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Eric C. Emerson, Steptoe & Johnson LLP

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Contributed by Eric C. Emerson, Steptoe & Johnson LLP

For much of 2019, congressional leaders discussed approaches to limiting the U.S. President's authority to use statutory trade remedies, but have not yet acted to put those limits into place. Wholesale judicial challenges to the president's authority under these statutes have been unavailing, and pending challenges to these measures before the World Trade Organization are unlikely to yield any results, particularly in the short term. But in two recent decisions, the U.S. Court of International Trade has identified at least some limits on the president's authority.

These decisions do not wholly negate the president's authority, but they do address the manner in which these regimes are administered. While neither of these decisions offers parties complete relief, taken together, these decisions signal the possibility that parties may have some recourse to address the seemingly boundless discretion with which these tariffs are being applied.

Statutory Basis for Trade Remedies

Since taking office in Jan. 2017, President Donald Trump has taken action under range of previously rarely used statutory provisions in order to impose tariffs on a staggering volume of U.S. imports. Leaving aside antidumping and countervailing duty actions, to date the president's actions have been taken principally under the following three statutes:

- Section 201 of the Trade Act of 1974 ("Section 201") allows the president to impose tariffs or other restrictions on imports after a finding by the U.S. International Trade Commission that such imports are "being imported in such increased quantities that {they are} a substantial cause of serious injury, or threat thereof, to the U.S. industry." 19 U.S.C. § 2251 et seq. In Jan. 2018, President Trump used this authority to impose tariffs on imports of solar panels and tariff-rate quotas on imports of washing machines.

- Section 232 of the Trade Expansion Act of 1962 permits the president to impose tariffs or other relief on imports if the U.S. Department of Commerce "finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862 et seq. The Trump administration has used Section 232 to impose tariffs and quotas on steel and aluminum from most sources, and has also used this provision to investigate whether imports of autos and auto parts threaten U.S. national security. Investigations of other imports, including uranium and titanium sponge, are pending.

- Section 301 of the Trade Act of 1974 authorizes the U.S. Trade Representative "to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory, and that burdens or restricts U.S. commerce." 19 U.S.C. § 2411 et seq. The president used Section 301 to impose tariffs on a substantial portion of imports from China in order to force changes to various Chinese laws and policies adversely affecting U.S. commercial interests.

Using the same authority, the president has also threatened to impose tariffs on imports of luxury goods from France to force that country to make changes to its policy regarding the taxation of digital services, and threatened to impose tariffs against a wide range of imports from the E.U. to force the E.U. to comply with decisions from the WTO related to commercial aircraft.

Legal Challenges to Presidential Action

In the wake of these actions, parties adversely affected by these tariffs have filed legal challenges to the administration's actions. The court with exclusive jurisdiction to hear these cases is the U.S. Court of International Trade, a federal court located in New York.

The first legal challenges sought to overturn the President's actions altogether, but these suits were largely unsuccessful. The most prominent of these was *American Institute for International Steel v. United States*, 376 F.Supp.3d 1335 (Ct. Int'l Trade 2019), in which plaintiffs mounted a facial challenge to the Section 232 statute itself. In AIIS, a three-judge panel concluded that it was bound by the U.S. Supreme Court's decision in *Fed. Energy Admin. v. Algonquin SNG Inc.*, 426 U.S. 548 (1976), which held that Section 232 did not constitute an unconstitutional delegation of congressional authority to the president.

The panel recognized that the language of Section 232 was extremely broad and permitted the president nearly unlimited authority in fashioning applying a remedy, but concluded that had no authority to assess the reasonableness of an action wholly delegated to presidential discretion. The panel speculated that it might have the ability to act if the president's action was wholly unrelated to national security, but even then, the inability to probe the president's motives or fact-finding might prevent even that assessment.

A separate challenge was raised against the president's decision to impose relief in the Section 201 investigation of solar products. A group of Canadian solar module producer/exporters sought an injunction to prevent the imposition of a tariff-rate quota on imports of solar modules, and in particular, on imports of solar modules from Canada. *Silfab Solar, Inc. v. United States*, 296 F.Supp.3d 1295 (Ct. Int'l Trade), aff'd 892 F.3d. 1340 (Fed. Cir. 2018). In that case, both the CIT and the Federal Circuit found that the plaintiffs were unlikely to succeed on the merits, and denied their motion for a preliminary injunction.

In particular, both courts noted the substantial discretion granted to the president under Section 201, with the Federal Circuit even declining to review the president's decision that a 2 percent Canadian market share was “substantial” as required by the North American Free Trade Agreement to impose safeguard duties on Canadian imports. This is consistent with other decisions of the CIT and the Federal Circuit which have affirmed presidential determinations in Section 201 proceedings. See, e.g., *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351 (Fed. Cir. 2003); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86 (Fed. Cir. 1985).

