



The Legal Basis for the U.S.-China “Phase One” Agreement and Implications for Implementation

February 4, 2020

On January 15, 2020, the United States and China signed and [released](#) the text of a “phase one” agreement to address some of the trade and investment issues between the Parties, including the issues that the Administration investigated pursuant to [Section 301](#) of the Trade Act of 1974. U.S. Trade Representative Robert Lighthizer has [testified](#) that the Agreement, formally titled the “Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China” (U.S.-China Agreement), does not require congressional approval. This is because the Executive relied on authority Congress delegated to it in Section 301 and on its constitutional authority to enter into executive agreements. This Sidebar provides a brief overview of the possible legal bases for the United States’ entry into the U.S.-China Agreement without congressional involvement, and the implications for its implementation.

Background

On August 18, 2017, at the direction of the President, the Office of the United States Trade Representative (USTR) [initiated](#) an investigation under [Section 301](#) of the Trade Act of 1974 into “China’s acts, policies, and practices related to technology transfer, intellectual property, and innovation.” Following this investigation, USTR issued a [report](#) finding that four of China’s practices relating to these areas were unreasonable and burdened U.S. commerce. (For details, see this CRS [In Focus](#).) Based on these findings, the President [directed](#) USTR to consider, among other potential remedies, increasing tariffs and bringing a dispute settlement action against China before the World Trade Organization (WTO). Since this directive was issued, the Executive Branch has imposed a series of tariffs on Chinese products. (See this CRS [Insight](#).)

During this time, the United States and China also [commenced](#) negotiations to, among other things, “reduce the United States trade deficit in goods with China” by addressing U.S. agriculture and energy exports; trade in manufactured goods and services; intellectual property protection; and investment between the two nations. In February 2019, Ambassador Lighthizer testified before the House Ways and

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LSB10403

Means Committee about the ongoing negotiations. Ambassador Lighthizer [characterized](#) a potential U.S.-China agreement as “an executive agreement” and “settlement of a [Section] 301 action,” entered into pursuant to the President’s constitutional authority to conclude executive agreements and the Section 301 authority that Congress delegated to him.

The Parties reached an agreement in December 2019 and signed it on January 15, 2020. The U.S.-China Agreement includes provisions on protections for intellectual property; technology transfer; trade in food and agriculture products; financial services; macroeconomic policy and exchange rate matters; purchasing requirements for China; and dispute resolution. (For more details, see this CRS [Insight](#).) USTR [indicated](#) that the “United States has agreed to modify its Section 301 tariff actions in a significant way” as part of the deal, although the text of the U.S.-China Agreement does not explicitly reflect this commitment or mention the Section 301 action. On January 21, 2020, USTR [issued](#) a notice that it “no longer is appropriate” to retain all tariffs imposed after the Section 301 investigation in light of the new Agreement. Accordingly, the United States will reduce the Section 301 tariffs imposed on Chinese products on September 1, 2019, from 15% to 7.5%, effective February 14, 2020.

The Legal Bases for the U.S.-China “Phase One” Deal

As noted, Ambassador Lighthizer testified that a potential U.S.-China agreement would not require congressional approval because the President was using his authority under Section 301 and the U.S. Constitution to conclude it. This section briefly reviews the potential legal bases for the U.S.-China Agreement and implications for its implementation.

Section 301 Authority

Under [Section 301](#) of the Trade Act of 1974 (19 U.S.C. § 2411), the Executive Branch may take certain actions to address a trade partner’s practices that it deems “unreasonable” or that “burden United States commerce.” As one of these actions, USTR may “enter into binding agreements” with a trade partner to achieve any of the following objectives:

- “[E]liminate, or phase out, the act, policy, or practice that is the subject of the action to be taken”;
- “[E]liminate any burden or restriction on United States commerce resulting from such act, policy, or practice”; or
- “[P]rovide the United States with compensatory trade benefits.”

The Executive has used Section 301 to enter into international agreements to resolve past trade disputes. For example, in 2019, the United States entered into an agreement with the European Union (EU) to address a long-running WTO dispute about hormone-treated meat. This [agreement](#) addressed U.S. exports of meat products to the EU, and built on a 2009 [Memorandum of Understanding](#) (revised in 2014), that created a three-phase resolution. The EU agreed to a tariff-rate quota (TRQ—a mechanism using tariffs and quotas to control import levels) for high-quality beef and to increase the amount of U.S. products that may be imported under the TRQ during subsequent phases. In exchange, the United States committed to reducing tariffs imposed on EU products during each phase. The 2019 Agreement updated the TRQ allocation for U.S. products and required USTR to [terminate](#) its Section 301 action against the EU.

Constitutional Authority to Enter into Executive Agreements

As noted, Ambassador Lighthizer indicated that USTR negotiated parts of the U.S.-China Agreement under the President’s constitutional authority to enter into executive agreements, although he did not specify which provisions. This section briefly describes the scope of this authority.

[Article II](#) of the U.S. Constitution permits the President to enter into international agreements without congressional approval (sometimes referred to as “[sole executive agreements](#)”) in certain circumstances. First, the President may do so when he possesses exclusive authority over an issue (e.g., recognizing foreign governments). Second, when the President shares constitutional power with Congress, he may conclude executive agreements, but the precise contours of this authority remain unsettled.

The latter circumstance may implicate the U.S.-China Agreement, as it includes provisions on issues that arguably implicate [Congress’s constitutional power](#) to “regulate commerce with foreign Nations.” For instance, the Agreement includes a [chapter](#) titled “Trade in Food and Agricultural Products,” which requires China to permit the importation of certain U.S. agriculture products. Trade agreements are often entered into as “congressional-executive agreements” (i.e., Congress votes to approve an agreement after the President concludes it), as with the [United States-Mexico-Canada Agreement](#). Such a practice, however, does not necessarily suggest that the President lacks constitutional authority to conclude a sole executive agreement on this issue, especially in the absence of a statute prohibiting such action. Instead, recent reliance on the “congressional-executive” method to conclude trade agreements may indicate only that the choice to conclude the U.S.-China Agreement as a sole executive agreement is perhaps unusual.

Implementation of the U.S.-China Agreement

As discussed, the U.S.-China Agreement is rooted in two sources of authority, neither of which appears to require congressional approval before the Agreement may enter into force. Thus, the Agreement may seemingly enter into force according to its text. Specifically, [Article 8.3.1](#) provides that the Agreement will enter into force within thirty days of signing or when “the Parties have notified each other in writing of the completion of their respective applicable domestic procedures, whichever is sooner.” Assuming that the Parties do not complete all relevant domestic implementing procedures within thirty days, the Agreement will take effect on February 14, 2020. The Parties may have anticipated this outcome, as some of the Section 301 tariffs will be reduced from 15% to 7.5% on that day.

Once the U.S.-China Agreement enters into force, its obligations bind the United States as a matter of international law. In other words, if the United States acts inconsistently with one of its obligations, then China might claim the United States has violated the Agreement and may ultimately suspend one of its obligations to the United States or impose another remedial measure (e.g., higher tariffs), as permitted in [Chapter 7](#). Moreover, as a matter of domestic law, the commitments in the Agreement have a status similar to congressionally-enacted law in their ability to [preempt](#) U.S. States from enacting contrary legislation. (For details about the effect of agreements on U.S. law, see this CRS [Report](#).) In sum, once the Agreement enters into force, the United States may not act inconsistently with its terms as a matter of international law and the U.S. States may not act inconsistently with it as a matter of domestic law.

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