

Indirect Tax Alert

US imposes additional tariffs on derivative articles of steel and aluminum; 17 member countries agree to interim remedy to WTO dispute settlement process

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Executive summary

On 24 January 2020, United States (US) President Donald Trump announced in a Presidential Proclamation that the US would impose punitive tariffs of 10% on derivative articles of aluminum and 25% on derivative articles of steel punitive tariffs of, under Section 232 of the *Trade Expansion Act of 1962* (Section 232).¹ The tariffs are scheduled to take effect 8 February 2020.

On the same day, the European Union (EU),² China and 15 other member countries³ of the World Trade Organization (WTO) announced an agreement to create an interim dispute settlement mechanism to counter the now defunct WTO Appellate Body.⁴ The agreement, publicized at the recent World Economic Forum in Davos, Switzerland, preserves the two-step dispute settlement system at the WTO among the 17 nations, and acts as a contingency measure until the WTO Appellate Body becomes operational again.

Detailed discussion

Section 232

In March 2018, under the authority granted to him by Section 232,⁵ President Trump signed two Presidential Proclamations imposing a 10% ad valorem tariff on specifically defined articles of aluminum and a 25% ad valorem tariff

on specifically defined articles of steel. Section 232, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the US in such quantities or under such circumstances as to threaten to impair the national security of the US.

The tariffs were a direct result of the US Commerce Department's investigations and recommendations to the President under Section 232, which concluded that imports of certain steel and aluminum products "threaten to impair the national security of the United States."⁶

Both proclamations excluded Canada and Mexico and allowed for the potential to approve exemptions for additional countries that reached an agreement with the US. Ultimately, the President approved the imposition of quotas on steel articles from South Korea, Argentina and Brazil, as well as quotas on aluminum articles from Argentina.

The President further instructed the Secretary of Commerce (Secretary) to monitor the imports of aluminum and steel articles and advise if the Secretary believed there to be a need for additional action to be taken under Section 232.

Upon subsequent review, the Secretary advised the President that despite a decline in imports of steel and aluminum articles overall since the punitive tariffs and quotas took effect, subsequent importation of certain derivatives⁷ of steel and aluminum articles has significantly increased.

Specifically, the Secretary noted that import volumes of steel nails, tacks, staples and similar articles increased 33% from June 2018 to May 2019, compared to the same time frame the prior year. Further, import volumes of aluminum stranded wires, cables, and similar articles increased by 152%, also during the same time frame.

According to the Secretary's review, the increase in imports of aforementioned products was due to foreign producers attempting to circumvent the currently imposed 10% and 25% punitive tariffs on aluminum and steel articles, respectively, by further manufacturing the metals abroad with the ultimate conclusion that the resultant imports threaten to undermine the actions taken in the prior Proclamations.

On this basis, on 24 January 2020, President Trump issued a Presidential Proclamation imposing an additional 10% ad valorem tariff on derivative aluminum articles, and an additional 25% ad valorem tariff on derivative steel articles. The specific articles and the applicable Harmonized Tariff Schedule of the US (HTSUS) are noted in Annex I and Annex II of the Proclamation.

Annex I, regarding articles of aluminum derivatives, applies to all countries except Argentina, Australia, Canada, and Mexico and covers six HTSUS subheadings, outlined below. Additionally, it provides a new specific heading, 9903.80.03, for reporting the products now covered by the punitive actions:

- ▶ Stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles, provided for in HTS subheading 7614.10.50
- ▶ Stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing comprising electrical conductors, not fitted with fittings or made up into articles, provided for in HTS subheading 7614.90.20
- ▶ Stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing not comprising electrical conductors, not fitted with fittings or made up into articles, provided for in HTS subheading 7614.90.40
- ▶ Stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles, provided for in HTS subheading 7614.90.50
- ▶ Bumper stampings of aluminum, the foregoing comprising parts and accessories of the motor vehicles of headings 8701 to 8705, provided for in HTS subheading 8708.10.30
- ▶ Body stampings of aluminum, for tractors suitable for agricultural use, provided for in HTS subheading 8708.29.21

Annex II, regarding articles of steel derivatives, applies to all countries except Argentina, Australia, Brazil, Canada, Mexico, and South Korea and covers nine HTS subheadings, outlined below. Additionally, it provides a new specific heading, 9903.85.03, for reporting the products now covered by the punitive actions:

- ▶ Nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles, of iron or steel, whether or not with heads of other material (excluding such articles with heads of copper), suitable for use in powder-actuated hand tools, threaded, provided for in HTS subheading 7317.00.30

- Nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles, of iron or steel, whether or not with heads of other material (excluding such articles with heads of copper), of one piece construction, whether or not made of round wire; the foregoing, provided for in HTSUS 7317.00.5503, 7317.00.5505, 7317.00.5507, 7317.00.5560, 7317.00.5580 or 7317.00.6560 only and not in other HTS subheadings 7317.00.55 and 7317.00.65
- Bumper stampings of steel, the foregoing comprising parts and accessories of the motor vehicles of headings 8701 to 8705, provided for in HTS subheading 8708.10.30
- Body stampings of steel, for tractors suitable for agricultural use, provided for in HTS subheading 8708.29.21

While the proclamation notes that there will be an exclusion process for eligible goods, similar to the previous 232 action, articles subject to both Annexes will not be eligible for drawback.