While it is difficult to draw conclusions from only two precedents, the teaching of these cases and prior precedents is that broad legal challenges to overturn actions under these trade remedy statutes are unlikely to succeed. In each of these cases, the CIT appears to have concluded that Congress ceded substantial discretion and authority to the executive branch under these statutes, and to date, the president's actions have stayed inside these widely spaced guard rails. As a consequence, across-the-board legal challenges to the president's actions under these provisions have been unsuccessful, and the teaching of these cases is that future challenges may result in similar outcomes.

Where parties seem to be gaining traction, though, is with more focused challenges to the administration of the trade restrictions imposed under these statutes. While the president enjoys substantial discretion to craft remedies to address the specific problems identified in these statutory provisions, in at least two cases, the CIT has found that this discretion is not unlimited.

The first case is *Transpacific Steel LLC v. United States*, Slip Op. 19-142 (Ct. Int'l Trade 2019). The plaintiffs challenged the president's decision in Aug. 2018 to increase the Section 232 duties on imports of steel products from Turkey from 25 percent to 50 percent, and the U.S. sought to dismiss the case for failure to state a claim. The CIT denied the government's motion, finding both that the tariff increase was contrary to the statute, and also that the president's decision to single out Turkey violated the U.S. Constitution's equal protection guarantees.

As to the plaintiffs' procedural argument, the government took the position that the original Section 232 investigation provided the president with ongoing authority to modify the relief originally imposed in March 2018. The court disagreed. In the court's view, while the statute does grant the president broad authority to fashion relief to address threats to national security, that authority must be exercised within the timelines provided by statute. In the view of the court, “{t}he procedural safeguards in section 232 do not merely roadmap action; they are constraints on power.” These constraints are critical, in the view of the court, to protect Section 232 from a challenge of unconstitutional delegation of authority by Congress.

As to the plaintiffs' equal protection claim, the CIT held that in the realm of economic relations, it would take only a “rational basis” for the president to justify his actions, but in this case, even that justification was unavailing. “{I}t is difficult to imagine Presidential action in connection with section 232 where one would be at a loss to conjure a rational justification; yet, the reality of this case proves otherwise.” The court concluded that none of the facts offered by the government justified the president's decision to single out Turkey from among the other countries exporting steel to the U.S. for punitive treatment, and concluded that the plaintiffs' equal protection claim could survive.

In the second case, the CIT issued a preliminary injunction prohibiting USTR from eliminating an exclusion from the relief granted under the Section 201 case on solar products. *Invenergy Renewables LLC v. United States et al.*, Slip Op. 19-153 (Ct. Int'l Trade 2019). Plaintiffs in *Invenergy Renewables* challenged USTR's decision to withdraw an exclusion from Section 201 duties for bifacial solar panels. They argued that this exclusion had been included after a notice-and-comment rulemaking process, but that the withdrawal of this exclusion four months later was effected with no such procedure. The court granted a temporary restraining order, and then later a preliminary injunction, to prevent the withdrawal of this exclusion.

Among the issues that the court was required to examine prior to granting the preliminary injunction was the plaintiffs' likelihood of success on the merits of its claims. There, the court held that USTR constitutes an "agency" of the U.S. government for purposes of the Administrative Procedures Act, and that that process for granting (and withdrawing) exclusions was a rulemaking governed by the APA, and not an adjudication outside its ambit. The court concluded that the process by which the withdrawal was issued did not conform to required notice-and-comment procedures, was likely also arbitrary and capricious, and was not covered by the foreign affairs exception to the APA. On the basis of this analysis, the court concluded that the plaintiffs were likely to prevail on the substance of their complaint, which is now being litigated.

Here too, it is difficult to draw broad conclusions from only two procedural decisions, but they tend to support a conclusion that the CIT is open to challenges to the manner in which these statutes are administered, even if it is unwilling to overturn the executive branch's authority wholesale. They also establish important, albeit preliminary, precedents that aspects of these trade proceedings are governed by the APA, and that the CIT may be willing to entertain constitutional challenges to the administration of these remedies. Other, similar cases challenging these trade remedies are pending before the CIT, and taken together, they could establish limits on what has up to now seemed like an area of unfettered and unlimited authority.

Implications for Companies and Practitioners

For companies heavily dependent on imports, it is an understatement to say that the last two and a half years have been a frustrating time. The administration's decisions whether to increase or decrease tariffs on imports from particular countries have often seemed to lack factual or legal foundation. Similarly, the opaque exclusion processes developed by the administration to provide relief from some of these tariffs have appeared equally arbitrary in their timing and outcome. Against this backdrop, these decisions stand out, as they provide at least some measure of hope to parties who believe themselves aggrieved. A few issues in particular seem ripe for challenge.

