Trade Update

December 3, 2019

By Michael Anderson

Highlights

- **USMCA:** A deal was "imminent" and is now "within range" according to Speaker Nancy Pelosi, to tee up USMCA for vote in Congress.

- **China Tariffs:** The clock is ticking on whether the U.S. and China can complete a phase-one deal before another round of U.S. tariffs on Chinese goods takes effect on December 15th. Chinese demands for a roll back or elimination of existing tariffs as part of any concluded phase one trade deal with the U.S. has slowed the pace of the negotiations.

- **WTO:** Twenty years removed from the "Battle in Seattle," the WTO faces another looming crisis – the Appellate Body shutdown. Several outside experts, including Georgetown Law Professor Jennifer Hillman, have proposed solutions to "reset" the AB system, while a draft General Council statement may finally provide the U.S. with the acknowledgement it has long sought, that the AB has failed to adhere to the Dispute Settlement Understanding (DSU) provisions in some trade disputes.

USMCA

- Amb. Lighthizer met with President Trump on Tuesday morning to discuss USMCA, with White House Trade Advisor Peter Navarro saying after the meeting that Trump is "raring to go" and that the administration is ready to agree to Democrat's demands on enforcement provisions and put those details into writing. Speaker Pelosi indicated that seeing the final details in writing is necessary to get her approval to bring the deal to a House vote.

- House Speaker Pelosi said last Monday that USTR and the House working group are now "within range of a substantially improved agreement for America's workers. Now, we need to see our progress in writing from the Trade Representative for final review." Speaker Pelosi's statement came after President Trump stated during a meeting with the Bulgarian Prime Minister earlier in the day that USMCA is "sitting on Nancy Pelosi's desk" and then later added "She's incapable of moving it. It looks like she can't. Everybody knows it's a great deal. She knows it's a great deal; she said it. She keeps saying she wants to get it done, but we're talking about many, many months sitting on her desk, no votes."

(House Speaker, Nancy Pelosi)

- Mexican President Andrés Manuel López Obrador said last Monday that he would send a communiqué to Capitol Hill requesting no more USMCA delays after the Mexican Chamber of Deputies approved the 2020 fiscal year budget the previous week. This budget includes additional funding for implementation of Mexico's labor reforms, an item that many House Democrats have stated is imperative to get them to support USMCA.

- Several reports last Wednesday noted that the trade ministers from the United States, Canada, and Mexico met in Washington, D.C. to discuss USMCA and a possible deal between USTR and House Democrats. The meeting between Amb. Lighthizer, Deputy Canadian Prime Minister Chrystia Freeland, and Mexican Undersecretary for North America Jesús Seade may portend a deal with House Democrats, making changes to the current USMCA text on labor, environmental, enforcement, and drug pricing provisions, is close.

(Amb. Robert Lighthizer and Deputy Prime Minister Chrystia Freeland)

- Jesús Seade, Mexican Under Secretary for North America, confirmed last week that the Mexican government has received USMCA proposals crafted by Amb. Lighthizer and a group of House Democrats . "Every single issue that has made me lose my sleep is off the table. We are on the way to a resolution," Jesús Seade said. "What is now being considered … is not going too far and it certainly will be a huge improvement to what we had originally, thanks to the Democrats."

(Mexican Undersecretary for North America, Jesús Seade)

- Separately, Seade reported last week that Amb. Lighthizer and the USMCA working group "without a doubt" have agreed to improve the deal's dispute-settlement process, citing conversations with the USTR. He further noted that "The changes will be in a new document that one could call a 'protocol of additions and modifications' and whatever Lighthizer sends to Congress will be USMCA combined with this new document and implementing legislation that reflects that combination." Seade said language precluding the ability to block a dispute-settlement panel has "already been agreed to" and will be in the addendum.

- Over the weekend, President Trump continued the pressure on Democrats to vote for USMCA tweeting, "Nancy Pelosi won't put it up for a vote. Has delayed it for 6 months. See you in #2020!"

Section 232 Tariff Actions

- President Trump announced by tweet on December 2nd that the U.S. is placing tariffs on steel and aluminum imports from Argentina and Brazil, alleging that the two countries "have been presiding over a massive devaluation of their currencies." The Brazilian real hit a record low against the dollar the week of November 25th, while the Argentine peso has suffered a sharp decline against the dollar since the presidential elections in October, when President Mauricio Macri, a right-leaning former businessman, was rejected for a second term in favor of Alberto Fernández. Fernández is expected to return the country to Peronism, an Argentine political movement oriented towards economic autonomy, nationalism, and populism. The peso also underwent a sharp devaluation in 2018 as a result of high inflation and a combination of other factors.

