The Automotive Sector Faces Sharply Increased Duties and International Trade Risks Following Announcement of Unprecedented Section 232 Tariffs on Steel and Aluminum

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On March 1st, the automotive sector that consume steel and aluminum were confronted with a potentially large tariff rate increase. Despite intense lobbying by automotive companies, President Trump announced that the U.S. Government would invoke the seldom-used section 232 national security provisions as a basis for imposing tariffs of 25 percent on all imports of steel and tariffs of ten percent on all imports of aluminum.

These tariffs will have a major impact on automotive companies. By weight, the typical car is more than fifty percent steel – generally a mix of standard, alloy, and specialty steels. Due to its lighter weight, modern autos now have up to 10 percent aluminum. Overall, the automotive sector accounts for almost fifteen percent of U.S. consumption of steel. As a result, the automotive sector will see the biggest impact of any manufacturing sector from this surprise announcement.

The section 232 measures are intended to raise the prices of all steel products – whether imported or domestic – and thus will have an impact on any major purchaser of steel. Further, many of the parts and components that the OEMs purchase are made from domestic- and foreign-sourced steel and aluminum parts, meaning that the announcement will have a ripple effect on the entire automotive sector. According to the American International Automobile Dealers Association, these proposed tariffs “couldn’t come at a worse time” when auto sales are flattening.

Also of concern to the sector is that this action could spark a trade war, and even could have a major impact on the NAFTA renegotiations, also an area of key concern to the automotive sector. But far from shying away from pronouncements that this was the start of a potential trade war, President Trump appeared to invite one, stating that “trade wars are good, and easy to win.” President Trump doubled down on the tariffs, vowing to impose further trade restrictions on any country that the administration views as engaging in “unfair” trade or even to impose “reciprocal taxes” on automobiles from the EU if the European states retaliate.

The result is a great deal of uncertainty for automotive-sector companies. This Client Alert is our attempt to clear up some of that uncertainty. It provides a summary of the section 232 situation as it exists to date, as well as a roadmap to where the section 232 situation is likely to go. The Alert also provides analysis of the likely impact of this unprecedented action on the ongoing attempts to renegotiate the North American Free Trade Agreement (NAFTA), which also is of intense interest to the automotive sector. Finally, the Alert provides some practical guidance regarding concrete steps that automotive companies that rely on imported steel and aluminum – or that believe that they are victims of unfair trade – can take to deal with the ongoing international trade war that is starting to engulf the global trading system.

Developments are moving quickly in this area. As the details of how these tariffs will be implemented unfold, additional questions and uncertainties will arise. Attorneys in Foley & Lardner’s Automotive Industry Team and its
President Trump’s announcement of tariffs was a surprise even to many people in the government. Rumors began of a potential announcement – more than a month ahead of the section 232 statutory deadline – the night before. Even on the morning of the announcement, supposedly knowledgeable insiders were stating that there would be no section 232 developments that day. But President Trump had other plans.

As a result of the surprise announcement, the normal vetting that would occur for a major policy announcement never occurred. Much of what is known is based upon twitter postings from the President, comments made to steel executives the same day, and a few internal leaks. Most importantly, the critical details of the plan, the scope of products that will be covered, and how the section 232 tariffs (and any process to apply for exemptions process) will be implemented are not known. This lack of clarity complicates contingency planning by large importers of steel and aluminum and even the long-term plans of companies that rely solely on domestic sources (where prices have already started to move up strongly). Details on how to plan for the new and uncertain trade environment and supply chain uncertainty are provided at the conclusion of this Client Alert.

The responses to the major questions surrounding the section 232 tariffs are as follows:

**The Section 232 Announcement**

**What was announced?**

The Department of Commerce presented the President with three suggested options on steel:

- An across-the-board tariff of 24% on imports from all countries.
- Tariffs of at least 53% on imports from 12 countries: Brazil, China, Costa Rica, Egypt, India, Malaysia, South Korea, Russia, South Africa, Thailand, Turkey and Vietnam. These countries also would have a quota that would prevent them from exporting more steel to the United States than they did last year.
- A quota that would cut world-wide imports of steel by 37% from all countries.

The President chose the first option – a tariff on all steel products – rounding it up for good measure (reportedly because 25 percent “sounds better”). This remedy mirrored the action taken in the section 232 aluminum review, which had similar options, including a proposed tariff of 7.7 percent (also rounded up to ten percent).

**Why was the announcement made early?**

Numerous administration sources were surprised by the announcement. According to insiders, the President has grown impatient with progress on the issue, which was discussed in weekly meetings without anyone coming to a clear consensus. The President had promised the steel industry during the campaign that he would take action to protect steelworkers and steelmakers and seemingly determined that there was no reason to delay an announcement. Thus, the announcement came out more than a month before the statutory deadline. This lack of implementation, scope, and other details increases the uncertainty regarding the potential impact of the section 232 announcement.

**Why did the President choose global tariffs?**

The President was concerned that if there was an exemption for any one country then other countries would “line up” to ask for an exemption as well. President Trump also told steel company executives that a global tariff was needed to prevent transshipping through exempted countries, which he felt would undermine measures if they were only against the twelve identified countries.

**Is the administration uniformly in favor of the relief?**

No. This is the largest trade action ever taken. Steel imports account for $29 billion of annual imports (and aluminum is another $17 billion). There were concerns that such a large trade action would have major – and unknown – impacts on the economy, particular heavy consumers of steel and aluminum. These concerns extended to the automotive sector, which ranks as both a top-five importer and exporter and which also represents approximately 15 percent of all steel usage in the country and a substantial amount of aluminum consumption as well.
Defense Secretary Mattis argued that steel and aluminum use by the U.S. military accounted for only three percent of U.S. production and stated that the Department of Defense was “concerned about the negative impact on our key allies” if the U.S. Government imposed large tariffs. The Department of Defense argued that any tariffs should be “targeted” and not global in effect. Secretary of State Rex Tillerson and National Security Adviser H.R. McMaster argued that large tariffs or quotas would undermine U.S. relations with crucial allies. Gary Cohn, the director of the National Economic Council, has been lobbying to postpone or narrow the proposed remedies.