The first area is the administration's Section 232 exclusion process. Shortly after it imposed duties on steel and aluminum imports, it also announced a program for parties to seek exclusions from these duties. This exclusion process was newly created for these Section 232 steel and aluminum tariffs, and was based on the principle that products not produced in the U.S. should not be subject to restriction. Importers were given the opportunity to submit applications for the exclusion of specific quantities of specific products that were unavailable domestically. Domestic steel and aluminum producers were given the opportunity to object to these requests by claiming that they could in fact supply the imported product.

An objection by the domestic industry to an exclusion request has a major impact on whether an exclusion will be granted. An April 2019 report by the Mercatus Center at George Mason University found that only 1 percent of exclusion requests were granted over the objections of the domestic industry. But notwithstanding the importance of these objections to the exclusion process, the Commerce Department does not appear assess them critically. The Mercatus Center also determined that the objections filed by the three main U.S. steel producers equaled nearly 170 percent of their 2017 production capacity. They conclude that this calls into question whether the domestic industry can truly supply all of the products to which it has filed objections.

The fact that the Commerce Department appears to be relying so heavily on this factor without any analysis could mean that its rejection of certain exclusion requests may not survive scrutiny. In late 2018, the Department provided parties to submit rebuttals to these objections (and sur-rebuttals to those rebuttals). Perhaps this additional information on the U.S. industry's ability to supply these products will allow the Department to make more reasoned and fact-based decisions on exclusions.

The Office of the Inspector General of the U.S. Department of Commerce has equally found flaws in the Section 232 exclusion process. In Oct. 2019, a management alert released by the IG's office concluded that the exclusion process was marked by procedural irregularities, including an unofficial appeals process, changes to the exclusion request form based on unrecorded input from an interested party, and a lack of any record of the nearly 100 interactions between the Department and interested parties during the March 2018–March 2019 time period. The severity of these failings suggests that a challenge to the exclusion process based on due process grounds might be effective, and could become even more so once the IG's full report is released.

The second area for potential challenge is the administration's apparent disregard for statutory timelines. The basis for the CIT's holding in *Transpacific Steel* was that Section 232 imposes statutory deadlines that limit the president's authority, and that a failure to act within those timeframes divests him of his authority. In at least two other contexts, this holding is highly relevant.

The first is the president's statement on Dec. 2, 2019, via Twitter, that he intended to impose tariffs on steel and aluminum imports from Brazil and Argentina as a result of their alleged currency manipulation, "effective immediately." As of this date of this article, these tariffs have not yet been reimposed, though just the threat of their reimposition has caused disruption in the market. Other comments made by the president suggested that this threat arose not as the result of any actual national security risk from Brazilian and Argentinean steel imports, but to punish these South American countries for increasing their agricultural exports to China to replace the U.S. imports that China had restricted as a result of the Section 301 proceeding. A decision to replace the quotas imposed in May 2018 with duties appears to be contrary to the Section 232 statute, at least as interpreted by the Court in *Transpacific Steel*, as such an action would be long past the deadline for the president to act under the original Section 232 proclamation.

A similar conclusion may apply to the administration's self-initiated Section 232 investigation against automobiles. This investigation was self-initiated on May 23, 2018, and was completed on Feb. 17, 2019, within the 270-day time frame required by law. The president then had 90 days to determine what relief, if any, to impose. Instead, relying on authority to extend that deadline where trade agreements were being negotiated, the president extended the deadline by another 90 days, to Nov. 14, 2019. The president announced no relief by that deadline, and as of this writing, has still not announced any relief. The holding in *Transpacific Steel* strongly suggests that the president has now lost his ability to impose any relief under this investigation. If he concludes that action is necessary to address the national security concerns the Commerce Department apparently identified in its report, the president may need to find another statutory option.

To date, no legal challenges have been filed against the administration's use of the Section 301 remedy against China, but aspects of this process could equally be subject to challenge. As with the steel and aluminum Section 232 tariffs, an exclusion process has been developed for imports subject to the Section 301 tariffs. And as with the Section 232 exclusion process, the Section 301 exclusion process is largely opaque, with no opportunity for hearing and little insight into the basis for USTR's decisions to grant or deny exclusions other than a relatively pro-forma letter issued when exclusion requests are rejected. Some of the same criticisms that have been leveled against the Commerce Department could be made of USTR as well, which in turn could open the Section 301 exclusion process to similar legal challenge.

It is difficult to know what path these various proceedings will take, and in particular, whether they are now permanent fixtures of U.S. trade policy. But even if they were to be repealed tomorrow, the legal issues these various efforts have spawned will not be so easily resolved. Given the massive liability that all of these proceedings have generated, it seems likely that similar challenges to their administration will continue to arise. And through these challenges, we will begin to see the limits of the discretion afforded to the executive branch in the area of international trade policy.

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