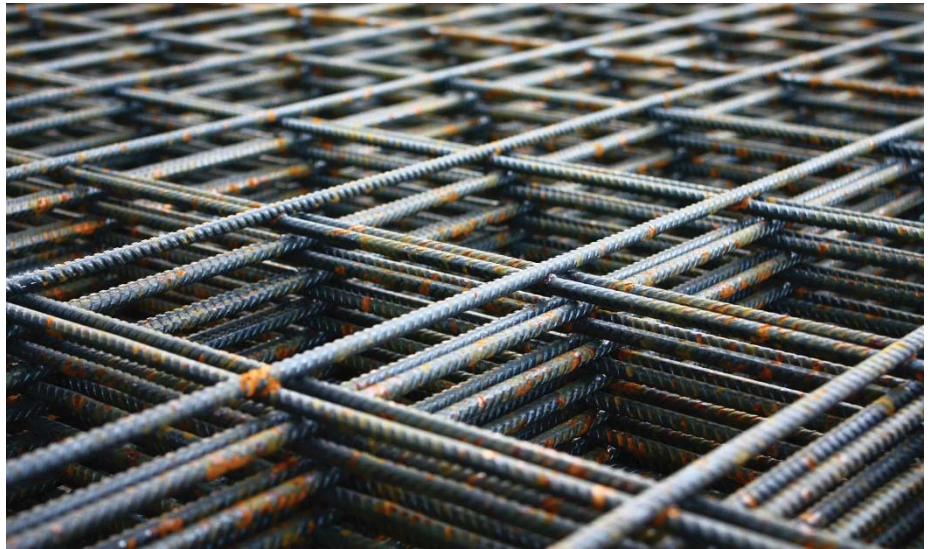


WATSON FARLEY
&
WILLIAMS

BRIEFING

U.S. TARIFFS ON STEEL AND ALUMINUM
POSE CHALLENGES TO GLOBAL TRADE
MARCH 2018

- U.S. TARIFFS ON STEEL AND ALUMINUM DUE TO TAKE EFFECT FROM MARCH 23, 2018
- SPECIAL EXCEPTION FOR IMPORTS FROM CANADA AND MEXICO
- POTENTIAL FOR CHALLENGES IN U.S. COURTS AND WTO



Introduction

On March 8, 2018, President Donald Trump issued a proclamation imposing new tariffs on imports of steel and aluminum articles into the United States. The tariffs are “ad valorem,” which means they are imposed on the value of the imports, rather than a measure of quantity. The tariff amounts are 25 percent with respect to steel and 10 percent with respect to aluminum, in addition to any other tariffs that may apply (which may vary, based on the precise item being imported). The tariffs generally apply to raw steel and aluminum (in various forms), rather than finished products that incorporate steel or aluminum.

“THE TARIFFS ARE “AD VALOREM,” WHICH MEANS THEY ARE IMPOSED ON THE VALUE OF THE IMPORTS, RATHER THAN A MEASURE OF QUANTITY.”

The tariffs are scheduled to take effect for goods entered into the United States, or withdrawn from warehouse for consumption, starting March 23, 2018. There is no grandfathering for pre-existing contracts, and no expiration date.

The proclamation contains a special exception for imports from Canada and Mexico, the two fellow members, with the United States, of the North American Free Trade Agreement (“NAFTA”). President Trump announced his “expectation” that Canada and Mexico will take action to prevent the circumvention of the tariffs by transshipping steel or aluminum from a third country through Canada or Mexico to the United States. Additional countries are invited to discuss reducing or eliminating the tariffs in conjunction with the elimination of threats to U.S. national security. The U.S. Secretary of Commerce is also authorized to implement additional exceptions for steel or aluminum articles not produced in significant quantity in the United States, or to address additional national security considerations. On March 9, 2018,

“THE REPORTS CONCLUDED THAT “EXCESSIVE” IMPORTATION OF STEEL AND ALUMINUM WEAKENED THE U.S. ECONOMY BY HARMING THE U.S. STEEL AND ALUMINUM INDUSTRIES, AND THREATENED TO IMPAIR U.S. NATIONAL SECURITY.”

President Trump announced via Twitter that an agreement eliminating the tariffs on Australian imports was in the works. Additional exemptions may follow.