On the other side, Commerce Secretary Ross, U.S. Trade Representative Robert Lighthizer, and White House trade adviser Peter Navarro strongly pushed for relief. The President sided with them, stating that it was a “disgrace” how prior administrations had let imports harm the U.S. steel and aluminum industries.

The Reaction to the Section 232 Announcement

What was the business reaction?

The steel industry applauded the announcement. The American Iron and Steel Institute thanked the President for the announcement, stating that the measure was needed to combat an import “surge” in 2017 and large amounts of worldwide excess steel capacity. Major consumers of steel and aluminum, just as predictably, released announcements stating that the tariffs would hurt U.S. competitiveness, cost U.S. jobs, and raise the prices paid by U.S. consumers. The American International Automobile Dealers Association stated that the proposed tariffs “couldn't come at a worse time” when auto sales are flattening, while beer manufacturers lamented the expected rise in the cost of aluminum for cans.

Secretary Ross cited an International Trade Commission report that had found that the earlier steel safeguards, which imposed restrictions on all forms of steel, had not led to a meaningful loss of jobs in downstream industries. Most economists, however, believe that the number of jobs saved in the steel industry by any section 232 tariffs will be far less than the number of jobs lost in downstream steel-consuming sectors. This is because employment in the U.S. steel industry is only around 60,000 people while employment in steel-consuming companies is estimated to be 15-20 times larger. Because steelmaking has become highly automated, even a sharp increase in output would create only a moderate amount of new jobs.

The stock market reaction mirrored this position. AK steel’s stock price rose almost 10 percent, U.S. Steel rose over five percent, and Nucor rose over three percent. Steel consumer Ford fell three percent and GM fell almost four percent. Overall, the stock market fell, with most business analysts stating that this was a reaction to the section 232 news. Overnight, stock markets in Asia and Europe also fell sharply as the international business and finance community digested news of the opening salvos in a likely international trade war.

What was the reaction of automotive companies to the news?

The steel industry applauded the announcement. The American Iron and Steel Institute thanked the President for the announcement, stating that the measure was needed to combat an import “surge” in 2017 and large amounts of worldwide excess steel capacity. Major consumers of steel and aluminum released announcements stating that the tariffs would hurt U.S. competitiveness, cost U.S. jobs, and raise the prices paid by U.S. consumers. The American International Automobile Dealers Association stated that the proposed tariffs “couldn't come at a worse time” when auto sales are flattening. General Motors took a more measured approach, noting that it sources more than 90 percent of its steel domestically and stating that it would wait and see what the full details of the section 232 announcement will be.

Where will the impact be most felt in the automotive sector?

Because steel and aluminum are both used in great quantities in the automotive sector, the impact will be felt very broadly. Companies that purchase a large amount of steel and aluminum obviously will see a greater impact, as will companies that import a greater share of their steel and aluminum inputs. The greatest impact will be felt by companies that use specialty forms of steel and aluminum that may not be available at all from domestic producers or only in limited quantities. It is uncertain at this point whether there will be an exemptions process to take short supply situations into account.

The impact of the measures also will likely impact small consumers of steel and aluminum harder than large ones. Companies that purchase large amounts of steel and aluminum, such as the OEMs and large Tier One companies, still maintain leverage through their ability to swing large purchases among different suppliers. Smaller companies that are more in a position of just accepting the market price do not have the same types of options.

An additional factor, in the short term, is how supply contracts are established. Purchasers who rely on spot
purchases, or who purchase under long-term contracts that are based upon market indices or other variable pricing, will see the impact first. But eventually, if higher prices become the norm (which is the entire point of the section 232 tariffs) then the higher prices will impact all users of aluminum and steel.

**What was the political reaction?**

The political reaction ran the gamut, from approving statements from Senators and Congressional members who represent steel-producing states/regions to outright hostility from representatives who represent steel-consuming areas. Overall, the concerns were mostly negative, with the House Ways & Means Committee circulating a letter arguing against the tariffs, high-ranking Senate Republicans generally voicing opposition and arguing that the new tariffs would undermine recent tax cuts, and House Speaker Paul Ryan releasing a statement stating worries about “the consequences of a trade war.”

More specifically:

- **Agricultural Retaliation Fears**: Senator Pat Roberts, who chairs the Agricultural Committee, strongly disagreed with the tariffs, stating that “every time” there is a trade war other countries retaliate against U.S. agricultural goods. Senator Thune, as well as other Senators and members of Congress, expressed the same concerns. Along these lines, China already has threatened to target such goods as U.S. soybeans and sorghum, while the EU has indicated that it will consider retaliation against agricultural goods as well.

- **General Retaliation**. Even representatives who are not in agricultural states, such as Senator Pat Toomey from Pennsylvania, argued that retaliation would make section 232 relief a bad idea.

- **Concern for Downstream Users**. Many representatives stated their opposition to the tariffs, out of concern that it would harm major employers within their districts.

- **Concern about Allies**. There was general concern that hitting NATO allies and other friendly countries would be counterproductive to efforts to cooperate on national security, military, and foreign policy issues.

- **Concerns about a Trade War**. Finally, many political actors expressed fears that a trade war could spin out of control, hurting U.S. exporters. Such concerns would impact the automotive industry strongly, both because the industry is a major exporter and also because of the cross-border supply chains that the industry has built, particularly with Canada and Mexico.

