

UNITED STATES COURT OF INTERNATIONAL TRADE
NEW YORK, NEW YORK

SEVERSTAL EXPORT GMBH and
SEVERSTAL EXPORT MIAMI CORPORATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
UNITED STATES CUSTOMS AND BORDER
PROTECTION,
ACTING COMMISSIONER KEVIN K.
MCALEENAN,
DEPARTMENT OF COMMERCE,
SECRETARY WILBUR L. ROSS, and
PRESIDENT DONALD J. TRUMP,

Defendants.

Case No. 18-00057

NONCONFIDENTIAL
VERSION

COMPLAINT

This is an action by a Swiss exporter of steel and its U.S. affiliate that serves as the importer of record of steel that was under contract for delivery to U.S. customers prior to the announcement on March 8, 2018 of a 25 percent tariff on imported steel by defendant President Donald J. Trump. The imposition of that tariff on the Plaintiffs' steel is unconstitutional inasmuch as the Administration's Steel Proclamation was issued purely for political and economic reasons, and therefore exceeded the scope of Congress's delegation of authority to the Executive Branch to impose tariffs to promote and protect national security. Moreover, the tariffs as applied to shipments that were already on the water as of March 8, 2018 are unenforceable for failure to provide fair notice.

Accordingly, Plaintiffs Severstal Export GmbH (“SSE”) and Severstal Export Miami Corporation (“SSE Miami”) (collectively, “Plaintiffs”), by and through their undersigned counsel, bring this Complaint against the United States of America, United States Customs and Border Protection, Acting Commissioner Kevin K. McAleenan, the United States Department of Commerce, Secretary Wilbur L. Ross, and President of the United States Donald J. Trump (collectively “Defendants”). The Complaint seeks injunctive relief against the imposition of the Steel Proclamation tariffs and a declaration that those tariffs are unconstitutional because they are not tied to the interest of protective national security.

PARTIES

1. Plaintiff SSE is a Swiss company that contracts for sales of steel to U.S. and other foreign customers. Its principal office is at Via Cantonale 2c, Centro Galleria 2, CH-6928, Manno, Switzerland.

2. Plaintiff SSE Miami is a Florida corporation that acts as the importer of record for SSE’s steel products into the United States, and is headquartered at 8750 NW 36th Street, Suite 250, Miami, Florida 33178.

3. SSE and SSE Miami are wholly-owned subsidiaries of PAO Severstal, a Russian producer of carbon and alloy steel products.

4. Defendant United States of America is the federal government of the United States of America.

5. Defendant United States Customs and Border Protection (“CBP”) is an executive agency of the U.S. Government, and a component of the Department of Homeland Security. This agency is headquartered at 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

6. Defendant Commissioner Kevin K. McAleenan is the Acting Commissioner of the United States Customs and Border Protection. He is sued in his official capacity.

7. Defendant United States Department of Commerce (“Commerce Department”) is an executive agency of the U.S. Government, and is headquartered at 1401 Constitution Ave N.W., Washington, D.C. 20230.

8. Defendant Wilbur L. Ross is the Secretary of Commerce. He is sued in his official capacity.

9. Defendant Donald J. Trump is the President of the United States. He is sued in his official capacity.

JURISDICTION AND STANDING

10. This Court possesses exclusive jurisdiction to entertain this action pursuant to 28 U.S.C. § 1581(i)(2).

11. Section 1581 provides, as relevant, that “the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for ... (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.” 28 U.S.C. § 1581(i)(2)-(4).

12. Plaintiffs have standing to challenge the Defendants’ unlawful acts and omissions in adopting, implementing, and enforcing the Steel Proclamation. Plaintiffs are

exporters and importers of steel products who are responsible for the payment of tariffs on their imports. The Steel Proclamation will inflict severe and irreparable injuries upon Plaintiffs.

13. These injuries are directly traceable to the challenged Steel Proclamation, and would be redressed by a favorable decision declaring that the Steel Proclamation is unlawful and unconstitutional as applied to Plaintiffs, including those vessels containing steel products that are currently in transport by sea to the United States, and enjoining its enforcement against Plaintiffs.

