Trade Wars
AND THEIR IMPACT ON DETROIT

BY LESLIE ALAN GLICK

President Trump has declared that "Trade Wars" are good and easy to win and has set the stage for some of the most intense tariff and trade battles which have not been seen in this country since the Smoot-Hawley Tariff in the 1930s, which some historians and economists argue led to the Great Depression. Tariffs have now come to affect the daily lives and well-being of a large part of the country in diverse sectors, ranging from manufacturing to agriculture, and have had an impact on the stock market. An announcement of increasing certain tariffs on China from 10% to 25% likely caused the stock market to drop by 600 points in one day (see "Dow drops more than 600 points, posts worst day since January" https://wcnbc.com/2019/05/13/us-markets-react-to-china-trade-war-news-and-more.html).

The tariff impact has been especially felt in Michigan, and the Detroit metropolitan area due to its high concentration in the automotive industry sector, which has been particularly impacted by the "Trade Wars" and tariff issues in many ways: The automotive industry today is more dependent on international supply chains than ever before, and changes in tariffs or quotas that might affect costs and delivery times can have a catastrophic effect. Moreover, the question of who absorbs the tariffs–the supplier or the customer–has become a challenge and concern with lawyers for automotive manufacturers and their suppliers looking for answers in the"terms and conditions" of their contracts that often have not explicitly addressed these issues. The broader issue of Presidential authority to impose tariffs under certain laws is being considered in both the courts and Congress.

The first shot was fired on March 8, 2018 in the "Trade Wars" by the U.S., when President Trump used Section 232 of the Trade Expansion Act of 1962 to impose a 25% tariff on steel imports (83 FR 11625) and a 10% tariff on aluminum imports (83 FR 11619). Section 232, sometimes referred to as the National Security Clause, authorizes the President to impose tariffs or quotas if he "finds that an article is being imported into the U.S. in such quantities or under such circumstances as to threaten to impair the national security." If this occurs, "the President is authorized to take such action as he deems necessary to adjust the imports of such articles." The language itself is quite broad, but the authority has been used sparingly until recently. Previous cases involved countries, such as Iran and Libya, and the last prior invocation of the statute was in 1982. However, President Trump has now given new life to this statute with the strong encouragement of his Trade Representative Robert Lighthizer. Unlike other trade laws that require a majority vote of the six-member U.S. International Trade Commission (USITC), which is a bipartisan agency with no more than three commissioners from any party, Section 232 is decided entirely by the U.S. Commerce Department. The Commerce Department is part of the Cabinet and makes non-binding recommendations to the President. While there is input from the Defense Department as well, it is not dispositive.

The Section 232 tariffs now apply to most countries, with the exception of Brazil, Argentina, Australia, and South Korea. All of these countries, except Australia, had to agree to quotas to obtain the exemption. Mexico and Canada have also been more recently exempted, which removed a major obstacle to the approval by Canada and Mexico of the new U.S. Mexico Canada Agreement (USMCA) that will replace NAFTA.

Section 232 tariffs on steel and aluminum, fortunately, have been subject to an exclusion process, based on such factors as lack of domestic production and economic hardship, that is still available to U.S. importers, but Section 232 tariffs nevertheless have had a huge impact on many companies, particularly in the automotive industry. The processing time by the Department of Commerce for these exclusions has been slow, although they are retroactive if granted.

On May 23, 2018, the Trump Administration initiated a second Section 232 investigation into the imports of motor vehicles and automotive parts (83 FR 24735). Hearings were held on this new Section 232 case on July 19, 2018–which I attended–and out of 45 witnesses only two supported the proposed tariffs. The U.S. automotive industry, from original equipment manufacturers to parts suppliers and car dealers were uniformly opposed to these tariffs that were supposedly

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being proposed by the government to protect them. On February 17, 2019, the Commerce Department issued its report to the President, which was kept confidential. However, on May 17, 2019, the President announced that for six months he was postponing any decision on these tariffs, but indicated that the Commerce Department report did find that American-owned automotive R&D and manufacturing are vital to national security. The proposed section 232 tariffs were a topic for discussion at the August, 2019 G-7 meeting in France. President Trump indicated that in view of an agreement in principle with Japan on a new trade agreement, that Japan would not likely be included in any section 232 tariffs on automobiles and auto parts which should prove beneficial to the many Japanese companies located in and serving the automotive industry in Michigan.