Legal Framework

The tariffs were enacted pursuant to Section 232 of the U.S. Trade Expansion Act of 1962 (19 U.S.C. §1862), which deals with U.S. national security. Section 232 generally provides that the U.S. Secretary of Commerce, in consultation with the Department of Defense, may investigate and prepare a report addressing the effects of the importation of specified articles on U.S. national security, and making recommendations to the president. If the report concludes that the importation of an article harms U.S. national security, and the president concurs with the report, he or she may take action restricting the importation of that article, taking into account U.S. economic welfare.

In January 2018, the U.S. Secretary of Commerce released reports addressing the effects of steel and aluminum imports on U.S. national security, including the effects on the U.S. economy. The reports concluded that “excessive” importation of steel and aluminum weakened the U.S. economy by harming the domestic steel and aluminum industries, and threatened to impair national security, largely under the theory that if too much steel and aluminum is imported from abroad, the sudden inability to obtain these materials could prevent the armed forces from quickly obtaining relevant supplies needed. The reports went on to recommend a number of alternate measures including the use of global tariffs with guidance as to the level of tariffs required to bring about the desired reduction in imports and corresponding increase in domestic capacity.

Neither the statute nor the Secretary of Commerce reports refer to the tariffs as a protectionist measure, although this is clearly the effect, and very likely the intent, of the tariffs.

Legal Challenges to the Tariffs

The new tariffs are likely to be subject to legal challenge in U.S. courts. A possible avenue of challenge would be to argue that the tariffs were motivated not by concerns of U.S. national security, but by a protectionist agenda, and that the Secretary of Commerce reports were merely an *ex post facto* validation of this agenda, rather than a genuine investigation into the effects of steel and aluminum imports on U.S. national security. It is also likely that countries impacted by the tariffs will bring a legal challenge before the World Trade Organization (“WTO”).

In 2002, President George W. Bush imposed “temporary” steel tariffs under Section 201 of the U.S. Trade Act of 1974 (19 U.S.C. § 2251), which is a more openly protectionist statute than Section 232. The Bush tariffs were intended to be a temporary three-year measure. However, they were subject to a successful legal challenge in the WTO, and were withdrawn after less than two years.

The timing and likelihood of success of legal challenges to the new tariffs remain uncertain.

Commercial Effects of the Tariffs

The tariffs are imposed on the importer of record of steel and aluminum articles. The importer must pay an estimated duty to clear the imports from U.S. customs. The final duty is assessed at “liquidation,” which may be several months after the

“SEVERAL COUNTRIES, INCLUDING MAJOR TRADING PARTNERS, HAVE THREATENED THE UNITED STATES WITH RETALIATORY TARIFFS IF THE STEEL AND ALUMINUM TARIFFS ARE NOT ELIMINATED.”

article has been imported. Given the high tariff rates, and the fact that the tariffs are imposed on an ad valorem basis (with the possibility of a substantial range of ways of valuing the imports for the purposes of assessing the tariff), there may be significant uncertainty regarding the amount of the tariff at the time of importation. Importers, exporters and other parties potentially affected by the tariffs should review carefully their contracts to assess the potential impact of any tariffs on them.

Several countries, including major trading partners, have threatened the United States with retaliatory tariffs if the steel and aluminum tariffs are not eliminated (or if such countries are not exempted from the tariffs), raising the specter of a broader trade war. The consensus of economists is that tariffs are generally harmful to economic growth, although the tariffs could help U.S. steel and aluminum producers.

Open Questions

Among the open questions remaining are:

- Will the tariffs be successfully challenged in U.S. courts and/or the WTO, and what will be the timing of those challenges?
- What will be the procedures for obtaining an exemption from the tariffs, and what exemptions will be granted?
- What measures will be implemented, if any, to prevent importers from circumventing the tariffs by transshipping steel or aluminum through Canada or Mexico?
- Will a trade war ensue?

Conclusion

Importers and other interested parties should carefully review their existing contracts and evaluate their supply lines to determine what measures can and should be taken. Companies in the industry should closely monitor news and updates related to the new tariffs, including the procedures to be issued by the Secretary of Commerce for the requests for the exclusions described above.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with the authors below or your regular contact at Watson Farley & Williams.



DANIEL PILARSKI
Partner
New York

T +1 212 922 2234
dpilarski@wfw.com



BRETT M. RIEDERS
Associate
New York

T +1 212 922 2271
brieders@wfw.com