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Section 232 Tariffs Survive Constitutional Challenge, But Reforms Remain Possible

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International Trade

On March 25, 2019, the U.S. Court of International Trade ("CIT") denied a constitutional challenge to Section 232 of the Trade Expansion Act of 1962, thereby upholding the steel and aluminum tariffs that President Donald Trump imposed in March 2018 on the basis of national security concerns. Finding that it was "bound" by Supreme Court precedent, the special three-judge panel of the CIT nevertheless acknowledged the validity of many of the plaintiffs' arguments, with one judge expressing "grave doubts" about the statute's constitutionality in a separate opinion. The CIT decision, now on appeal before the Federal Circuit, suggests that the Section 232 tariffs will likely remain in place, absent congressional action or a departure from precedent by the U.S. Supreme Court.

The CIT decision was issued in response to a June 2018 complaint filed by the American Institute for International Steel and two member companies, which claimed that Section 232 constitutes an improper delegation of legislative authority in violation of Article I of the U.S. Constitution and the separation of powers. Under the "non-delegation doctrine," Congress may not delegate any of its law-making powers, such as its power to regulate trade, unless it provides an "intelligible principle" or set of clear standards defining the extent of the delegation. The plaintiffs contended that Section 232 permits the President "to consider, in essence, anything in the Nation's economy that imports might affect" because it fails to delineate what constitutes "national security" and leaves it to the President's discretion to determine the appropriate remedy.

The case was widely considered a long shot, both because a non-delegation challenge has not been upheld since 1935 and because the Supreme Court, in *Federal Energy Administration v. Algonquin*, had already ruled specifically that Section 232 "easily" met the intelligible principle standard and was "clearly sufficient to meet any delegation doctrine attack." While the plaintiffs argued that *Algonquin* only concerned the specific *remedy* that the President had selected, the CIT determined that the Supreme Court had "squarely addressed" the non-delegation issue in *Algonquin*. Finding itself bound by precedent, the CIT majority nevertheless acknowledged that "the broad guideposts of [the statute] bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." Unlike government agencies, the President is not subject to the Administrative Procedure Act ("APA"). As a result, decisions committed to the President's discretion—such as those made under Section 232—are not subject to judicial review on the basis of rationality, findings of fact, or abuse of discretion.

Judge Gary Katzmann, in a separate "dubitante" opinion that is neither a concurrence nor a dissent, expressed "grave doubts" that Section 232 "passes constitutional muster" and suggested that it may be appropriate for the Supreme Court to revisit *Algonquin*. Acknowledging that "as a lower court, it behooves us to follow the decision of the highest court," Judge Katzmann explained that "[w]hat we have come to learn is that section 232 . . . provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress." Although Judge Katzmann did not dissent in light of the binding precedent, he noted that "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers."

This constitutional challenge may eventually land in the Supreme Court, but in the meantime the Section 232 tariffs on steel and aluminum are likely to remain in place. Moreover, additional Section 232 actions—on automobiles, uranium, and other imports—are in process or under consideration.

As this litigation proceeds, companies affected by the Section 232 tariff actions may consider different avenues to advocate for their interests. For example, with the case now on appeal before the Federal Circuit, interested stakeholders will have an opportunity to submit *amicus* briefs. Such briefs could include submissions about the concrete impact of the Section 232 tariffs and the business uncertainty created by the President's broad discretion.

The Administration's newly aggressive use of Section 232 has prompted pushback on Capitol Hill. Multiple U.S. lawmakers, including Senators Rob Portman (R-Ohio), Doug Jones (D-Alabama), Joni Ernst (R-Iowa), Pat Toomey (R-Pennsylvania), and Mark Warner (D-Virginia), along with Representatives Mike Gallagher (R) and Ron Kind (D) of Wisconsin, have introduced legislation that would limit the President's authority under Section 232. Most recently, Senate Finance Committee Chairman Chuck Grassley (R-Iowa) announced that he would pull elements from various proposals and introduce a new bipartisan bill "in the coming weeks." As the political momentum for reform builds, companies may want to engage allies on Capitol Hill regarding their concerns about Section 232.

There is also growing support in Congress for the restoration of country exemptions for imports of steel and aluminum from Canada and Mexico. Both countries were originally exempt from the Section 232 tariffs, but those exemptions expired on June 1, 2018. In response, Canada and Mexico imposed retaliatory tariff measures, and have signaled that more retaliatory measures may be on the way if a resolution is not reached. Senator Grassley has indicated that Congress will be reluctant to vote on the United States-Mexico-Canada Agreement ("USMCA") until Canada and Mexico are exempted from the Section 232 tariffs. Top negotiators from Canada and Mexico have expressed similar sentiments, and both Canada and Mexico have also suggested that they would not be amenable to a quota arrangement in lieu of tariffs.

In the meantime, the amended product exclusion process remains available to parties seeking relief from the tariffs for their affected steel and aluminum imports. Covington trade lawyers have successfully assisted clients from multiple sectors in requesting product exclusions since the procedures were instituted in March 2018.

Additionally, for companies whose exclusion requests have been denied by the U.S. Department of Commerce, it may make sense to evaluate the potential value of a litigation challenge. In its briefing to the CIT, the U.S. Department of Justice acknowledged that Section 232 product exclusion determinations are subject to judicial review, consistent with "the

presumption of judicial review of final agency actions." Unlike actions by the President, final determinations by Commerce may be reviewed to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

With trade negotiations underway, legislation being drafted, exclusions under review, and a constitutional challenge before the Federal Circuit, the Section 232 landscape remains dynamic.

A number of Covington trade lawyers have been advising a wide range of clients with regard to the Section 232 actions against steel and aluminum imports, as well as other pending or contemplated Section 232 investigations. Our team includes former senior trade and defense officials who are well placed to represent clients in these matters.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade practice:

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