WTO

The WTO was established on 1 January 1995 to act as an international organization to address rules and legalities of trade between member nations. This role includes, but is not limited to, administering WTO trade agreements, acting as a forum for trade negotiations, monitoring national trade policies and handling trade disputes, as they pertain to the 164 WTO member countries.

The WTO Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.⁸ Disputes are first referred to a panel of experts selected by the WTO Dispute Settlement Body (DSB) in consultation with the parties to the dispute. The panel ruling may be appealed by either party, and the Appellate Body, which consists of seven persons, may uphold, modify or reverse the legal findings and conclusions of a WTO panel.

As discussed in EY Global Trade Tax Alert [USTR proposes new tariffs on EU under Section 301; WTO Appellate Body set to disband](#), the members of the WTO Appellate Body are appointed by the DSB. The DSB is comprised of all member country governments and typically represented by ambassadors or equivalents. The adjudicators serve four-year terms, with the opportunity to be reappointed once. Each member country, as part of the DSB, has a vote when determining new appointees to the Appellate Body. The US

has, over the last two years, exercised its veto and blocked new appointments, leaving the WTO Appellate Body with just three members, the minimum required to review cases.

In December 2019, two of the final three Appellate Body members' terms expired, rendering the Appellate Body nonoperational, as it no longer met the requisite number of adjudicators to hear a case.

The US is currently involved in 2 of the 10 cases currently appealed to the Appellate Body. In the first, the US is the complainant in a case involving certain alleged export subsidy measures by India, where India has appealed the decision of a lower panel.⁹ The US is the respondent in the second case, in which Canada is the complainant, regarding US anti-dumping measures to softwood lumber products of Canada.¹⁰ Canada appealed to the arbitration body due to certain issues of law and legal interpretations in the initial panel report. The US is also involved in a number of other disputes at the panel level.

As a result, WTO members are now left without the ability to raise appeals to the Appellate Body. A number of countries have sought an interim solution while reform contestations are discussed among the member countries.

In late January 2020, 17 WTO member countries issued a statement announcing that they had reached an agreement in which the countries party to the arrangement would preserve the two-step dispute settlement system at the WTO in disputes among them.

The arrangement is applicable under Article 25 of the WTO Dispute Settle Understanding and allows for the countries to form a separate appeals body to review cases under dispute involving the 17 nations, which include; Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union,¹¹ Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay. It has been noted that this arrangement is a contingency measure and will only be in effect until the WTO Appellate Body becomes operational once more.

Actions for businesses

Companies importing derivative articles of aluminum and steel from countries that are currently subject to punitive duties and/or are on the proposed list of new products should closely monitor the progression of the implemented Presidential actions and further developments. Immediate actions companies can consider are:

- ▶ Fully understand the extent of products impacted on the proposed list of HTSUS codes
- ▶ Consider implications of increased duties and taxes and impact on US Customs bonds
- ▶ Review exclusion process once announced

Companies who conduct any form of international trade should closely monitor WTO Appellate Body updates and consider long-term impacts to their businesses.

Endnotes

1. See Presidential Proclamation, "Proclamation on Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States."
2. EU member countries are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
3. List of WTO member countries can be found here: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
4. See European Commission Press Release, "Trade: EU and 16 WTO members agree to work together on an interim appeal arbitration arrangement."
5. See Presidential Proclamations 9704 and 9705.
6. See Department of Commerce Report, "The Effect of Imports of Steel on the National Security."
7. For purposes of this proclamation, an article is "derivative" if all of the following conditions are present: (a) the aluminum article or steel article represents, on average, two-thirds or more of the total cost of materials of the derivative article; (b) import volumes of such derivative article increased year-to-year since 1 June 2018, following the imposition of the tariffs in Proclamation 9704 and Proclamation 9705, as amended by Proclamation 9739 and Proclamation 9740, respectively, in comparison to import volumes of such derivative article during the two preceding years; and (c) import volumes of such derivative article following the imposition of the tariffs exceeded the four percent average increase in the total volume of goods imported into the United States during the same period since 1 June 2018.
8. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).
9. See WT/DS541/7.
10. See WT/DS534/6.
11. The European Union is the political and economic union comprised of 28 member states, see endnote 2 for list of member states.

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