By contrast, Senators Sherrod Brown and Casey (representing the steel-producing states of Ohio and Pennsylvania), applauded the “aggressive measures” that the President was putting in place. Responding to concerns about the foreign response to the tariffs, Secretary Ross said that any retaliation by foreign countries would be “pretty trivial.”

**What was the international reaction?**

Most major steelmaking countries promised a swift and rapid response, consisting of both defensive and offensive measures. The last time there were similar tariffs imposed – by the George W. Bush administration under the “safeguards” laws – the European Union, China, and numerous other countries put their own tariffs in place to prevent the deflection of steel into their own markets. They also pursued retaliatory duties on other goods. It is likely that these types of responses may occur again.

The reactions of major trading partners were as follows:

- The EU issued a rapid response, stating that these “unfair” tariffs on steel “represent a blatant intervention to protect U.S. domestic industry and [are] not ... based on any national security justification.” The EU promised that it would “if necessary ... propose WTO-compatible safeguard action to preserve the stability of the EU market.” This is a threat to impose safeguard actions to prevent a surge of steel imports into the EU.

The next day, the EU followed up with a statement that the 28 nations of the EU would respond as a single bloc. The rumored targets that have been preliminarily identified by the EU include Harley-Davidson motorcycles, bourbon whiskey, Levi jeans, and agricultural products. A second proposal was that the EU would target $3.5 billion worth of U.S. products, based upon a calculation that this was the amount of EU steel where there was no increase in exports to the United States over the prior year. The targeted classes of products would be one-third U.S. steel exports, one-third industrial products, and one-third agricultural products. In either case, the strategy of targeting other U.S. exports was one the EU used in 2002 in response to the safeguard actions, where the EU threatened to impose counter-measures targeting oranges from Florida and textiles from North Carolina.
Mexico promised that it would take “reciprocal measures,” both to combat an expected diversion of steel into Mexico and to target U.S. products in an attempt to pressure the United States into exempting Mexico. Mexican officials were not as far along as the EU in identifying targets, but are considering both retaliation and safeguard measures. Mexico also has the option of pursing both NAFTA and WTO dispute resolution.

Canada promised that it would “take responsive measures” to defend its interests. Like Mexico, Canada also has the ability to pursue NAFTA and WTO dispute resolution.

China promised that it would pursue retaliation, likely against agricultural goods. China could also target U.S. interests that operate in China, including Apple and Intel.

**Implementation of the Section 232 Announcement**

**Can the announced option change?**

Yes. The action is not yet formal. As Press Secretary Sarah Huckabee Sanders stated: “The president is announcing his intent to sign those actions next week. We’re not going to get into any more details until those details are finalized.” As part of the finalization process, the shape of any plan could change to a small or large degree.

**How will the Administration implement section 232 tariffs?**

It is not difficult for the U.S. Government to change tariff rates. Once the relevant Harmonized Tariff Schedule codes are identified, the Department of Commerce can instruct U.S. Customs & Border Protection as to what the new tariff rates are. Customs, in turn, charges the importers of record the new, higher duties.

The President did not state how the tariffs would be formally announced, but it is likely that they will be announced by some form of Executive branch announcement, such as an Executive Order, which will become effective once it is published in the Federal Register (generally 5-7 days later). Although the President has promised action next week, under the section 232 statute there is still over a month to complete the process. Determination of questions like the scope of the relief (products covered) and how the exemptions process (if any) will function could take weeks to work out.

**Will there be exemptions?**

In its initial section 232 report, the Department of Commerce recommended that the President include a process to allow U.S. companies to grant requests to exclude specific products if there are no U.S. producers of that product, if those producers cannot produce adequate quantities, or for “other” national security considerations. Presumably, the President will implement this process, as otherwise the section 232 relief would have a major disruptive impact on downstream producers, who might need to shutter factories or cut employment to pay the large tariff increase. There is, however, no requirement that there be such a process.

In 2002 and 2003, when the George W. Bush administration imposed safeguard actions on broad steel imports, there were hundreds of exemptions issued within six months of the measures being imposed. Some observers indicated that country-specific exemptions also might occur, whether as part of the initial implementation or later. These might arise due to a negotiated solution between governments. The most commonly cited example was Canada, which also is the leading seller of steel to the United States. (South Korea and Brazil round out the top three; China, which is the country with the largest amount of steel overcapacity, is not a top-ten import source for steel any more, due to the large number of antidumping and countervailing duty actions brought against it in recent years.) The President, however, has taken the position that granting any exemptions could open the floodgates to further requests, apparently ruling out an exemption even for Canada. Presidential advisor Peter Navarro (famously the author of “Death by China”) reinforced this position of no country-specific exclusions over the weekend. Given the close integration of the automotive sectors in the two countries, this lack of an exemption for the closest ally of the United States will have a major impact on cross-border trade for the two countries in the automotive sector.

**What is the timing of any new implementation?**

President Trump stated to the steel executives that “we’ll be signing it next week and you’ll have the protection you need.” It is likely, however, that the announcement will not contain implementation details and will be general in nature. This is because there has not been sufficient time for the Department of Commerce and other relevant agencies to come up with an administrable system. Among the open questions are what the scope of the order will be (i.e., whether it covers slabs, whether it covers moderately transformed downstream products, and so forth), what Harmonized Tariff Schedule numbers it will cover, what the exemption process (if any) will be, and
Due to the way the tariff system works, it is possible to take months to establish the tariff rates, as it is possible to adjust the rates up until the time of "liquidation," which is the final assessment of duties. This generally occurs six or more months later after entry of the goods into the United States. The uncertainty will most likely cut steel imports as importers of record will be reluctant to import goods if they do not know what the final tariff rate will be.

