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Buy American, Hire American and the Use of National Security as a Pretext for Protectionism

On April 18, 2017, President Trump signed an “Executive Order on Buy American and Hire American” which will have a significant impact on international trade. The Executive Order states that “it shall be the policy of the executive branch to buy American and hire American” and that the Executive Branch will “maximize, consistent with law, through terms and conditions of federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.”¹ In this action, the President has charged the Secretary of Commerce with assessing the current state of monitoring, enforcing, implementing and complying with Buy American Laws, assessing the use of waivers and their impact on domestic industry, and developing policies for the Department of Commerce to ensure that “federal procurements maximize the use of materials produced in the United States, including manufactured products; components of manufactured products; and materials such as steel, iron, aluminum, and cement.” With regard to iron and steel products specifically, the EO defines “produced in the United States” to mean that all manufacturing processes, from the initial melting stage through the application of coatings, occurs in the United States. Along with a number of timelines to conduct investigations, produce reports, and submit findings, the executive branch has ordered that Commerce shall submit a report with all of its findings of the efficacy of current buy American policies and the suggestions of new policies.

In order to achieve the deadlines set by the Buy American, Hire American Order, Commerce initiated an investigation under Section 232 of the Trade Expansion Act of 1962 (19 USC § 1862). Initially, given the broad

¹ Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

scope of the Executive Order, this investigation was focused on the effect of imports on the national security but, on April 19, 2017, Commerce launched its investigation with regard to the import of steel specifically.²

A section 232 investigation is initiated to determine the effects of certain imported articles on the national security of the US. The regulations governing the investigation are codified in Title 15 of the Code of Federal Regulations, section 705, and set forth the procedures by which Commerce shall commence and conduct an investigation, as well as the recommended action or inaction regarding an adjustment of imported articles in light of the investigation's findings. Pursuant to these regulations, the criteria for determining whether there is an effect on national security due to imports include:

- (1) Domestic production needed for projected national defense requirements
- (2) The capacity of domestic industries to meet projected national defense requirements
- (3) The existing and anticipated availabilities of human resources, products, raw materials, production equipment and facilities, and other supplies and services essential to the national defense;
- (4) The growth requirements of domestic industries to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth; and
- (5) Any other relevant factors.³

In addition, Commerce also considers the impact of foreign competition on economic welfare and domestic industry essential to national security, displacement of any domestic products causing unemployment decrease in the revenues of government, and additional factors that play into the weakening of the national economy.⁴ With regard to these various criterion, Commerce reaches out to the public for comment at a public hearing as well as accepting written comment. Commerce also consults with other government agencies, especially the Department of Defense.

Commerce is then charged with reporting on the results of the investigation and providing advice based on those results. Generally, within 270 days of the initiation of the investigation, Commerce is required by law to present their findings and advice, at which time the President determines within 90 day to concur with Commerce's findings and a statement of corrective action.⁵ If the President does concur, he shall within that same time period "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threatened to impair the national security."⁶ In the past these actions have included measures beyond mere import tariffs, such as research and

² Ltr. From W. Ross to J. Mattis, *Notification Letter to Secretary of Defense James Mattis* (Apr. 19, 2017).

³ 15 CFR 705.4(a)

⁴ 15 CFR 705.4(b)

⁵ 15 CFR 705.11(a)(1)

⁶ *Id.*

development funding for industry provided by the Department of Defense (as in the integrated circuit ceramic packaging investigation of 1992) or implementation of buy American restrictions for certain defense-related commodities through encouragement of Department of Defense Regulations (as in the antifriction bearings investigation of 1988). Under Commerce’s regulations, the President shall take the proposed action within 15 days, and within 30 days report to Congress with the reasons why he has taken such action.⁷

With regard to the current steel Section 232 investigation, Commerce has established May 24, 2017 as the date of the hearing and May 31, 2017 as the date by which any written comments must be submitted for review.⁸ To date, Commerce has identified, through FAQ publication, five different categories of steel products currently subject of the investigation: Flat products, long products, pipe and tube products, semi-finished products, and stainless products. The investigation is not limited to these products and more may be subject of the investigation. Commerce has stated that the investigation is prompted not only at the urging of the President, but in light of the decreasing utilization of steel production in the US, the increase in steel imports, and impact that antidumping and countervailing orders have had on the global market trends and protection of US steel industry, which have to date had “little practical effect.”⁹

With the Executive Branch utilizing this tool, they are demonstrating to the world that they are willing to view trade through the lens of national security or use national security as a pretext to protect uncompetitive US industries or companies. This action may set a trend in motion that could damage the competitive nature of the US economy, and see the scales tipping far in favor of domestic industry. This is likely to do greater economic harm in the long term, and potentially have a larger impact on our ability to be a global player in certain industries in the future. Depending on how Commerce and President Trump define and grant relief under the auspice of “national security,” the landscape of trade related matters may be in jeopardy not just for steel but in a number of different sectors in which the US currently has domestic production.

Additionally, this may be a tool used by the President to increase bilateral trade agreements. If Commerce and the President use their broad power under a Section 232 investigation to first establish tariffs on all imported steel products, for example, it would pave the way for individual countries to negotiate with the US through favorable bilateral agreements negotiated and curated by the executive branch. At a minimum, there will be increased stumbling blocks for steel importers, above and beyond the current AD/CVD orders that are in place, within the next year, should the executive choose to take action upon a finding of harm to national security as a result of the 232 investigation.

⁷ 15 CFR 705.11(a)(2),(3)

⁸ Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19205, April 26, 2017.

⁹ Frequently Asked Questions: Section 232 Investigations: The Effect of Steel Imports on National Security, April 21 2017.

<https://www.commerce.gov/news/fact-sheets/2017/04/frequently-asked-questions-section-232-investigations-effect-steel-imports>.

The Law Office of Lawrence W. Hanson, P.C.

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- Basic overviews to U.S. import regulations or U.S. export Controls
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- Compliance workshops helping importers conduct their own Importer Self Assessments, prepare for or conduct their own Focused Assessments
- Import and export compliance manual workshops outlining step by step development of these critical materials
- Updates on current legal issues and developments

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