(Argentine President, Mauricio Macri)

Auto Tariffs

- Despite expectations that President Trump would make an announcement several weeks ago regarding an additional delay on a Section 232 action on import tariffs, no announcement has been made to date, raising hopes among some Members of Congress that Trump may decide against enacting these tariffs. "I think we are heading in the right direction—so that's good news. All the information that I've received—it looks like we are heading in the right direction" Senate Finance Committee member Tim Scott said last month. Sen. Ben Cardin and Sen. Rob Portman concurred.

- With the lapse in President Trump's 180-day, self-imposed deadline on an auto tariff decision, Sen. Pat Toomey said that a recent Court of International Trade ruling makes clear the window has closed for Trump to impose national security duties on auto imports from the EU or any other country. Toomey said, "As a recent U.S. trade court opinion stated, the president's authority to impose 'national security' tariffs or other import restrictions under Section 232 is not indefinite." "With the 180-day deadline having passed, the window for new 'national security' taxes on imported automobiles has closed."

(Sen. Pat Toomey)

- Some observers indicate that President Trump may keep the pressure on EU officials through other trade tools, including a section 301 investigation, which would examine EU subsidies and other programs in the auto sector. A former EU official characterize the potential strategy as creating “a situation that, for another year, would give the president leverage over the EU.”

Section 301 Tariff Actions

- China is insisting on the roll back or elimination of existing tariffs as part of any concluded phase one trade deal with the U.S., according to the Global Times. In a separate tweet, the Global Times, which is affiliated with the People’s Daily, a Chinese government newspaper, reported that the U.S. pressure and demands for specific levels of agriculture purchases constitutes interference in China’s internal affairs and could scuttle the phase one deal.

- Only 13 days remain for Amb. Lighthizer and his Chinese counterpart, Vice Premier Liu He, to lock in the details of a phase-one deal to avoid another escalation in a trade war with the 4th tranche of U.S. tariffs (List 4b) scheduled to take effect on Dec. 15th, covering consumer products such as smartphones, laptops, and toys. Last week President Trump indicated a deal was close, ““We’re in the final throes of a very important deal, I guess you could say one of the most important deals in trade ever.” “It’s going very well but at the same time we want to see it go well in Hong Kong and I think it will. I think that [Chinese] President Xi [Jinping] can make that happen, and I know him, and I know he’d like to make it happen.”

- Many experts are growing increasingly doubtful about eventual likelihood of a more comprehensive “phase two” agreement between China and the U.S. as the two countries continue to have difficulty completing an initial “phase one” deal. The signing of the phase one deal is increasingly expected to take place next year as opposed to this year, and some Chinese officials have indicated that they have no intention of pursuing a phase two agreement until after the U.S. presidential elections. “It’s Trump who wants to sign these deals, not us. We can wait” said one of these officials. The “phase 2” agreement is expected to focus on more contentious issues such as forced technology transfer that will require China to make structural changes.

U.S. - Japan Trade Agreement

- According to the advisory group the Intergovernmental Policy Advisory Committee, USTR did not follow obligations according to the 2015 Trade Promotion Authority Act in negotiating the stage-one deal with Japan. The group stated that the deal did not meet these obligations “because of the narrow nature of the deal” and that “It is also difficult, if not impossible, to evaluate whether Stage 1 of the Trade Agreement between the United States and Japan promotes the overall economic interests of the United States.” These critiques echo those made by some Democrats during the

House Ways & Means hearing on the U.S.-Japan stage-one deal on November 20th.

- The lower house of the Diet, the Japanese parliamentary body, passed the U.S.-Japan deal on Tuesday, November 19th, leaving the upper house several weeks to consider and pass the deal before the extraordinary session of the Diet concludes on December 9th. The goal remains for the deal, which the Trump administration has determined does not need to be approved by the U.S. Congress, to enter into effect in January 2020.

U.S. - EU Trade

- Over the weekend, Germany's Ursula von der Leyen became President of the European Commission, marking the leadership transition in a short ceremony with her top counterparts, including Trade Commissioner Phil Hogan. Von der Leyen replaces EU veteran Jean-Claude Juncker. She will lead a 27-strong team of commissioners, who also began work today, facing challenges on many fronts, including climate change, trade, and regulatory governance.

(European Commission, College of Commissioners)

- As reported previously, the announced 10% or 25% tariffs of $7.5 billion of EU goods, resulting from the WTO's ruling of illegal launch aid to Airbus, went into effect on October 18th. Products subject to additional 25% duties include a wide range of agriculture and manufactured goods, notably cheeses, yogurt, butter, fruits, whiskey, and certain textile and apparel items, according to the final list released by the White House. The 10% duties are comprised solely of non-military aircraft and parts.

U.S.-U.K Trade Agreement

- Brits will head back to the polls on December 12th for a general election that was called for by Prime Minister (PM) Boris Johnson on October 29th. PM Johnson hopes that the elections will give him a majority in Parliament, thus paving a smoother path for the passage of a Brexit deal ahead of the extended deadline of January 31st.

