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SECTION 232 INVESTIGATIONS : WHAT STEEL-CONSUMING BUSINESSES NEED TO KNOW

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In just the first four months of 2018, among a surge in trade complaints filed by domestic steel manufacturers against foreign rivals (a frequency not seen in over 15 years), and after a lengthy investigation by the Secretary of Commerce concluding "that the present quantities and circumstance of steel imports are 'weakening our internal economy' and threaten to impair the national security" of the United States, President Trump has issued two presidential proclamations—adjusting the imports of certain steel products by imposing a 25 percent ad valorem tariff (the "Tariffs") on those steel products from all countries—granted a permanent extension to the Tariffs for South Korea, Argentina, Australia, and Brazil and has extended a final temporary 30 day exemption from the Tariffs to Canada, Mexico and the member countries of the European Union, the United States' biggest trading partner.

With respect to the permanent exemptions announced and the Trump administration's ongoing negotiations with temporarily exempt countries, quotas in lieu of tariffs seem to be the favored agreement. While we know that South Korea agreed to an annual import quota of 2.68 million tons, roughly equivalent to 70 percent of South Korea's annual export volume to the United States between 2015 and 2017, the Trump administration has yet to disclose further details on its agreements with Argentina, Australia and Brazil. Those countries, however, have likely reached an agreement similar to South Korea. And, the Trump administration has made clear that with respect to its final stretch of negotiations with Canada, Mexico and the European Union, it will "focus on quotas that will restrain imports, prevent transshipment and protect the US national security."

To add even more uncertainty, with respect to the countries without a current exemption to the Tariffs, the Trump administration stated that certain steel products, regardless of their country of origin, may be provided exemptions, but only after a specific request for exclusion is made by a directly affected party located in the United States. Since a product-specific exemption may only provide relief on a party-by-party basis, taking into account factors such as the regional availability of particular steel products and the ability to transport those products within the United States, there is little doubt that the high cost paid by the requestor and outcome uncertainty will almost always make this exclusion moot as cost and resource prohibitive.

While President Trump has relied on concerns over "the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the impact of further plant closures on capacity needed in a national emergency" to justify the implementation of the Tariffs, some of the exemptions appear to make little impact on addressing those concerns given that the top steel suppliers to the United States in 2017 were Canada, followed by Brazil, South Korea and Mexico.

The biggest problem, however? With the exemption of certain countries from the Tariffs (temporarily or otherwise), there are now the haves and the have nots, and we're talking about U.S.-based companies. Previously entered into contracts for steel goods between U.S.-based companies and foreign steel manufacturers located in non-exempt countries are now "loser" contracts and those entered into with foreign steel manufacturers located in exempt countries are likely to be windfalls.

Notwithstanding the widespread concern that the imposition of the Tariffs will result in uninvolved sectors being retaliated against and the fear of a global trade war, certain industries will feel the immediate effect of higher priced steel. Those in particular are steel-consuming businesses.

Construction

National Association of Home Builders has been vocal saying the Tariffs would pile on costs on builders and ultimately, homebuyers. Not to mention higher priced construction equipment. Also, certainly to be impacted by the Tariffs are the end users of construction materials, such as developers, owners, and contractors. Most assuredly, where possible, the increased cost of material acquisition resulting from the Tariffs will passed along from suppliers to contractors to owners, etc. Of course whoever ultimately ends up with the preverbal "hot potato" will be dictated by contract terms, which may or may not have been negotiated with the foresight of this looming issue.

Oil and Gas Industry

While we are experiencing a much needed boom in our energy sector, the Tariffs could derail the progress we've recently seen by raising prices on foreign steel used for drilling and production, as well as for pipeline and refinery construction. And, as many pipeline operators have long argued, certain combinations of steel line pipe size and grade are not available from domestic suppliers.

Transportation and Trucking

Steel is used in virtually every mode of transportation, from freight to rail. Driving up costs to produce and purchase those modes of transportation will drive up virtually every good Americans purchase. The Motor & Equipment Manufacturers Association has said that the Tariffs will make cars more expensive and could put many of the over 800,000 jobs in its industry at risk.

Steel Distribution and Trading

While in the long-run American jobs in many different sectors may be affected by the Tariffs, the short term effects on traders and distributors of imported steel are jolting. Many steel suppliers are locked into long-term, price-fixed contracts. Often, those contracts require the steel to be supplied by only a handful of approved manufacturers, which may or may not be located in a currently exempt country. With the creation of a 25 percent cost increase practically overnight, many suppliers will be on the losing end of those contracts and will be forced to cancel them or go belly-up. Whether grounds for cancellation exist is another uncertainty.

In addition, a less discussed but costly impact for importers of record and US-based steel distributors alike, is the likelihood that the implementation of quotas for certain countries and tariffs for others will inevitably result in an increased amount of transshipping and countervailing, which in turn will induce domestic steel manufacturers to continue to file more and more ITC complaints. While US companies are often not the targets of these complaints, domestic manufacturers rely on the broad subpoena power granted to ITC judges in order to obtain documentation needed to prove transshipping and countervailing claims. This means importers of record, and in some cases US-based distributors, must hire counsel and, more importantly, spend hundreds of man hours defending and complying with document requests.

Although the Tariffs have already created mass confusion in supply chains, shown significant downstream effects, increased costs unnecessarily, and negatively impacted U.S. capital intensive projects, we've listed a spattering of action items that can be taken:

- Companies contemplating purchasing steel goods from suppliers and manufacturers located in Canada, Mexico or a member country of the European Union should negotiate the risk of an exemption expiration or impact of a quota agreement prior to entering into a contract for the purchase of affected goods;

- Companies should consider not only the long-term impacts, but should immediately brace for the short-term impacts by cutting any non-essential or luxury spending since adjusting to supply chains and sourcing patterns are likely to cause a spike in excess costs, at least temporarily;

- Companies locked into contracts to purchase and/or sell steel goods manufactured in non-exempt countries should investigate their right to cancel or modify, without penalty, their existing contracts with sellers and purchasers alike;

- Importers of record importing steel goods from non-exempt countries who currently utilize customs brokers to advance payment of duties and fees, subject to reimbursement by the importer of record, should consider issuing a separate check and paying Customs and Border Protection directly to save paying a 25 percent increase in finance charges or disbursement fees charged by the customs broker;

- Exporters to negatively-affected countries should assess the risk of future-imposed retaliatory duties.

In the end, while we're in for the long-haul of unpredictability, preparation and foresight are two of the most important factors in determining who will come out on top.

ABOUT THE AUTHOR

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Alexis Foster is primarily a commercial litigator and has developed a practice largely focused on the steel industry and related domestic and international legal matters. She also spends a fair amount of time advising clients on pre-litigation matters such as lien perfection, contractual debts and other matters related to the sale of goods. Alexis' unique understanding of the steel industry allows her to provide clients with knowledgeable counsel regarding the effects of litigation from both a legal and business perspective, thus her approach to any business dispute is both a practical and creative one.