In view of these events, it is not surprising that lawyers for importers have attempted to challenge these tariffs in court. This has taken place in the Court of International Trade (CIT) in New York, an Article III court that has exclusive jurisdiction over tariff and trade matters. An early case involving an importer of steel from Russia, *Severstal Exp. GmbH v. United States*, No. 18-00057, Slip Op. 18-37(Ct. Int'l Trade, Apr. 5, 2018), unsuccessfully attempted to obtain a preliminary injunction against the Section 232 tariffs. More recently, a three-judge panel of the CIT reviewed the constitutionality of the law in *American Inst. For Int'l Steel v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade, March 25, 2019) and found that the Congress had delegated broad powers to the President under Section 232, which were supported by a Supreme Court precedent in *Fed. Energy Admin. et al. v. Algonquin Sng, Inc.*, 426 U.S. 548 (1976), and that not only did the President have the broad constitutional power to increase tariffs under Section 232, but his judgment as to the impact of the subject imports on the national security was within his sole discretion and not subject to court review.

This interpretation, which was supported by all three judges based on precedent, but only reluctantly by at least one of the three, was inevitably headed for the Supreme Court, but cert was denied on 6/24/2019 in *Am. Inst. for Int'l. Steel, Inc. v. United States*, 139 S. Ct. 2748 (2019). Thus, Section 232 is a strong weapon in the President's arsenal in the "Trade Wars" and likely to be used again. While it is difficult to predict the Supreme Court action in future cases that might arise, it is possible, given the makeup of the court, that they might well decide that it is only Congress that can alter the strong delegation of power it has given to the President under this statute. In fact, there have already been several bills introduced to this end. *See, e.g.* The Bicameral Congressional Trade Authority Act of 2019, S 287 and HR 940. However, it is reasonable to assume that the President will veto any bill designed to limit his power in this area, and it is questionable whether a two-thirds majority in both houses of Congress exists in the present Congress to overturn such a veto.

The tension between the executive branch and Congress on the use of executive power to take trade related actions has recently expanded in relation to the other major contested trade issue that has been on the forefront of the news, the Presidential use of Section 301 of the Trade Act of 1974. Pub.L. 93–618, 19 U.S.C. § 2411 in respect to imports from China. Section 301 is a broad statute that gives the President, through his U.S. Trade Representative (USTR), the means by which the United States can address "unfair" foreign barriers to U.S. exports and enforce U.S. rights under trade agreements. A complete discussion of Section 301 is outside the scope of this article. A good reference to further understand this wide-ranging law can be found in the Congressional Research Service Report to Congress, Section 301 of The Trade Act of 1974, As Amended: Its Operation and Issues Involving its Use by the United States, August 17, 2000, Order Code 98-454 E.

Following a Memorandum from President Trump, on August 18, 2017, the U.S. Trade Representative initiated an investigation under Section 301 of the Trade Act of 1974 into the Government of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section).

After required public hearings and a public comment period, the President issued a series of tariffs on Chinese

products in several tranches currently totaling four different lists. These duties have been increased periodically in response to Chinese retaliatory tariffs against the U.S.

More recently, on Friday, August 23, 2019, before departing for the G-7 meeting in Europe, President Trump through a tweet (@realDonaldTrump, TWITTER, August 23, 2019, 2:00 PM) announced that additional duties will be added to the existing duties under Section 301 lists 3 and 4 as follows: For existing "list 3" goods (approximately $250 billion worth of Chinese imports), the increase will be from 25% to 30%, effective October 1, 2019, later extended to October 15, 2019, following a required notice and comment period. For the "List 4" goods already subject to 10% tariffs that the President announced earlier on approximately $300 billion of Chinese imports, the tariffs will now be 15%, effective on the already scheduled dates for tariff increases on these imports.

What raised additional public attention and legal scrutiny of this effort was an announcement in a Presidential Tweet that "Our great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing your companies HOME and making your products in the USA." @realDonaldTrump, TWITTER August 23, 2019, 7:59 AM. After considerable questions about his authority to take this action the President later tweeted the same day, citing as his legal authority for such action, the Emergency Economic Powers Act of 1977. *Id.* 8:58 PM. This is an issue likely to raise additional court challenges. Congress can vote to terminate a national emergency through a joint resolution, but it is subject to Presidential veto. See National Emergencies Act, 50 U.S.C. Section 1662.

At least for the next two years, it looks like "Trade Wars" are here to stay, particularly as long the President perceives that he is winning them, but tempered by the economic realities of adverse reactions in the stock market and the effect on the economy. What is clear is that legal actions concerning the President's authority in the tariff and trade area will continue to be in the forefront defining the balance of power between the executive and legislative branches. This is certain to have a great impact on the automotive industry and the Detroit metropolitan area. What makes this process more difficult for attorneys and their clients is that many of these actions are taken through the informal avenue of Presidential tweets, often not followed up with formal proclamations or Federal Register notices for days or weeks. In addition, deadlines for various tariff increases have frequently been extended, often as a negotiating tactic and occasionally to give importers more time to adjust, and reflecting the hardship resulting from tariff increases on shipments already in transit.

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