**Potential Roadblocks to Implementation of the Section 232 Announcement**

**Can Congress block the action?**

Yes – but only if there are sufficient votes to overcome a likely Presidential veto. Under the Constitution, Congress has authority over taxes and tariffs. Congress, however, has largely delegated tariff authority to the President. There is nothing to say, however, that Congress could not take steps to reassert itself in this area.

The House Ways & Means Committee released a statement laying out the position that “the administration and Congress must work together on trade policies that build off the momentum of the President’s tax cuts, which is why any tariffs should be narrow, targeted, and focused on addressing unfairly traded products, without disrupting the flow of fairly traded products for American businesses and consumer.” Although both branches of Congress are in Republican hands, the imposition of large tariffs runs counter to years of Republican support for expanded free trade. Nonetheless, it would appear unlikely that the small majority of Republicans would be able to overcome any Presidential veto, especially given that some Republicans expressed support for the new tariffs. Overcoming a veto accordingly would require picking up sufficient Democratic votes to overcome these Republican defections, making it harder to assemble a veto-proof majority.

**Will there be a court challenge?**

Highly likely. There is too much money at stake for there not to be. At this point it is unclear how such challenges will be undertaken or how successful efforts to establish judicial jurisdiction will be, because of the rareness of the remedy and the lack of meaningful precedent.

Assuming that the challenge is accepted by the court, the tariffs are open to judicial scrutiny. Prior to the initiation of the section 232 action, the President, Commerce Secretary Ross, and other administration figures pre-judged the conclusions, stating that they were beginning a process to give the steel industry relief. The fact that the final steel and aluminum tariffs were increased to 25 and 10 percent, apparently based on nothing other than the President’s statement that round numbers “look better,” only underscores the arbitrariness of the process.

Further, the section 232 report leaves itself open to challenge, in that it ignored the hundreds of briefs and myriad factual information put on the record as part of the section 232 process. This information focused on the national security pitfalls of granting section 232 relief, such as the national security implications of hollowing out downstream industries that rely on imported steel and forcing these industries off-shore. Instead, the section 232 report that is the basis for the President’s actions lays out only the national security concerns of the U.S. steel industry.

An additional problem for the U.S. industry is that it is widely reported that the Department of Defense itself was opposed to the remedy chosen, based on the fact that the U.S. military consumes only three percent of U.S. steel output and the potential impact on major defense suppliers. A reviewing court may also note that, when an earlier attempt was made to bring about section 232 iron and steel relief, the Department of Commerce came to an opposite conclusion, finding that there was no national security interest given the small amount of steel purchased by the U.S. military. The report does not fully explore the rationale why the Department of Commerce reached the opposite conclusion today.¹ The section 232 report does not deal with these issues, making it appear to be a one-sided effort to reach a pre-ordained result. Further, in other contexts the U.S. Supreme Court has defined “national security” in a way that is counter to the aggressive interpretation put forward by the section 232 report.

On the counter side, the administration would argue that it established a wide-ranging section 232 process, which gave any interested party the right to submit comments, which were taken into account in the lengthy Department of Commerce section 232. The administration also would argue that these arguments were taken into account when reaching the section 232 recommendations. The administration would likely push hard on the jurisdictional arguments and also argue that there is no place for the courts to intercede on issues of national security, which are entrusted mostly to the Executive branch, not the courts. Given the reluctance of the courts to intercede on both political and foreign policy/national security issues, a ruling court might decline to reach the substantive issues at all.

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Will there be a WTO challenge?

Yes. The steel safeguard remedy was struck down by the WTO, resulting in the early termination of that relief under the George W. Bush administration. This will be viewed as a model as to how to respond.

It may be unlikely that a WTO panel would look kindly on the use of section 232’s national security arguments to support action on the steel industry. Although the WTO Agreements do have a national security exemption, it has long been believed that using this exemption broadly would be the option that could lead to the end of the WTO system altogether. If the United States can unilaterally determine that an industry needs national security protections, then the same is true of any other WTO member. This would allow countries to circumvent the WTO opening of trade based upon their own declared circumstances and could undermine opening international trade and lowering trade barriers.

On the other hand, Secretary Ross has pointed out that other countries maintain global tariffs on key industries. Secretary Ross explicitly pointed to the automotive sector as a prime example. Special automobile tariffs are imposed by the United States (2.5%), the E.U. (10%), and China (25%). According to Secretary Ross, this shows that there can be exceptions that are compatible with WTO restrictions and also justify the United States taking similar actions in favor of the steel and aluminum industries.

Two additional factors make WTO relief a problematic solution. The first is the delay inherent in the process. The section 201 WTO challenge took eighteen months; current WTO challenges are reportedly taking longer. Further, even after a ruling is announced, the U.S. Government (if the finding is adverse) is able to modify its approach, which would result in an additional review of the U.S. response, which could take an additional year or more. Second, any relief granted is prospective only under the WTO process, which means that even if the section 232 tariffs are ruled to violate the WTO there is no remedy for the years during which the section 232 tariffs were in place prior to the ruling.

The Repercussions of the Section 232 Announcement

How long will section 232 tariffs last?

There is no time limit under the law. The President has discretion and can decide how long the tariffs will last. President Trump himself has vowed that relief will be put in place “for a long period of time.” Whether this will be carried out depends on the results of the inevitable court and WTO challenges. The closest analogue to this situation – the safeguard steel remedies that were put in place in 2002 by the Bush Administration – lasted only around eighteen months, as they were struck down by a WTO panel. The Bush Administration thereafter revoked the duties, due as much to the desire to end retaliation by foreign governments (which imposed large tariffs on unrelated U.S. products) as it was a desire to end the WTO challenge.

