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Section 232 Steel and Aluminum Duties Litigation Shifts Into High Gear

As we pass the three-year mark since the 25 percent duties on steel imports and the 10 percent duties on aluminum imports pursuant to Section 232 were first imposed by Presidential Proclamation 9705, legal challenges are proliferating and there is renewed legislative interest in Section 232 reform. For those looking for any signs of a swift removal of the duties, the wait continues.

The Administration's rapid decision to reinstate the Section 232 duties on aluminum imports from the United Arab Emirates within 13 days after they were removed by President Trump upon leaving office,[1] shows no haste to change the *status quo*. And the comment by the new Secretary of Commerce that the duties have been "effective" signals no imminent decision to change.[2] The Government continues to actively defend these broad duties before the reviewing courts and at the WTO in scores of cases questioning various aspects of their legality.

Following the victory of Transpacific Steel LLC, which successfully struck down a presidential proclamation doubling the national security duties on steel imports from Turkey, interested parties have filed Court of International Trade (CIT) challenges on a range of issues stemming from the additional duties, including the extension of the duties to derivative products of steel and aluminum, the exclusion process managed by the Commerce Department (Commerce) and Commerce's treatment of Section 232 duties in antidumping (AD) proceedings.

As some cases reach inflection points and a narrowing of the issues, we highlight legal challenges worth following, including a trio of recent decisions by the CIT that reviewed the Section 232 duties from different vantage points. We also provide an update on the status of WTO litigation and recent

1 Presidential Proclamation 10144 of Feb. 1, 2021 reinstating the Section 232 duties on aluminum imports from the UAE that were terminated by Proclamation 10139 of Jan. 19, 2021 and replaced with a quota.

2 "The data show that those tariffs have been effective," Commerce Secretary Gina Raimondo said in an interview with MSNBC. Interview available here.

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legislative proposals for Section 232 reform.

Another Link to Transpacific

— ***United Steel Products* provides context: the CIT continues to knock down broad challenges to Presidential action under Section 232, but, for now, remains consistent in its hesitancy to allow the President unfettered, unending discretion.**

Section 232 of the Trade Expansion Act of 1962 authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

The statutory and constitutional challenges to the Section 232 duties brought by various importers have faced a high hurdle at the CIT. Recently, the CIT rejected the arguments by Universal Steel Products, Inc., PSK Steel Corporation, Dayton Parts, LLC, Borusan Mannesmann Pipe U.S., Inc., and Jordan International Company that the Section 232 duties violated the statute. *Universal Steel Products* shows that, at least at the CIT, broad challenges to the President's authority under Section 232 are likely to fall flat. The CIT rejected each of plaintiffs' arguments, holding that the Commerce Secretary's report was not reviewable by the Court, that the President's conclusion that imports pose a national security threat under Section 232 is not reviewable by the Court, and that the duration and timing of the duties imposed by the President were in accordance with the statute.

The only challenge in *Universal Steel Products* to survive judicial review at the CIT was the count relating to imports from Turkey, which is stayed pending the outcome in *Transpacific*. In *Transpacific*, a three-judge panel of the CIT held that the President's modification of Proclamation 9705 to double the duties on Turkish steel imports violated Section 232 because the statute does not permit such modifications after the statutory deadlines without a new formal investigation and report from the Commerce Secretary.[3] Additionally, the CIT held that the president's action to double the duties on imports from Turkey alone violated the importer's equal protection rights under the Constitution. The Government's appeal of *Transpacific* case is currently before the Court of Appeals for the Federal Circuit. Universal Steel Products et al. have also appealed to the Federal Circuit.

Challenge to Section 232 Duties on Derivative Products Survives Motion to Dismiss

— **Digging deeper, the CIT in *PrimeSource Building Products* analyzes Presidential**

3 *See* 415 F. Supp. 3d 1267, 1273–76 (Ct. Int'l Trade 2019); *see also Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1253 (Ct. Int'l Trade 2020) , appeal docketed, No. 20-2157 (Fed. Cir. Aug. 17, 2020).

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discretion with respect to the "derivatives" of an article and again holds that Presidential power cannot extend past the statutory time limits.

PrimeSource Building Products challenged the Section 232 "derivatives proclamation," Presidential Proclamation 9980, that imposed 25% duties on imports of certain articles made of steel, including steel nails, on both statutory and constitutional grounds. A three-judge panel of the CIT dismissed all claims except PrimeSource's claim that Presidential Proclamation 9980 is invalid because it was issued after the authority delegated to the President by the statute expired, mirroring one of the claims made in *Transpacific*. The CIT held that the time limitations in Section 232 "expressly confine the exercise of the President's discretion *regardless* of whether the President determines to adjust imports only of the 'article' named" or the "article and its derivatives" named in the Secretary of Commerce's report. In other words, the CIT held that the President does not retain power to take additional steps to adjust imports of articles unnamed in the original action, or their derivatives, indefinitely. The CIT's decision follows its findings in *Transpacific*, where it also denied the Government's motion to dismiss the lawsuit. In *Transpacific*, the CIT then also found, on the merits, that although "Section 232 grants the President great, but not unfettered, discretion," the President acted outside of the defined time period to do so.

