Husch Blackwell LLP Blog (March 2, 2021)

Federal Circuit Upholds President's Authority To Impose Section 232 Tariffs On Steel And Aluminum

On February 28, 2020, the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's decision that found the institution of Section 232 tariffs on steel and aluminum were not an unconstitutional delegation of authority by Congress to the President under Supreme Court precedent. This appeal addressed the basic steel and aluminum products that were subject to the March 23, 2018, Presidential Proclamation but the appeal did not address the issues being raised regarding the procedural and substantive legality of the more recent derivative steel and aluminum products in the Presidential Proclamations of 9704 and 9705. Thus, absent a successful appeal to the U.S. Supreme Court, the section 232 tariffs of 25% on steel and the 10% tariffs on aluminum will remain in force.

The Federal Circuit stated that it was bound by Supreme Court precedent concluding that Section 232 is not an unconstitutional delegation of authority of Congressional powers to the President. The Court of International Trade had reached the same conclusion.

The applicable binding precedent is the *Algonquin* case, which was decided in 1976. The Federal Circuit specifically stated that "We affirm without deciding what ruling on the constitutional challenge would be proper in the absence of *Algonquin*." Thus, the Federal Circuit may have been troubled by the *Algonquin* decision but believed it was bound to follow it based upon the principle of *stare decisis*. The Court also declined to find itself free to strike down Section 232 on the grounds of the overreach of the delegation doctrine even though the Supreme Court in another case, *Hampton*, potentially makes *Algongquin* no longer binding. To quote the Federal Circuit – "Five members of the Court have recently expressed interest in at least exploring reconsideration of the {delegation} standard. . . . But such expressions give us neither license to disregard the currently governing precedent nor a substitute standard to apply." The Federal Circuit also stated that it does "not have a full briefing on the issues that might demand exploration under a standard different from the one stated in *Hampton*." The Federal Circuit thus took the path of judicial restraint: "If a precedent of {the Supreme Court} has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving {the Supreme Court}, the prerogative of overruling its own decisions."

As a result, the only recourse for AIIS is to either ask for review by the full Federal Circuit (an *en banc* review) or ask for a writ of *certiorari* to allow appeal to the U.S. Supreme Court. AIIS has indicated it will ask for such Supreme Court review. While the Supreme Court generally refuses to hear most requests for appeals, the delegation issue and the broad interpretation of the term "national security" could make this appeal an exception.