What will be the impact on antidumping and countervailing duty tariffs already in place? Will it impact new case filings?

The United States currently has 169 anti-dumping and countervailing duty orders in place for steel (29 of which are against China, which is estimated to have the majority of the world’s excess steel production capacity).

It is unclear how the U.S. steel industry will respond. Reportedly, the industry has prepared antidumping and countervailing duty petitions on additional steel products, but was holding back on filing them pending the release of the section 232 results. There is still an incentive for the U.S. industry to file these actions, especially if they have taken the costly step of preparing petitions. As noted above, the lifespan of any section 232 relief is unknown. The earlier safeguard action on steel lasted only eighteen months. Antidumping and countervailing duty actions, by contrast, are countenanced by the WTO and generally last for fifteen years or longer. (While they can be sunsetted every five years, this hardly ever happens until the third review or later.) Thus, there is every incentive to still file antidumping and countervailing duty cases, which offer prospects for long-standing relief.

Achieving success in such filings, however, may be harder to achieve. The presence of the section 232 relief will make it harder to win these cases. In order to achieve an antidumping or countervailing duty order, the U.S. industry must show that it is suffering “material injury” that is “by reason of” the subject imports or that the subject imports “threaten” the U.S. industry with “material injury.” This determination is made by the International Trade Commission (ITC). The presence of uniform tariffs of 25 percent on imports is going to make material injury arguments more difficult to make at the ITC.

Will there be an international trade war?

The war has already begun. Antidumping and countervailing duty actions were up nearly fifty percent in the first
year of the new administration. The President has chosen international trade hardliners to form the core of his international trade team. NAFTA is being renegotiated, with the U.S. Government pushing for strong regional content rules and other initiatives that would tilt the balance of trade against imports from Mexico. KORUS (the free trade agreement with Korea) is soon to follow. And in the area of foreign investment in the United States, the Trump Administration already has used the CFIUS (Committee on Foreign Investment in the United States) process to reject several high-profile investments in the United States, turning the CFIUS process into a de facto form of industrial policy for investments in U.S. firms by foreign companies where there is a potential U.S. national security interest.

Concerns about a potential trade war were only exacerbated by events over the weekend. The EU listed potential targets for retaliation, as did other countries. President Trump doubled down on his declaration that a trade war would be “easy to win,” stating that he would target automobiles from the EU if there was any retaliation against any U.S. goods in the wake of the section 232 announcement.

In short, the section 232 tariffs are best viewed as the newest battlefront in the international trade war. The difference with the earlier battles is that this is one where the other countries are going to make a stand and start to fight back.

**President Trump’s Section 232 Aluminum Announcement**

The President also announced that he would impose a similar remedy for the aluminum industry. Here, the Department of Commerce had issued three recommendations: (1) a 7.7% tariff on all aluminum exports from all countries; (2) a 23.6% tariff on all products from China, Hong Kong, Russia, Venezuela and Vietnam, with other countries facing a quota set at 100% of 2017 exports to the United States; and (3) a quota on imports from all countries to a maximum of 86.7% of their 2017 exports to the United States.

Once again, the President chose the global tariff option, rounding it up to ten percent.

The reaction was the same from trading partners, who largely grouped their responses to the two forms of tariffs together. The main difference is that exports of aluminum are concentrated in fewer countries than is true for the more widespread steel industry. The aluminum industry, which has been injured by imports from China, was supportive of the measures. The issues related to this decision mirror those for the steel industry.

**Coping with the Section 232 Tariffs**

Due to the global nature of the section 232 tariffs, there will be widespread ramifications from the section 232 announcements. Even companies that purchase only domestically sourced steel and aluminum will see substantial price increases as the market adjusts to new tariffs on over $45 billion dollars of annual imports of steel and aluminum. Spot shortages are likely to arise, with automotive companies that rely on specialized forms of steel and aluminum that primarily are produced abroad seeking the greatest impact.

Some of the issues that are likely to arise – and some practical advice for coping with them – are as follows:

**What will be the supply chain issues flowing from the steel and aluminum section 232 tariffs?**

Any industry that uses steel and aluminum in its manufacturing supply chain will be impacted by these tariffs. As with any raw materials cost increase, these tariffs will create many issues across manufacturing supply chains. Further, although the section 232 tariffs are aimed at imported steel, in the wake of the announcement prices of all forms of steel – including domestically produced steel sold in the sport market – rose sharply. Thus, automotive companies that consume steel – even if entirely procured from domestic sources – likely will see an impact from these new tariffs. Issues that may arise include:

1. A review and exercise of price adjustment clauses in supply contracts for raw material increases;
2. Unilateral demands for price increases or for price surcharges;
3. Demands that consumers take over responsibility for duties, including through shifting responsibility for which company acts as the importer of record;
4. Product shortages and allocation issues;
5. Claims of commercial impracticability under U.C.C. § 2-615;
6. Claims of force majeure and the exercise of force majeure provisions in contracts (particularly if the force majeure clause contains broad catchall language such as “or any other events or circumstances that may
Companies should update their procurement and sales teams regarding these developments and their potential impact across the manufacturing supply chain. Companies may want to proactively conduct a review and risk assessment of key supply chain contracts requiring steel and aluminum input.

**Will the section 232 announcement impact the ongoing renegotiations of NAFTA?**

Almost certainly. The chances of a withdrawal – on both the U.S. and the Mexico/Canada sides – increased sharply after the section 232 announcement. This is true regardless of whether President Trump carries through on his statements linking any exemptions for Canadian and Mexican steel to the ongoing renegotiation of NAFTA.