PrimeSource also argued that (1) the Secretary of Commerce violated its regulations and the Administrative Procedure Act when conducting its "assessments;" (2) Proclamation 9980 was in violation of the time limits specified in Section 232; (3) its due process rights under the Fifth Amendment were violated when it was not provided notice or an opportunity to comment before Proclamation 9980 was issued; (4) Section 232 is unconstitutional as an over-delegation of legislative power to the President; and (5) the Secretary of Commerce acted unlawfully in making certain assessments and determinations provided to the President, resulting in Proclamation 9705. The CIT dismissed all but argument (2), holding that the first argument did not assert a valid cause of action; PrimeSource has no constitutional right to due process; that the Supreme Court already decided that broad delegation of legislative authority from Congress to the President is acceptable; and Section 232 does not allow for judicial review and there is no final action by Commerce that is reviewable under the Administrative Procedures Act. PrimeSource's appeal is now ripe for judgment on the merits.

Exclusion Process Draws Legal Challenges from Both Importers and US Producers Alike

— **Despite acknowledged concerns regarding the exclusion request process, broad constitutional and statutory challenges at the CIT face an uphill battle.**

Shortly after the Section 232 duties went into effect in March 2018, Commerce announced a process through which US parties could request an exclusion from the additional duties. To date, more than 200,000 requests have been filed by US companies seeking an exclusion from payment of

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the additional duties on steel and aluminum products determined to be "unavailable" in the United States.

Since its implementation, the Section 232 process has received criticism from users due to a lack of transparency and Commerce's inability to efficiently process the volume of requests received. Problems with the Section 232 exclusion process have been echoed by Commerce's own Inspector General, which has publicly expressed concern regarding the handling of exclusion requests on two occasions in October 2019 and again in January 2021.

Given the systemic issues with the exclusion request process, both importers and domestic steel producers alike have challenged various facets of its legality with the CIT. First, on March 10, 2021, the CIT addressed a challenge filed by Thyssenkrupp Materials NA Inc. and other importers of steel and aluminum questioning Commerce's process of granting exclusions to specific requesters on an application basis, rather than to all importers on a product-wide basis. Specifically, Thyssenkrupp argued that the Section 232 exclusion process (1) violates the Uniformity Clause of the Constitution because it results in a "dis-uniform tax" where individual importers pay different duty rates on the same merchandise, (2) untimely modifies the authorized Presidential Action under Section 232, and (3) is arbitrary, capricious, contrary to Presidential instruction, and not in accordance with law because it does not provide automatic product-based exclusions once an exclusion has been granted to an importer for a particular product category. Though the CIT found that Thyssenkrupp had experienced economic injury necessary to establish standing, it rejected each of Thyssenkrupp's challenges to the exclusion request process, finding that it does not violate the Uniformity Clause because it is defined in "nongeographic terms" with no resulting "geographic discrimination"; does not alter the process in a material way and is a permissible modification to the timely Presidential action under Section 232; and is based on a reasonable interpretation of the Presidential Proclamations implementing the duties and the Section 232 statute.

Other challenges to the Section 232 exclusion request process have been filed on the basis that Commerce's denial of exclusion requests without any evidentiary or reasoned basis via the same, "boilerplate" decision memoranda is arbitrary, capricious, an abuse of discretion, or otherwise in violation of mandatory requirements under the Administrative Procedure Act. To date, at least three such challenges filed by JSW Steel (USA) Inc. (Court No. 19-133), Borusan Mannesmann Pipe U.S., Inc. (Court No. 20-12), and NLMK Indiana, LLC and NLMK Pennsylvania, LLC (Court No. 20-50), have been stipulated for judgement, with Commerce agreeing to a full and complete settlement of all claims by refunding the Section 232 duties paid with interest, but without admitting liability. A fourth challenge on the same basis was filed on March 5, 2021 by voestalpine High Performance Metals Corp. and its wholly-owned subsidiary Edro Specialty Steels, Inc., importers and distributors of high alloyed specialty steel.