- Proposed changes to the EU and U.K. tariff schedules after the completion of Brexit remain a major concern for the U.S. and other WTO members. The U.S. was recently joined by Australia, New Zealand, Canada, China, Mexico, South Korea and others in speaking out against the proposals, arguing that they would lead to diminished market access.

- The U.S. stated during the Geneva meeting that the UK and EU plan will not equitably divide access to the two members' markets but will rather decrease it. Citing two examples, the U.S. noted that TRQs (tariff rate quotas) would be effectively eliminated, pointing to grape juice exports to the bloc and pizza cheese exports to the UK as illustrative examples. "Furthermore, the proposed approach fails to address how bilateral EU-UK will be treated once the UK is no longer part of the European

Union. Currently that trade is not subject to the TRQs. But what happens once Brexit concludes?" The U.S. further stated, "This is unjustifiable, and clearly an unacceptable outcome for other WTO members," and invited both trade partners to engage with the U.S. in "productive negotiations" on the issue.

- President Trump and Prime Minister Johnson previously expressed a common goal to have a U.S.-UK free trade agreement concluded quickly after the exit of Britain from the European Union. According to Bloomberg Economics, about 0.9% of global GDP is exposed to Brexit trade risk. For some context, EU-UK trade is about 3.1% of world trade.

Suspension Agreements

Tomato Suspension Agreement

- As reported earlier, the Florida tomato growers secured a winning vote in the anti-dumping case last month. The ITC voted affirmatively, finding that the "U.S. industry is threatened with material injury by reason of imports of fresh tomatoes from Mexico that the U.S. Department of Commerce (Commerce) has determined are sold in the United States at less than fair value." The ITC's report and Commission's opinion will be available by December 30, 2019.

- As a result of the ITC's affirmative determination, the suspension agreement that Commerce previously entered concerning fresh tomatoes from Mexico will remain in place and the antidumping duties will be suspended. The finding provides a backstop in the form of anti-dumping duties to the Florida Growers should Mexico or the U.S. withdraw or otherwise terminate the current Suspension Agreement.

Sugar Suspension Agreement

- Owing to expected shortfalls in U.S. sugar production, the Commerce Department announced approval of 100,000 additional short tons of Mexican refined sugar imports. Mexican sugar is subject to import quotas under the US-Mexico suspension agreement. The increase in refined sugar does not change the total amount of Mexican sugar allowed into the US market – just the mix between refined and other sugar. USDA recently notified Commerce of the need for additional sugar in the U.S. market as adverse weather has lowered expectations for US sugar production significantly for both sugar beet and sugarcane regions.

- As noted earlier, the Court of International Trade (CIT) extended the enforcement date to December 6th, 2019 for "vacating" the existing Sugar Suspension Agreement with Mexico. The Justice Department had requested a 90-day stay of a CIT's ruling ordering the U.S. to vacate the 2017 amendments to sugar suspension agreements with Mexico. The request was supported by domestic producers, the Mexican industry, and Mexican government as being necessary to ensure that all parties have ample time to file comments with the Department of Commerce on the suspension agreements, and to give the Department of Commerce time to follow proper procedure during the process, according to an American Sugar Alliance spokesperson.

U.S. - India Trade Developments

- U.S. trade negotiators traveled to India two weeks ago to continue discussions on a partial trade deal with Indian Commerce Minister Piyush Goyal and his team. According to Indian press reports, market access for medical devices and related products was one of the key topics of discussion for both sides, and reports emerged post-trip that negotiations on medical devices were close to being completed. Having previously eliminated discussions over U.S. information and communications technology products, the major sticking point in the recent discussions were those surrounding restoration of some Generalized System of Preferences (GSP) benefits for India.

- As previous reports indicated, Amb. Lighthizer is interested in aligning GSP benefits to reciprocal Indian market-access concessions. For example, the amount of GSP benefits reestablished would equal the amount of new market access India provided the U.S. on a dollar-by-dollar basis. U.S. industry sources indicated cautious optimism about the trajectory of the negotiations, but also indicated that they remain uncertain whether the discussions can be completed before the start of 2020.

U.S. - Brazil Trade Developments

- No significant updates since initial reports last month of a potential for U.S. – Brazil trade talks. As noted earlier, according to a joint statement released at the end of the annual U.S.-Brazil CEO Forum additional "higher-level" meetings under a bilateral forum led by USTR and the Brazilian foreign affairs and trade ministries could occur. According to reports, initial discussions between the two sides also discussed several aerospace, infrastructure and transportation initiatives.

