration’s plans to take action on medical and pharmaceutical products: “Unfortunately, like others, we are learning in this crisis that over-dependence on other countries as a source of cheap medical products and supplies has created a strategic vulnerability to our economy. For the United States, we are encouraging diversification of supply chains and seeking to promote more manufacturing at home.”

Senate Finance Committee Chairman Chuck Grassley expressed support on March 31 for some sort of reshoring of pharmaceutical production as well: “I think we have to do it, even if we have very cordial relationships with China and we get back to normal trading relations with them, or with India...I think this pandemic has pointed out that the United States is foolhardy if we want to have 80 percent of our pharmaceutical [industry]...come from one country.”

On April 2, Navarro told the press the executive order was still in the works, but was being put to the side as other pandemic-related initiatives were being prioritized. He stressed that the policy would not take effect until after the end of the COVID-19 crisis.