In a tweet on March 5th, President Trump stated that for Canada and Mexico, “[t]ariffs on Steel and Aluminum will only come off if new & fair NAFTA Agreement is signed.” Canadian and Mexican negotiators are not likely to look kindly on an attempt to create negotiating leverage through a unilateral imposition of duties that arguably violates the very agreement that currently is being renegotiated. Rather, by adding another contentious issue on top of the ones already in play – increased regional content rules, requirements for U.S.-specific regional content to qualify for decreased NAFTA tariffs, and so forth – President Trump has made it more difficult for the three parties to reach agreement on new NAFTA provisions. Since President Trump has often stated his dislike for NAFTA, he may not consider this to be a bad development.

On the U.S. side, many of the arguments against section 232 relief mirror the arguments made to defend NAFTA. In the section 232 context, the main arguments against the tariffs was that they could actually cost U.S. jobs, due to the much larger employment in steel-consuming sectors than in the steel sector itself. In the NAFTA context, the main argument against a withdrawal is that many jobs in the United States depend on trade with Canada and Mexico. President Trump’s cursory dismissal of any arguments that there would be ancillary consequences to the section 232 tariffs, and that companies would adjust without much difficulty to the new tariffs, presages a similar outcome in the NAFTA context.

On the Canadian and Mexican sides, the largest exporter of steel to the United States is Canada (16 percent of all U.S. steel imports), followed by Mexico in fourth place (at 9 percent). Mexico’s Economy Minister Ildefonso Guajardo already had conducted scheduled talks with Secretary Ross on the section 232 tariffs (which did not have any impact on the outcome of the section 232 process). At the time of the announcement, the three countries were gathered in Mexico City, engaging in the seventh round of NAFTA renegotiation talks. While talks continued in the wake of the announcement, according to observers the negotiators were just “going through the motions.” The concern was that if the United States could just impose unilateral tariffs – including against NAFTA partners – then the Free Trade Agreement is not giving Canada and Mexico much protection.

There is, of course, a counter-argument, which is that NAFTA gives Canada and Mexico an additional route to try to strike down the section 232 tariffs, at least as applied to those two countries. Given the problems of any attempt to strike down this action in the WTO (as explored below), this right of an additional avenue of attack could provide to be very helpful to Canadian and Mexican interests. Nonetheless, there is no question that the section 232 announcement will complicate the ongoing NAFTA renegotiations, which already were foundering on such U.S. proposals as creating sharply higher regional content requirements (which would impact the automotive sector more than any other industry).

**What can automotive-sector companies that consume steel and aluminum do to mitigate the damage to their businesses?**

Now that President Trump has chosen the most global of all options before him – tariffs on all steel products from all countries – the options available for automotive-sector steel consumers are limited. It is true that the full details are not available and that there is ongoing, furious lobbying of the key decision makers, including by large automotive companies. It is possible that exemptions could still be put in place. Further, the scope of the products covered is still not set. While core steel products, like flat-rolled carbon steel products, stainless steel products, and other commonly used forms of steel will certainly be covered, issues like whether semi-finished steel like ingots and slabs will be covered, and how far downstream the tariffs will extend, are still open.² The U.S. steel industry is lobbying heavily to secure a broad scope of remedy, so consumer trade associations and major users may need to consider whether they will invest resources to be part of the discussion as well.

Given the likelihood of a broad scope for the tariffs, the essential issue will be how any exemptions process is implemented. Assuming that the section 232 recommendation for a robust exemptions process is adopted, a
lengthy queue of applications will quickly arise, much as occurred with the earlier global steel safeguards action. Success will depend on how quickly the application is filed, the strength of the arguments establishing that the steel is in short supply from U.S. producers, and especially the quality of evidence establishing the difficulties in domestic procurement. Mere assertions will not carry the day; rather, concrete evidence, such as rejected orders, comparisons of physical characteristics, and metallurgical reports establishing objective differences in U.S. and foreign steel will be needed.

Companies that import steel and aluminum also need to evaluate their supply chain carefully, to determine where they act as the importer of record. Under the U.S. Customs system, it is the importer of record who is responsible for clearing Customs and paying any duties. The importer of record bears all responsibilities for paying any duties, even if they are unanticipated. Contractual arrangements to pay duties, including what might seem to be routine designations of the importer of record, can lead to unanticipated costs. Companies that import steel and aluminum need to confirm the responsibility for paying duties and need to take steps to allocate the risk of the new duties for new shipments.

Finally, importers need to keep in mind that section 232 tariffs – although costly – are only one form of international trade remedy. There are antidumping and countervailing duty orders on well over 150 product-country pairings of steel, with various forms of aluminum also either already subject to duties or in ongoing investigations (e.g., aluminum foil). These steel and aluminum antidumping and countervailing duties will continue to be levied in addition to the new section 232 steel tariffs. Coping strategies to deal with antidumping and countervailing duty orders are detailed below.

**How can companies cope with the new international trade environment?**

The section 232 announcement is but one part of an ongoing push by the administration to block what it believes is unfair trade. With the number of antidumping and countervailing duty actions rising by nearly fifty percent in the first year of the Trump administration, companies that rely on imported goods need to be aware of the potential disruption of their international supply chains. At the same time, companies that believe that they are the victims of unfair trade have more tools available than ever before to combat perceived unfair trade. Both topics are covered below.

**What can companies do that believe they are potential targets for international trade remedy proceedings?**

Automobiles and automotive parts have been the subject of antidumping and countervailing duty actions. These actions have been brought on entire vehicles, such as mini-vans from Japan, and on individual parts, such as tires. The decision as to whether to bring a case is within the discretion of the U.S. industry producing a given product. Even where a case is self-initiated by the U.S. government, it generally proceeds with the support of the U.S. industry.