General Trade Cooperation/WTO Reform

- Twenty years ago, the WTO faced a crisis from external forces that disrupted and sidetracked the 1999 Ministerial in Seattle, WA. As WTO delegates from around the world met to negotiate lower tariffs and enhanced market access, thousands of protestors, promoting concerns with globalization, the environment, worker rights, and a host of other issues, descended on downtown Seattle overwhelming local law enforcement. The chaos and concern for public safety shut down many ministerial meetings. Today the WTO faces another crisis, but of an internal nature, as the U.S. has effectively protested the practices and judicial overreach of the Appellate Body. The U.S. blocking of the appointment of new Appellate Body panel members will soon effectively shut down the ultimate WTO forum for dispute settlement resolution. The WTO Appellate Body is careening towards the December 10th dissolution due to lack of quorum with the expiration of two panel members' terms.

WTO Ministerial in Seattle (1999)

- A host of observers, WTO experts, and legal minds continue to weigh in on the impact and outcome of a dissolved AB. Of immediate concern to many WTO members is the status of 13 pending AB cases, which could stall indefinitely, and or could quickly devolve into tit-for-tat tariff wars.

- Amb. David Walker (New Zealand) secured approval last Friday from WTO trade officials for a draft General Council decision that states unambiguously, as previously argued by the U.S., that "the Appellate Body has, in some respects, not been functioning as intended under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU")". The Council is expected to approve the statement at its upcoming meeting on December 9th, which could arm the U.S. with the long sought-after acknowledgment that the AB has failed to adhere to the Dispute Settlement Understanding (DSU) provisions in some trade disputes. Notably, the draft decision contains several amendments tied to U.S. demands regarding "transitional rules for outgoing Appellate Body members," the 90-day rule for completing the AB reports (including positive consensus that any member to the dispute can decide whether to go ahead or not), "scope of appeal," "advisor opinions," "precedent," "overreach" and "regular dialogue between the DSB and the Appellate Body." It remains unclear whether the U.S. will support the Council document, as the U.S. has insisted on a discuss of why and how the AB steered from its original mandate, before moving forward with reform actions

WTO Ambassador, David Walker

- Amidst the tumult in the looming AB crisis, several proposals outside the WTO member country framework have emerged to reform the AB system to address U.S. concerns. In a recent Washington International Trade Association (WITA) Forum, Jennifer Hillman, a Georgetown Law Professor, posited a three-step solution to "reset" the AB system.
    - *Adopt a term-limit rule that members of the Appellate Body Secretariat cannot serve for longer than eight years—the maximum length of time of an Appellate Body member*. Fixed terms and mobility of AB Secretariat staff would inject new perspectives to appeals and reduce the tendency to treat past decisions as precedent.
    - *Adopt the Walker principles through a decision of the WTO's General Council* . The principles include requirements that ostensibly address many of the U.S. procedural issues (i.e. 90-time limit on issuing reports) and substantive concerns (i.e. address only issues raised by parties) with the present functioning of the AB.
    - *Establish an oversight committee and audit to ensure compliance* . The Committee would review AB operations to ensure adherence to the Walker principles, either over the course of a given year or in unique individual cases.

- Hillman, a former WTO AB member (United States), noted that these changes will require WTO members to formally acknowledge that AB changes are needed and a concerted desire to act swiftly to avoid uncertain future outcomes and possible mini-trade wars in the absence of a functioning AB structure.

- The U.S. recently launched a new complaint about the Appellate Body, criticizing the AB's compensation structure, which, according to U.S. calculations, amounts to over 300,000 Swiss francs, or $330,648 USD a year for a part-time position. The U.S. argued that this compensation structure incentivizes AB panel members to continue working on pending appeals even after their terms expire, which is permissible under Rule 15 of the WTO Working Procedures for Appellate Review. "Without debate or effective oversight, have WTO Members acquiesced in a compensation structure that undermines, rather than promotes, the prompt resolution of a dispute?" U.S. Ambassador to the WTO Dennis Shea said in a statement.

WTO Ambassador, Dennis Shea (U.S.)

- Agriculture subsidies were a major topic of conversation last week at the WTO. The U.S. flagged the increasing incidents of underfilled tariff-rate quotas, noting that the average fill rate for all TRQs decreased from 61 percent to 51 percent from 2007 to 2016. "Although TRQs were designed as a tool of access, very high over quota and in-quota tariffs, low fill rates, and confusing operation and administration of TRQs are still prevalent today that can make TRQs a tool of protection rather than liberalization" the U.S. said in a statement. Australia and New Zealand raised the issue of the increasing domestic agricultural support that is taking place WTO-wide, specifically mentioning de minimis support and aggregate measures of support (AMS), which are both considered amber box measures. Costa Rica proposed a "proportionality" plan to address the issue of countries' high levels of domestic agriculture support, which would require each member country to decrease its subsidies at a level proportional to its level of contribution to global support.