TIMELINESS

14. An action under 28 U.S.C. § 1581(i) must be commenced within two years after the cause of action first accrues.

15. The claims asserted by Plaintiffs accrued at the earliest on March 8, 2018, the date on which the President issued the Steel Proclamation. This action is therefore timely filed.

FACTS

SSE's Business With U.S. Customers

16. SSE is the overseas selling arm of PAO Severstal, a Russian producer of carbon and alloy steel products. SSE negotiates and arranges sales with foreign customers, including those in the United States. SSE is a wholly-owned subsidiary of PAO Severstal.

17. PAO Severstal produces carbon and alloy steel included in the Harmonized System ("HS") for steel mill products 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes.

18. SSE Miami assists with sales steel products to the United States, and in many cases acts as importer of record for sales in the United States. SSE Miami is headquartered in Miami, Florida, and has two employees in the United States. SSE Miami is a wholly-owned subsidiary of PAO Severstal.

19. For sales to the United States, SSE and SSE Miami maintain the relationships with the customers, and negotiate product specifications, price, quantity, sales and delivery terms with such customers.

20. Once SSE contracts for a sale, [, the terms are sent to PAO Severstal. Then, PAO Severstal decides whether it can produce the specifications as requested.

21. PAO Severstal produces the products and loads them onto ships at the port in St. Petersburg, Russia for shipment to the United States. Once loaded on the vessel, title transfers from PAO Severstal to SSE.

22. The time period between a signed sales agreement with the customer and shipment to the United States can be three to four months depending on the product specifications and production schedules.

23. On arrival in the United States, SSE Miami arranges for importation and pays all applicable duties for sales that are sold on Delivered Duty Paid ("DDP") terms. Under these terms, SSE Miami is responsible for paying all entry fees upon importation. Once the goods clear United States Customs, title transfers to SSE's customer.

24. These terms are specified in the sales contracts with U.S. customers. SSE Miami's failure to adhere to these terms – including paying all duties – would result in a breach of contract.

25. SSE has a number of long-term customers in the United States. In some instances, SSE has sold to certain United States customers for at least 20 years. SSE's US customers include [

]. The steel materials being shipped all have specifications prescribed by contract for the particular end use of the customer. In other words, in most instances, the steel SSE sells is not fungible—a particular shipment cannot simply be sold to another customer for a different end use.

The Steel Proclamation Tariffs

26. On March 8, 2018, to the surprise of many and contrary to the findings of the U.S. Department of Defense concerning the national security status of the U.S. steel industry, President Trump issued Proclamation no. 9705, entitled “Adjusting Imports of Steel In the United States” (the “Steel Proclamation”). The Steel Proclamation determined that the import of steel articles required adjustment under the powers delegated to the President by Section 232 of the Trade Expansion Act of 1962. (Ex. E, ¶ 8.)

27. The Steel Proclamation imposed a 25 percent *ad valorem* tariff on steel articles. (Ex. E, ¶ 8.) This tariff has no stated termination date. The Steel Proclamation exempts any imports of steel from Canada and Mexico. (Ex. E., ¶ 8.)

28. The Steel Proclamation will inflict immediate, severe, and irreversible injuries on the Plaintiffs.

29. The Steel Proclamation, and Defendants' actions in adopting, implementing, and enforcing the Steel Proclamation, are unlawful as applied to Plaintiffs.

30. Specifically, the President's Steel Proclamation was an unconstitutional exercise of his authority under Section 232 of the Trade Expansion Act of 1962 because his stated national security justification is a pretext.

31. The Steel Proclamation is inconsistent with the findings of the Commerce Department's investigation into the effects of imports of steel mill products on the national security of the United States. That investigation was begun on April 17, 2017 by the Secretary of Commerce, citing Section 232 of the Trade Expansion Act of 1962. President Trump ordered that the investigation be completed in June of 2017.

32. However, this June 2017 deadline came and went. Therefore, it was not clear to Plaintiffs SSE and SSE Miami and the trading public in general what remedy—if any—would ultimately be imposed, or when.

33. Finally, on January 11, 2018, the Secretary of Commerce issued a report titled "The Effects of Imports of Steel on the National Security" on January 11, 2018 (hereinafter "the Steel Report").