It is not uncommon for importers of a product who have not prepared a contingency plan to find themselves stuck when a case is filed, particularly if they are contractually obligated to continue to purchase the foreign product despite the prospect of sharply higher duties. Here are some precautionary steps companies worried about being ensnared in a potential trade action can take:

- **Monitor Import Statistics and Trade Rumors.** Sometimes, trade filings come out of nowhere, through the filing of a petition that was impossible to predict. In many cases, however, there are signs a case is coming – industry rumors, articles in industry publications, or trade patterns compatible with a finding of material injury “by reason of” imports of a given product. Cases are especially likely to be filed when imports from key foreign countries are increasing, when average unit values for such products are declining, and when the U.S. industry is suffering from declining profitability or increasing losses. Especially for industries where trade remedy filings are common, it can be useful to pay attention to trends that potentially indicate the filing of an action. Data regarding import trends, including the average unit value of imports and the quantity of imports, broken down by country and Harmonized Tariff System classification, is available on the ITC Dataweb website.³

- **Evaluate When Acting As Importer of Record.** Although trade remedy actions are aimed at foreign manufacturers and exporters, the duties imposed actually are collected from the importer of record as a percentage of the ad valorem (value) of each entry of the subject merchandise. Importers who are not paying attention to the release of new orders can find they have inadvertently imported goods now subject to extra duties – in some cases, at rates that exceed the value of the good itself (i.e., where duty rates exceed 100 percent). Companies need to be aware of contractual arrangements where they have agreed to be the importer of record, particularly for goods like iron and steel products where trade filings are common.
Establish Contingency Measures in Long-Term Supply Agreements. Companies highly reliant on imported goods need to evaluate whether their long-term contracts cover the contingency of which party acts as the importer of record, the delivery terms (terms of delivery like CIF and FOB can impact who is responsible for paying for duties), whether reimbursement of duties occurs, whether the possibility of increasing tariffs is even addressed, and whether the parties have the right to terminate the contract based upon the imposition of unanticipated duties. Force majeure clauses may not meet legal requirements for contract termination on the basis of unanticipated duties.

Check Entries Carefully Against Orders. As noted, every time a new trade remedy is imposed, there are always importers surprised by the unanticipated duties. Relying on customs brokers or freight forwarders to handle this situation often can be inadequate, as these third parties generally are not given the responsibility of knowing what products are planned for importation. Once the goods have reached the customs territory of the United States, it is too late to do anything because duty drawback is not available for antidumping and countervailing duties. It also is not uncommon to have customs brokers miss the imposition of new antidumping or countervailing duties, even though this task does fall within their contractual responsibilities. Because the liability of customs brokers is generally limited by contract to the modest value of the fee paid for the processing of the goods, companies should take steps to independently follow which goods become subject to new orders as part of their customs compliance.

Know the Correct Classification of Entries. Duties are imposed based upon the physical description of the merchandise, not the HTS classification, which is given for convenience only. If Customs determines goods should have been declared to be subject to an antidumping duty order, it will impose the duties even if the HTS classification declared or believed to be true indicated otherwise. In any situation where entries are in a gray area, special attention should be paid to get the classification correct and determine whether the good falls within the scope of the order. Some orders have complicated scopes that can make classification, such as the aluminum extrusions order (which is the subject of approximately eighty scope determinations by the DOC). If certainty is not possible through self-classification, importers should consider filing a request for a scope ruling, which results in the DOC issuing a definitive ruling as to whether the goods are within the scope of an order.

Be Aware of Potential Circumvention Red Flags. Because duty rates can be high, some less scrupulous exporters will misclassify their goods, such as by claiming different product attributes or classifications than in fact exist; by claiming an erroneous country of origin, or otherwise. Duties are paid, however, by the importer of record not the manufacturer. Any importer noticing red flags that indicate potential circumvention should check into it before CBP does.

Establish a Monitoring System and Vigorously Participate in Administrative Reviews. Foreign companies that export subject merchandise need to be especially careful. Under the DOC rules, the two largest foreign exporters generally are chosen to be “mandatory respondents” in administrative reviews. Administrative reviews are conducted annually and involve the submission of new data by the foreign producer to reset the antidumping or countervailing duty margins. Sophisticated foreign companies operating under an order can construct detailed monitoring systems that allow them to sell at close to non-dumped prices in the United States, thereby allowing them to maintain or even lower the operative antidumping margin assessed against their entries.

Conduct a Risk Assessment Review of Critical Supply Contracts that May Be Impacted. Work with the company's sales and procurement teams to identify key long-term contracts and purchase orders that will be impacted by the tariffs. Specific contract terms that should be examined include provisions that pertain to: (a) raw materials increases and any applicable pricing formulas; (b) other requests for cost increases; (c) force majeure; (d) notice requirements; and (e) termination rights.

Investigate Alternative Sources of Supply. If a critical supplier threatens to cease supply absent price increases or seeks to terminate the contract, the company will need to act quickly to ensure a continuity of supply. If there are alternate sources available, the company may work to line up and qualify a replacement supplier. However, this may not be feasible if the goods are specially manufactured products that require testing and a lengthy validation process. The company should ascertain how much product it has in stock and identify when an interruption in supply would cause a shutdown in the manufacturing line. The company can then determine whether its best course of action is to acquiesce to the demand for price increases or refuse and proceed with qualifying an alternate supplier. Even if the company does decide to pay higher costs for the products (whether by paying the existing supplier a premium or by finding an alternate supplier), the company should do so with a full reservation of rights, solely as an act of cover, to mitigate its damages, and prevent any interruptions in the supply chain. The company should take all steps necessary to document its position regarding any request for price increases and reserve all of its rights under the parties’ contract.
What can companies who believe they are victims of unfair trade do?