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In an Issue of First Impression, the Court Affirms Commerce's Use of Section 232 Duties to Prop-Up Antidumping Duty Rates

— **The CIT has upheld the deduction of Section 232 duties from US price in antidumping cases involving steel products for now, but expect more challenges.**

For US importers of steel products originating in countries with antidumping duty orders, Section 232 duties could mean higher antidumping duty rates. Under current precedent from the Court of Appeals for the Federal Circuit, "special" duties like safeguard duties and antidumping duties are treated differently from "ordinary" customs duties:[4] while the former are not deducted from the US price used in antidumping calculations, the latter are deducted.[5] Commerce's position has been that Section 232 duties are more similar to ordinary customs duties and therefore deductible from the US price. In practical terms, a higher US price would typically result in a lower antidumping margin, therefore the decision to deduct the 25% duties can turn negative antidumping margins into positive margins.

In *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, the CIT affirmed Commerce's treatment of Section 232 duties as "US import duties." It was by no means a ringing endorsement of Commerce's recent practice. The CIT remarked that it was an issue of first impression and found that Commerce's interpretation of the ambiguous term "United States import duties" to include Section 232 duties was reasonable. The CIT considered the factors used by Commerce to distinguish Section 232 duties from safeguard duties: (1) whether the duties are remedial, (2) whether they are temporary, and (3) whether deducting them from US price would result in an impermissible double remedy. The CIT found that Commerce met factor (1) albeit the reasoning was "not the strongest," and that factor (2) was not a viable reason to distinguish Section 232 duties from safeguard duties since both are temporary in nature. The decision turned on factor (3) with the CIT finding that Commerce's reasoning was not "so lacking in merit that the court must say it is arbitrary." As Commerce's practice of deducting Section 232 duties from US prices is being applied in several proceedings involving steel and aluminum products, more challenges on this issue can be expected.

Still More to Come…Canadian Importer Takes Different Tack on Section 232 Challenge

Cases are still being filed at the CIT over Commerce's treatment of the Section 232 duties. Currently before the CIT is Maple Leaf Marketing's challenge to the imposition of Section 232 duties on goods imported from Canada. The Government has moved to dismiss certain counts included

4 *Wheatland Tube Co. v. United States*, 495 F.3d 1355 (Fed. Cir. 2007).

5 Deductions from US price are provided in the antidumping laws at 19 U.S.C. § 1677a(c)(2)(A).

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in Maple Leaf Marketing's complaint related to the President's authority to impose duties on steel articles from Canada, the liquidation of its entries by US Customs and Border Protection, and the President's authority to encompass goods covered by Chapter 98 of the Harmonized Tariff Schedule of the United States. Oral argument is expected on April 12, 2021.

The WTO Will Have Its Say Later this Year on the National Security Rationale for the Section 232 Duties

Aside from litigation in domestic courts, the Administration will reach a decision point on Section 232 later this year in the context of World Trade Organization (WTO) dispute settlement. The dispute over the Section 232 duties at the WTO is complex with the United States appearing as a respondent in seven cases and as a complainant in five proceedings.

The European Union, India, Russia, China, Turkey, Norway and Switzerland claim the additional 25% and 10% duties on imports of steel and aluminum products respectively are inconsistent with provisions of the WTO's General Agreement on Tariffs and Trade (GATT 1994) and of the Agreement on Safeguards.[6] Among other claims, the complaining parties argue that the duties on steel and aluminum are safeguards in disguise for which WTO rules require compensation and that the United States' national security rationale is not valid. The US cases against the European Union, China, Turkey, Russia and India[7] challenge the retaliatory measures taken by these countries as inconsistent with GATT 1994 because the Section 232 duties are not safeguards and retaliation was not justified.

In several respects the two sets of challenges are the mirror image of each other with the national security rationale for the duties and the GATT's national security exception at the center of the debate. With the 12 Panel rulings expected to be issued in the second half of this year, the choice on whether to continue or not President Trump's Section 232 duties becomes more pressing.

Legislative Proposal Would Strengthen the Process for the Imposition of Section 232 Duties

In the midst of these legal challenges, Congress is looking to reform Section 232 by revitalizing legislation first introduced in 2018. Senator Portman has re-introduced the Trade Security Act, which would require a report by the Defense Department identifying whether imports of a certain good threatened to impact national security. Then, the President could ask for a report from the Commerce Secretary and the United States Trade

6 *See e.g. United States — Certain Measures on Steel and Aluminium Products* (China) (DS544).

7 *See e.g. European Union — Additional Duties on Certain Products from the United States* (DS559).

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Representative. The Trade Security Act would also expand Congress' role, allowing the lawmakers to reject trade restrictions by passing a joint resolution of disapproval on *any* product (currently, Congress can do so for petroleum products). Competing legislation has been re-announced by Senator Toomey (the Bicameral Congressional Trade Authority Act), which would require lawmakers' prior approval of all presidential action taken pursuant to Section 232.

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