34. The Steel Report recommended implementing a global tariff of at least 24 percent on all steel imports; a tariff of at least 53 percent on imports from Brazil, China, Costa Rica, Egypt, India, Malaysia, Russia, South Africa, South Korea, Thailand, Turkey and Vietnam, with all other countries subject to quotas by product on imports equal to 100 percent of their 2017 exports to the United States; or a quota on all steel products from all countries equal to 63 percent of each country's 2017 exports to the United States.

35. Even with the release of the Steel Report and its suggested remedy, it was not clear what would be done. According to press reports, a number of members of the Trump Administration were opposed to the tariffs, and the Department of Defense

weighed in with a view that undercut any national security rationale for tariffs on imports, declaring that the domestic industry had sufficient capacity to fulfill the country's defense needs.

36. Given these developments, it was entirely unclear whether any tariffs would be imposed, if they were imposed how large they would be, to whom they would apply and for how long. Throughout this period, SSE continued to enter into contracts to make sales to the United States through the end of 2017 and beginning of 2018.

37. Yet on March 8, 2018, contrary to the advice of many of his economic advisors, in the face of DoD's statements that the domestic industry was sufficiently strong to meet national security needs, and over the outcry of hundreds of Senators and Members of Congress, President Trump signed the Steel Proclamation imposing a 25 percent tariff on imports of steel mill products. The tariffs are scheduled to be implemented on March 23, 2018, with no declared end date.

38. Further demonstrating that the "national security" rationale is a specious pretext for the Steel Proclamation, President Trump has exempted two of the largest steel exporters to the United States—Canada and Mexico—from the tariffs. The President's public statements on these exemptions lay bare that not only was the Steel Proclamation a political move, but the true rationale was simply that of seeking leverage in other trade negotiations.

Steel Proclamation's Affect on Plaintiffs

39. SSE estimates that it has over [] metric tons of product on the water headed for U.S. Customers under contracts entered into prior to March 8, and over [] metric tons of product left to ship soon under such contracts. These shipments

will not enter the United States before the imposition of duties on March 23, 2018, and therefore will be subject to the 25 percent duty sought to be imposed by the Steel Proclamation.

40. The Plaintiffs are therefore faced with a Hobson's Choice. First, they could fulfill their contracts with their U.S. customers but have to pay a tariff that would likely bankrupt SSE Miami. Second, they could incur the wrath of their U.S. customers by seeking to have those customers pay, in whole or in part, the tariff. Or, third, they could take the difficult and sometimes impossible step of trying to divert the shipment from the U.S. and send it to a different customer, thereby potentially breaching their contracts with customers.

41. SSE Miami estimates the tariffs payable on the goods currently in transit to the United States will be approximately []. As noted above, under the terms of the contracts, SSE Miami is responsible for paying the duties, but SSE Miami does not have sufficient funds to pay these tariffs.

42. If these tariffs are imposed, the Plaintiffs will suffer the following irreparable harm:

- a. Once paid, there is no lawful way for Plaintiffs to recover the tariffs they pay in the event that the Steel Proclamation is ultimately determined to be invalid.
- b. The tariffs will effectively wipe out the Plaintiffs' painstakingly-built U.S. business and ruin the goodwill and reputation that has taken over 20 years to grow and develop. Since the duration of these duties is indeterminate, the Plaintiffs will be unable to be a

reliable supplier to these U.S. customers, forcing them to look for alternative steel producers from the United States, Canada, Mexico or other countries that the President excluded from the duties.