The aggressive tariffs for steel and aluminum are understandably drawing a lot of notice as a new tool to fight perceived unfairly traded imports. In January of 2018, Energy Fuel Resources (USA) Inc and Ur-Energy USA Inc filed a petition requesting a national security finding and measures to halt imports from Russia, Kazakhstan, China, and Uzbekistan. Reportedly the Department of Commerce is reviewing other industries where section 232 potentially could be applied, with a focus on semiconductors/integrated circuits, aircraft, and shipbuilding. Other industries with an arguable national security argument are likely to give section 232 new consideration, as well as considering tried and true international trade remedies like antidumping and countervailing duty petitions.

For companies without a national security hook, there are still are potential international trade remedies available. The options for companies that believe they are being hurt by unfair trade varies depending on whether the good already is covered by an order or whether the producer is contemplating bringing a new action. For products covered under existing orders, constant vigilance regarding whether foreign competitors are taking steps to circumvent orders is necessary. Some common ways in which circumvention occurs is by mismarking the country of origin, transshipping goods through third countries, conducting minor processing of goods in a third country and claiming the good was substantially transformed and became a product of the third country, and shipping components into the United States for only minor assembly in so-called “screwdriver” factories. In some cases, companies have added trace amounts of nonessential components to try to take a product just slightly outside of the scope of the relevant order.

Monitoring this kind of activity is important for companies looking to capitalize fully on increased tariffs intended to diminish foreign competition. Information regarding imports can be gotten for a fee from commercial services, such as PIERS. If it appears duties are not being appropriately paid, this can be brought to the attention of the DOC through a request for an anti-circumvention inquiry.

An additional option recently opened up is a new law that gives U.S. producers a strong tool to prevent circumvention of orders through the grant to CBP of heightened authority to investigate allegations that foreign exporters are evading antidumping and countervailing orders. Under the new law, U.S. producers, wholesalers, and unions (among others) of the same or similar products covered by antidumping and countervailing duty orders can file an allegation that an importer has entered the merchandise subject to the order through evasion. CBP even provides a website to report such concerns. The law allows the DOC and the ITC to submit evidence of evasion as well. CBP is then required to investigate the allegation to determine its accuracy.

A final tool to consider is the False Claims Act, which is a way by which private persons can file a claim, on behalf of the U.S. government, alleging the U.S. government is being deprived of revenue due to the circumvention of orders. If such circumvention is determined to exist, the result can be penalties two or four times the duties, taxes, and fees of which the United States was deprived, or equal to the domestic value of the imported merchandise. Liability for treble damages and penalties ranging from $10,781 to a maximum of $21,563 per violation are also available. With duties potentially running into the triple-digit range, the amount of potential duties can quickly rise. In addition, whistleblower provisions may allow the recovery of up to 30 percent of any recovery made by the government, depending on whether the government intervenes to take over the case. If it does, the ongoing work from the whistleblower is low, as the case will be prosecuted to its end by the government, with the whistleblower potentially receiving a large bounty at the conclusion of the investigation.

Where products are not covered by an existing order, for all the reasons listed above the environment probably has never been more receptive for companies seeking import relief. This topic is covered below.

How can U.S. companies tell if they have a good case they should consider bringing?

Despite the surprising new use of section 232, the most common forms of trade remedy by far are antidumping and countervailing duty actions. These cases generally are initiated after a detailed petition is filed by manufacturers, producers, or wholesalers in the United States of the same or similar products; by a certified union or recognized union or group of workers in the United States of the same or similar products; by a trade or business association whose members manufacture, produce, or wholesale the same or similar products in the United States; or by an association of these groups.

Preparing a petition is a lot of work. The petition must contain detailed submissions relating to the existence and amount of dumping and/or subsidization, the identities of known manufacturers and importers, and copious information regarding how subject imports allegedly have harmed U.S. producers of the domestic like product. One advantage of the process, however, is a draft petition can be submitted in advance of filing to both the DOC and the ITC, which will follow up with detailed comments and requests for information to fill in any perceived gaps in the petition. This is a huge advantage, akin to a company being able to provide an advance copy of its brief to a judge for comments regarding the strengths of the arguments.
The determination as to whether a case should be brought is a complicated one, and depends on close evaluation of the level of imports, their pricing, trends in import quantities and their pricing, and other factors bearing on whether there is a case for material injury or the threat thereof. Detailed information also needs to be provided regarding the potential antidumping duty margin, which is evaluated at the DOC.

1 The Department attempted to distinguish its earlier findings by stating that the industry had changed since 2001 and also concluding that the broader scope of the current case strengthened the national security issues. The biggest change in analysis, however, was that in the 2001 steel and iron ore proceeding the Department relied on the fact that many imports came from reliable sources (i.e., friendly countries), and it did not take this into account in the present report. The Department gave no reason why its analysis had changed.

2 The scope of the section 232 steel action, as initiated, was for all steel-mill products, including carbon and alloy flat products, carbon and alloy long products, carbon and alloy pipe and tube products, carbon and alloy semi-finished products, and stainless products. The section 232 report indicated that all major categories of steel products - flat, long, semi-finished, pipe and tube, and stainless - were important to national security. Domestic steel companies argued that the scope should be considered expansively so that it covers downstream products, arguing that otherwise foreign companies would purchase steel abroad, transform it into a downstream product, and then export it to the United States to circumvent any section 232 measures.

The section 232 aluminum investigation applied to primary aluminum as well as semi-manufactured products including aluminum castings, forgings, plates, sheet and can sheet, foil, and wire. Rods and pipes also were included. Aluminum scrap, powders, and flakes were not. The same types of arguments over how far downstream the coverage should extend would arise for aluminum products as well.


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