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EU REACTION TO THE US NATIONAL SECURITY MEASURES

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Legal Briefings – By **Lode Van Den Hende, Partner and Eric White, Consultant**

The US Commerce Department issued Section 232 national security investigation reports on steel and aluminium.

President Trump has since, on 8 March, signed proclamations imposing duties of 25% on steel and 10% on aluminium imports which will enter into force on 23 March 2018.

To counter protests from "allies" of the US that they do not threaten US security, the proclamations state that:

"Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel/aluminum articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require."

The proclamations do however immediately exempt imports from Canada and Mexico because of they constitute a "special case". It is suggested that the exemption will be terminated if the NAFTA negotiations do not provide an alternative solution to the national security concerns.

THE EU RESPONSE

The EU rejects the US claim that these measures are necessary or even intended to address a national security concern and has announced three actions in response to these measures:

- WTO dispute settlement action against the measures.
- Rebalancing action under Article 8 of the Safeguards Agreement if the US does not offer trade compensation as foreseen in that provision. Press statements have referred to duties on politically sensitive products such as Kentucky Bourbon Whiskey, Blue Jeans and Harley Davidson Motorcycles as well as duties on exports of US steel.
- The initiation of (proper) safeguard proceedings by the EU to ensure that excess steel that is diverted from the US market is not imported into the EU in such increased quantities as to cause serious injury to EU industry.

The EU has also requested an exemption from the US measures since it considers that its security and even trade relationsip with the US is as important as that of Canada and Mexico. However, the US has so far not indicated what precise critieria it will apply or what procedure it will follow in deciding on exemptions.

WTO LEGAL ASSESSMENT OF THE PROPOSED EU RESPONSE

WTO DISPUTE SETTLEMENT

The EU takes the view that the kind of action taken by the US comes within the scope of the WTO Safeguards Agreement and must satisfy the conditions set out in that agreement. The Safeguards Agreement allows the imposition of temporary supplemental duties where an investigation demonstrates that a product is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. In principle these increased imports must be due to unforeseen circumstances.

The EU considers that the US has not satisfied the various conditions of the Safeguards Agreement and that therefore the proclamations constitute violations of the Safeguards Agreement.

The EU, together with an alliance of 7 other WTO members successfully brought a WTO dispute settlement case against the George W Bush safeguard measures on steel products in 2002-2003. That case was adjudicated within 18 months and the measures were withdrawn by the US under threat of WTO sanctioned trade retaliation from the EU and others.

The US does not even claim that its measures are justified by the Safeguards Agreement but relies on the "national security exception" in Article XXI GATT. This provides, in its paragraph (b)(iii), that "Nothing in this Agreement shall be construed … to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests … taken in time of war or other emergency in international relations".

While the traditional US view has been that this provision is "self-judging" and its invocation is not subject to dispute settlement, the EU view, at least since the conclusion of the WTO Agreement, has been that any action taken on the basis of the provision must be justified in accordance with its terms. The two already crossed swords on the matter in the Helms Burton dispute back in 1996.

While a WTO dispute settlement case is likely to be brought by a number of countries, the prospect of a speedy solution is less promising than in 2002 because the United States is currently blocking the appointment of new Members of the WTO **Appellate Body**, thereby impeding the functioning of the dispute settlement system.

REBALANCING ACTION UNDER ARTICLE 8 OF THE SAFEGUARDS AGREEMENT

The EU further takes the view that since the US measures come within the scope of the WTO Safeguards Agreement it is entitled to apply a special remedy that does not require recourse to dispute settlement.

Article 8(1) of the Safeguards Agreement requires a country wishing to impose a safeguard measure, on request of any affected Members, to enter into consultations to offer "adequate means of trade compensation for the adverse effects of the measure" on the trade of the other Members. If no agreement is reached within 30 days the affected exporting Members are entitled to suspend, on 30 days written notice, "the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure".

Paragraph 3 of Article 8 provides that such action cannot be taken for a period of three years where the safeguard measure has been imposed not in response to an absolute increase but merely a relative increase in imports (i.e. an increase in market share in a deceasing market).

The advantage of this course of action is that if the US disapproves it would itself need to take dispute settlement action against the "rebalancing action". For that to be effective, it would need a functioning WTO dispute settlement system.

The US President has threatened to retaliate against this retaliation by imposing duties on EU automobile exports but this would be a clear a blatant violation of the WTO Agreement which prohibits unauthorised retaliation without recourse to dispute settlement (Article 22.1 DSU).

THE INITIATION OF SAFEGUARD PROCEEDINGS BY THE EU

An additional concern of the EU is that the excess steel production will be diverted from the US market and be imported into the EU exacerbating the already delicate state of the industry. To protect against this the EU is preparing to start an investigation with a view to adopting its own, presumably legal, safeguard measures. It remains to be seen whether all the conditions of the Safeguards Agreement will be demonstrated as satisfied by the EU investigation. One interesting question will be whether the illegal US action could be considered an "unforeseen circumstance".

Again, the situation is reminiscent of the earlier steel crisis in 2002 when the US safeguard action prompted similar action around the world, including by the EU.

THE LEGALITY OF EXEMPTIONS

Naturally, every country is eager to obtain an exemption from the US measures and the EU has joined the fray. However, these exemptions pose an additional problem. The GATT contains a general Most Favoured Nation obligation (the MFN principle) which demands that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

Of course, the national security exception in Article XXI GATT can also justify a departure from the MFN principle. However, countries that do not benefit from an exemption will be likely to argue that the difference in treatment needs to be justified by objective differences relating to security – and not by trade concerns.

The WTO has avoided ruling on the MFN issue arising out of exemptions in earlier safeguard cases by holding them inconsistent with the WTO because of a breach of the "principle of parallelism" that it has developed. This requires exports from exempted countries to be excluded from the assessment of the need for the measures.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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