- c. SSE Miami does not have adequate reserves to pay the duties. SSE Miami operates on commission and has an annual budget of approximately []. In order to cover the possible duties in the short term, SSE Miami has obtained a loan from its parent company. However, its ability to repay the loan is in serious doubt if it can no longer earn commissions on sales in the United States due to the duties.
- d. With the loss of its sales in the United States, PAO Severstal will be forced to close SSE Miami. While a small office, it does play an important role in PAO Severstal and SSE's sales to the United States. As a result of this action, two people will lose their jobs.
- e. Should the Plaintiffs seek to avoid the tariffs by not delivering the steel to contracted U.S. customers, the failure to deliver will cause a substantial loss of goodwill and damage to their reputation as a reliable supplier. Attempts to re-negotiate the terms of outstanding contracts with customers has already strained the good will between SSE and its customers. []

]

COUNT I

DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201

43. Plaintiffs hereby incorporate by reference paragraphs 1 through 42 of this Complaint.

44. The Steel Proclamation states on its face that it was issued because the importation of steel articles threatened to “impair the national security.” However, the national security basis stated in the Steel Proclamation is a pretext to the actual intent for the imposition of tariffs on steel articles: President Trump’s regularly stated intent, both prior to entering the Office of the President, and after assuming the Presidency, to obtain a “positive trade balance” with other countries, to “bring jobs home”, and win trade wars. Because President Trump did not base his decision on national security grounds as required under Section 232 in issuing the Steel Proclamation, the Proclamation is unlawful.

45. The Constitution vests in Congress all powers related to the regulation of trade, including the imposition of tariffs and duties. The Executive has only those powers delegated to it by Congress. President Trump exceeded the authority delegated to him by Congress in Section 232, since that authority was limited to circumstances where he was legitimately acting in the interest of national security. Since the asserted national security grounds were a thinly veiled pretext for the President’s political agenda and his America First economic policy, the Steel Proclamation is unconstitutional and should be struck down. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952) (courts have authority to review whether the President’s actions violated the United States

Constitution or another federal statute); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) (“When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.”).

46. Because the Steel Proclamation was unlawfully and unconstitutionally issued, any actions taken by the Defendants to implement and enforce the Steel Proclamation are *ultra vires* and unlawful.

COUNT II

TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

47. Plaintiffs hereby incorporate by reference paragraphs 1 through 42 of this Complaint.

48. Plaintiffs contracted with their clients to ship steel products prior to the issuance of the Steel Proclamation. The steel products are currently being shipped by sea and are heading to ports in the United States.

49. If the tariffs imposed by the Steel Proclamation are not suspended as applied to Plaintiffs, or specifically with respect to the steel products already in transit prior to the issuance of the Steel Proclamation, SES and SES Miami do not have an adequate remedy at law.

50. Enforcing the tariffs in the Steel Proclamation will result in immediate and irreparable harm to SES and SES Miami that cannot be remedied solely by the recovery of damages. Indeed, there are no applicable legal means to recover damages or the return of the tariffs once paid.

51. The harms include, but are not limited to:

- a. An inability to receive a refund of the payment of the unlawful tariffs;
- b. Plaintiffs will be compelled to forgo business opportunities;
- c. Plaintiffs may be forced to close SSE Miami;
- d. SSE and SSE Miami's goodwill with customers will be irreparably damaged;
- e. SSE's ability to sell steel alloy products to customers in the United States will be irreparably damaged; and
- f. SSE and SSE Miami's ability to conduct business in the United States once the tariff is lifted will be irreparably harmed.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

- (1) Hold and declare that the Steel Proclamation, as applied to Plaintiffs, is unauthorized by, and contrary to, the laws of the United States;
- (2)(a) Enjoin Defendants from implementing or enforcing the Proclamation against Plaintiffs;
- (2)(b) In the alternative to (2)(a), enjoin Defendants from implementing or enforcing the Steel Proclamation against Plaintiffs in regards to Plaintiffs' steel articles subject to the Steel Proclamation that are currently in transit via sea to the United States;
- (3) Pursuant to Court of International Trade Rule 65(b)(2), set an expedited hearing within fourteen (14) days to determine whether the Temporary Restraining Order should be extended; and

(4) Grant Plaintiffs such further and additional relief as this Court may deem just and proper.

Respectfully submitted,

THOMPSON HINE LLP

March 22, 2018

By: _____/s/_____

Mark P. Lunn
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
Phone: 202.263.4115
Fax: 202.331.8330
mark.lunn@thompsonhine.com

David A. Wilson
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
Phone: 202.263.4161
Fax: 202.331.8330
david.wilson@thompsonhine.com

*Counsel to Severstal Export GmbH and
Severstal Export Miami Corp.*