

CLIENT ALERT

June 4, 2019

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INTERNATIONAL TRADE

PRESIDENT TRUMP ANNOUNCES IMPOSITION OF TARIFFS ON ALL GOODS IMPORTED INTO THE US FROM MEXICO EFFECTIVE JUNE 10, 2019

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The President of the United States of America (POTUS) Donald Trump declared a national emergency at the US-Mexico border on May 30, 2019, and announced the imposition of tariffs on “all goods imported from Mexico” effective June 10, 2019. <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/>. Pursuant to the White House release, the tariffs will proceed on the following schedule:

- June 10, 2019 5%
- July 1, 2019 10%
- August 1, 2019 15%
- September 1, 2019 20%
- October 1, 2019 25%

The tariffs may be lifted “if the illegal migration crisis is alleviated through effective actions taken by Mexico, to be determined in [the US]’ sole discretion and judgment, . . .”

In contrast to the Section 232 national security tariffs imposed by the US on Mexico’s steel and aluminum sector and recently lifted, POTUS now has invoked the International Emergency Economic Powers Act (IEEPA), which is a successor of the Trading with the Enemy Act (TWEA) dating back to World War I. The next step in the IEEPA process is that the President must “immediately” transmit the proclamation declaring the national emergency to Congress and publish it in the Federal Register. The President must also specify the provisions of law that he intends to use. Notably, the President was required to consult with Congress “in every possible instance” before exercising any of the authorities granted under IEEPA, which the White House likely will contend had been done throughout 2019 as part of the immigration discussions (including during the government shutdown).

Additionally, once the President declares a national emergency invoking IEEPA, he must immediately transmit a report to Congress specifying:

1. The circumstances which necessitate such exercise of authority;
2. Why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;
3. The authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;
4. Why the President believes such actions are necessary to deal with those circumstances;
5. Any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

The President subsequently is to report on the actions taken under the IEEPA at least once in every succeeding six-month interval that the authorities are exercised. The emergency may be terminated by the President, by a privileged joint resolution of Congress, or automatically if the President does not publish in the Federal Register and transmit to Congress a notice stating that such emergency is to continue in effect after such anniversary. However, to date, Congress has never attempted to terminate a national emergency invoked by any President.

Key IEEPA Considerations:

1. Again, it is critical to note that POTUS invoked these tariffs using the IEEPA and not the Section 232 tariffs used for steel, aluminum, and autos, nor the Section 301 tariffs used for the China investigations. The IEEPA is a congressional grant of sweeping powers to POTUS “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.” Entering 2019, US Presidents had declared 54 national emergencies invoking IEEPA, 29 of which are still ongoing. Typically, national emergencies invoking IEEPA last nearly a decade, although some have lasted significantly longer. For example, the first state of emergency declared was in response to the taking of US embassy staff as hostages by Iran in 1979 and remains in force.
2. IEEPA has been challenged in the courts with minor effect and Congress has placed some limits in the statute, largely relating to timing elements. It must be emphasized that POTUS’ authority under IEEPA, to date, has been recognized as extremely broad.
3. IEEPA remedies generally include blocking monetary transactions and freezing assets. There are examples (e.g., Nicaragua) where specific goods exported from the country have been barred entry into the US. **HOWEVER, no President has used IEEPA to place tariffs on imported products from a specific country or on products imported to the US in general.** Consequently, the use of IEEPA to impose tariffs of this nature is uncharted territory.

Next Steps:

1. Details on implementation of the IEEPA and tariffs are limited at this time to the White House Statement and press interviews with the White House Chief of Staff and Secretary of Homeland Security. The initial takeaways from these sources are that the IEEPA approach is an escalation by the US to catalyze Mexico toward (a) securing the Mexico border at Chiapas and Guatemala; (b) strengthening crackdowns on organizations that assist migrants travelling from the Central America through Mexico to the US border; and (c) seeking a longer term arrangement such as a “safe third agreement” between the US and Mexico, into which, to date, Mexico has been reluctant to enter.
2. It follows that Mexico’s reaction to the declaration of a national

emergency will be critical to the path forward. If Mexico responds to the US and the parties work constructively, the tariff impact may be minimal. However, Mexico may respond with retaliatory tariffs while the parties attempt to address the issues. Monitoring of Mexico's reaction is an imperative.

