

Legal Sidebar

UPDATE: A Steely Look at Steel: Commerce Directed to Prioritize Investigation of the Effects of Steel Imports on National Security

05/01/2017

UPDATE: On April 27, 2017, President Trump issued a nearly-identical [Presidential Memorandum](#) directing the Secretary to also prioritize investigating the effects of aluminum imports on national security pursuant to Section 232(b).

The original post from April 24, 2017, is below.

On April 20, 2017, President Trump issued a [Presidential Memorandum](#) (“Memorandum”) directing the Secretary of Commerce (“Secretary”) to prioritize investigating the effects of steel imports on national security pursuant to [Section 232\(b\) of the Trade Expansion Act of 1962](#). Under the Act, if the Secretary determines that steel “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” the President is authorized to take actions “to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” While not explicitly specified by the statute, such actions might include [imposing import quotas](#), [imposing license fees on imported goods](#), or [negotiating trade agreements](#) that otherwise restrict the importation into or exportation to the United States of the imported article.

Why Steel?

The steel industry figures prominently in [U.S. trade policy](#) and has been the subject of [many domestic legal challenges](#) related to unfair trade practices, as well as disputes before the World Trade Organization. From 2009 to 2016, for example, the [U.S. Trade Representative](#) filed twenty enforcement actions at the World Trade Organization, six of which related to the steel industry. The U.S. Department of Commerce also operates a [Steel Import Monitoring and Analysis \(SIMA\) System](#) to collect and publish data about steel product imports.

As noted in [Section 1 of the Memorandum](#), the United States already has many [antidumping](#) and [countervailing](#) duty orders in place on imported steel products. Such orders impose duties on goods that are sold in the United States at less-than-fair value (i.e., “dumped”), or have benefited from countervailable subsidies, and are injuring or threaten to injure the domestic steel industry. According to a fact sheet published by the [U.S. Trade Representative](#) in April 2016, of the 332 duty orders then in place, almost half (149) covered foreign steel products. Antidumping and/or countervailing duty orders cover a [large and diverse group of steel products with a broad geographical reach](#), ranging from hot-rolled carbon steel flat products from Australia, Brazil, China, India, Indonesia, Japan, Korea, Netherlands, Russia, Taiwan, Thailand, Turkey, Ukraine, and the United Kingdom; to steel nails from China, Korea, Malaysia, Oman, Taiwan, United Arab Emirates, and Vietnam; to steel wire garment hangers from China, Taiwan, and Vietnam. The fact sheet also reports that in fiscal year 2015, two-thirds of the 62 investigations Commerce initiated to investigate allegations of unfair trade practices involved steel products, and \$900,000 worth of steel products were seized and \$45.5 million in penalties were assessed for violations of antidumping and/or countervailing duty laws.

According to [Section 1 of the Memorandum](#), however, the President believes these measures “have not substantially

alleviated the negative effects that unfairly traded imports have had on the United States steel industry.” One particular area of concern is the issue of excess capacity. The Memorandum states that “both the United States and global markets for steel products are distorted by large volumes of excess capacity—much of which results from foreign government subsidies and other unfair practices.” According to the April 2016 fact sheet, “global crude steelmaking capacity more than doubled from 2000 to 2014, with global capacity growth led by an unprecedented expansion in capacity by China,” while “global demand for steel is weakening.”

Why National Security?

With respect to national security, [Section 1 of the Memorandum](#) notes that industries such as the steel industry “are critical elements of our manufacturing and defense industrial bases, which we must defend against unfair trade practices and other abuses.” In [Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 \(1976\)](#), a case involving a challenge to President Ford’s imposition of quotas and license fees on imports of petroleum and petroleum products under Section 232(b), the Supreme Court noted that during congressional hearings on the precursor statute to the Trade Expansion Act of 1962, “there was substantial testimony that increased imports were threatening to damage various domestic industries whose viability was perceived to be critical to the national security.” Thus, one purpose of the Trade Expansion Act of 1962 and its precursor was to counter such effects. [One provision of the statute](#) directs the Secretary and the President to “recognize the close relation of the economic welfare of the Nation to our national security.”

Although investigations under Section 232(b) have not been initiated in recent years, they were occasionally initiated in prior decades to examine the effects on national security of imports of a range of products, such as [iron ore and semi-finished steel \(2001\)](#); [crude oil and petroleum products \(1999\)](#); gears and gearing products (1991) (56 Fed. Reg. 56,626); uranium (1989) (54 Fed. Reg. 8225); anti-friction bearings (1987) (52 Fed. Reg. 28,857); metal-cutting and metal-forming machine tools (1983) (48 Fed. Reg. 15,174); and bolts, nuts and large screws of iron or steel (1982) (47 Fed. Reg. 13,546). Perhaps one reason these investigations are infrequently conducted may be that such investigations rarely result in a finding that certain imports threaten to impair national security. [As one commentator has noted](#), of the twenty-six investigations that have been initiated over the last fifty-five years, only two found a threat to national security; both of these investigations, one from 1979 and the other from 1983, involved crude oil.

How Do Such Investigations Proceed?

Section 232(b) provides that after the Secretary initiates an investigation, he must consult with the Secretary of Defense as to the “methodological and policy questions” the investigation will raise, and may request that the Defense Secretary provide “an assessment of the defense requirements” of the articles under investigation. According to the statute, the Secretary may also consult with other officers of the United States.

[Sections 705.1 through 705.12 of Title 15 of the Code of Federal Regulations](#) detail the procedures for how Commerce shall conduct such investigations. In addition to consultations with the Defense Secretary and other U.S. officers, these procedures specify that the Secretary may solicit information and advice relevant to the investigation by publishing a request in the *Federal Register* for “written comments, opinions, data, information or advice relative to the investigation” from “any interested party,” and may hold public hearings to elicit further information if he deems such action appropriate.

What Factors Will Be Examined?

[Section 232\(d\)](#) delineates the factors the Secretary and the President shall consider in such investigations, including:

- “Domestic production needed for projected national defense requirements, [and] the capacity of domestic industries to meet such requirements”;
- “existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense”;
- “requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth”;

- “the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements”;
- “the impact of foreign competition on the economic welfare of individual domestic industries; and”
- “any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports.”

[Section 2 of the Memorandum](#) draws upon these criteria and specifically directs the Secretary to consider them in the context of the steel industry. It also directs the Secretary to “consider the status and likely effectiveness of efforts of the United States to negotiate a reduction in the levels of excess steel capacity worldwide.”

What Happens Next?

Under [Section 232\(b\)\(3\)\(A\)](#), the Secretary has 270 days after the date the investigation is initiated to submit a report to the President on the effects of steel imports on national security. The report must include the Secretary’s recommended course of action or inaction based on the findings of the investigation. Pursuant to the statute, if the Secretary finds that steel “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.” The portions of the report that do not contain classified or proprietary information will be published in the *Federal Register* pursuant to [Section 232\(b\)\(3\)\(B\)](#).

Next, under [Section 232\(c\)\(1\)](#), within 90 days of receipt of a report by the Secretary finding that steel imports threaten to impair national security, the President shall determine: (1) whether he concurs with the Secretary’s findings; and (2) what actions should be taken to adjust the imports of steel and its derivatives so they no longer threaten to impair national security. [Section 232\(c\)\(2\)](#) then directs the President to submit to Congress a written statement of “the reasons why the President has decided to take action, or refused to take action” within 30 days of the date such determinations are made.

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