3. The Federal Register Notice likewise will provide business-critical details. For example, the only definition of what products may be impacted is "all goods imported from Mexico." Questions remain as to determining country of origin, NAFTA marking rules, application of substantial transformation, and transshipment, among many, many others. Also, there lacks any indication as to whether an exclusion process will be established. Dickinson Wright will continue to provide guidance once the FRN is published.
4. Given that US Customs and Border Protection (US-CBP) has been redeploying commercial officers off the line since March 2019 to address humanitarian issues at US-CBP, the imposition of tariffs on all imports will be a logistical and staffing nightmare at the US-Mexico ports of entry (POEs). Constant communication with counsel, carriers, freight forwarders, and customs brokers will be necessary as we await guidance from US-CBP. Given the most goods are moving from 0% tariffs to 5%, the resulting processing volumes will be unprecedented. Should this issue not be resolved by June 10, 2019, there likely will be extreme processing times at the US-Mexico POEs and a potential de facto closure of the US-Mexico commercial border. Indeed, as the business community races to move product from Mexico into the US to "beat the tariffs," we can expect immediate delays at the already suffering US-Mexico POEs.
5. Companies should be reviewing pricing, timely performance and just-in-time provisions in contracts. Additionally, while force majeure and related clauses were largely ineffective in the Sections 232/301 contexts, companies should consult with counsel to determine applicability upon this declaration of a national emergency pursuant to IEEPA. Dickinson Wright is available to assist with our ongoing monitoring of force majeure developments.

United States-Canada-Mexico Agreement (USMCA)

1. The IEEPA announcement surprisingly came on a day that witnessed momentum building on USMCA with a US Vice Presidential/Prime Minister of Canada meeting following Canada's introduction of legislation to ratify the USMCA. Mexico's President called for an extraordinary session of Mexico's senate to be held this summer to ratify USMCA, and the White House pressed forward with procedural mechanisms (i.e., the filing of the final text of USMCA and the Statement of Administrative Action) to ensure all timing hurdles would be clear should the US House of Representative desire to consider the USMCA implementing legislation in mid-July 2019. The White House was quick to emphasize that the IEEPA and USMCA were on different tracks;

however, it is difficult to envision a scenario where Mexico or the US Congress will advance USMCA legislation with IEEPA tariffs in place. USMCA was already facing a tight timing window to achieve ratification in Summer 2019 (pre-2020 election season), the likely delays that will follow in the wake of IEEPA tariffs will require Avengers-like ability to transcend space and time. End Game USMCA may be on hold until this issue is resolved.

2. As the tariffs are being invoked pursuant to IEEPA as opposed to Section 232, the auto side letters in USMCA, which came into force at their signing in November 2018, are inapplicable given that they are limited to Section 232. Mexico also negotiated Most Favored Nation (MFN) protection for certain volumes of automobiles and parts in USMCA; however, these protections, even if applicable to the present situation, are not in force because they are part of the main text of USMCA that still requires ratification. Other than IEEPA violating the spirit of USMCA, the new agreement is of little use in the IEEPA context.
3. Dickinson Wright will be hold a webinar on these issues and USMCA on June 5, 2019 to fully address the matters <https://www.globalchamber.org/events/2019/05/30/globinar/globinar-key-update-on-immigration-and-usmca/>.

Congress / Courts

1. Congress likely will object to IEEPA tariffs. However, it is likely that Congress will give POTUS the initial period until June 10 to see if IEEPA brings Mexico to the table. Should the US and Mexico fail to constructively engage, Congressional pressure will mount, perhaps serving as the catalyst for various pieces of legislation sitting in committees that seek to limit the Executive Branch's authority over tariffs. The trade nexus to immigration makes this a politically challenging issue. Suffice it to summarize, companies should not rely on a potential congressional remedy.
2. While a court challenge may arise almost immediately, given the lack of success in past matters, companies need to employ their own specific contracting, sourcing, purchasing, and pricing programs to mitigate these potential harms.

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