

# For National Security, Trump Administration Initiates Rarely Used Section 232 Statute to Probe Into Steel Imports

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On April 19, 2017, Secretary of Commerce Wilbur Ross launched a Section 232 investigation on all steel imports from anywhere in the world. On April 20, President Trump signed a memorandum directing Secretary Ross to “proceed expeditiously in conducting the investigation” and prepare a report with his findings and recommended “actions and steps that should be taken to adjust steel imports so that they will not threaten to impair the national security.”

## What is Section 232?

Section 232 investigations are conducted under the authority of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862). These procedures examine the effect of imports on US national security. Investigations may be initiated based on an application from an interested party, a request from the head of any department or agency, or at the self-initiation of the Secretary of Commerce.

## Investigation Process

Once an investigation is initiated, the Secretary of Commerce has 270 days to present the Department’s findings and recommendations to the President. While US law requires that the Commerce Department consult with the Department of Defense regarding the methodological and policy questions that arise during a Section 232 investigation, other government agencies, such as the Departments of State and Labor, can also participate in Section 232 interagency working groups based upon their relevant expertise and/or interest.

During the course of the investigation, the Commerce Department may provide the public with an opportunity to comment and present information relevant to the investigation, usually following notice in the Federal Register. Additional information can be gathered from sources such as surveys of producers, importers and end-users; on-the-record meetings with interested parties; site visits; and a review of public literature.

If the Commerce Secretary finds that imports threaten to impair the national security, the President has 90 days to determine whether he agrees with the Secretary’s findings and to determine whether he will use his statutory authority to adjust imports of the relevant product and its derivatives.

President Trump has expressed a desire to complete the whole Section 232 process in 50 days. US trade authorities are generally hard pressed to do the needed fact and merits analysis within the statutory deadlines set by US trade law deadlines, which are already viewed as tight.

## Potential Outcomes

### President Determines Action is Necessary

If President Trump concurs that the imports threaten national security, he must determine the nature and duration of any action to adjust the imports of the article and its derivatives, so that such imports will no longer threaten the national security.

President Trump must implement any such action no later than 15 days after he determines to take action. Within 30 days after such a determination, President Trump must submit to Congress a written statement of the reasons why he decided to take action. Possible actions include new tariffs and quotas limiting importation of the relevant article, but will not result in a complete ban on importation of the article.

If President Trump decides to seek negotiation of an agreement limiting or restricting imports of the article that he has found threatens to impair national security, and either no such agreement is entered into before 180 days after the date on which the President makes the determination to take such action, or such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security, the President may take such other actions under Section 232 as he deems necessary to adjust imports of the article so they no longer threaten to impair US national security. President Trump must publish notice of any additional actions in the Federal Register.

### President Determines No Action is Necessary

No later than 30 days after President Trump makes a determination that no action is necessary, he is required to submit to Congress a written statement of the reasons explaining why. If he determines not to take any action, President Trump must also publish such a determination in the Federal Register together with an explanation of his reasons why.

## Prior Section 232 Investigations

Only two Section 232 investigations have been pursued since the US joined the World Trade Organization (WTO) in 1995: crude oil in 1999, and iron and steel in 2001. In both cases, the Bureau of Industry and Security (BIS) within the Commerce Department recommended the President not take action under Section 232.

In the 1999 crude oil investigation, the Commerce Department found that the imports threatened national security, but did not recommend that the President use his authority under Section 232 to adjust oil imports. The President approved the finding that imports of crude oil threatened US national security and concurred that no action was necessary to adjust imports.<sup>1</sup>

BIS found in its most recent Section 232 investigation that, based on the statutory language and Congressional intent, the Section 232 standard would be met where imports of the product at issue threaten to impair US national security either (i) “by fostering US dependence on unreliable or unsafe imports,” or (ii) “by fundamentally threatening the ability of US domestic industries to satisfy national security needs.”

Accordingly, BIS concluded that imports of iron ore and semi-finished steel did not threaten to impair the national security of the US, and therefore, could not recommend to the president that he take action under Section 232 to adjust the level of imports.<sup>2</sup> The President subsequently determined that no action was necessary to adjust imports.

## Another Rarely Used Statute – Section 201 Investigations and Relevant Insights

There has also been discussion by the Trump Administration and others of possibly using – either instead of or in addition to Section 232 – Section 201 of the Trade Act of 1974, as amended (19 U.S.C. § 2251) to restrict steel imports. Section 201 (also called safeguard or escape clause) investigations require that the US International Trade Commission (ITC) first find that the domestic industry is seriously injured or threatened with serious injury due to increased imports. In the event of an affirmative determination, the ITC recommends appropriate remedies to the President. President Trump then does what he deems is in the national interest.

As a general rule, Section 201 investigations (like those conducted under Section 232) are not that common. For Section 201, this is because the statute provides an especially high injury standard to get past the ITC; the President must then also determine that any import restrictions are in the general US national interest, historically another high hurdle.

<sup>1</sup> US Dep’t of Commerce, The Effects of Imports on the National Security (June 2007), available at: <https://www.bis.doc.gov/index.php/forms-documents/section-232-investigations/86-section-232-booklet/file>.

<sup>2</sup> US Dep’t of Commerce, The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security (October 2001), available at: <https://www.bis.doc.gov/index.php/forms-documents/section-232-investigations/81-iron-ore-and-semi-finished-steel-2001/file>.

That said, in June 2002, President George W. Bush signed a proclamation imposing increased tariffs on certain steel products under Section 201. The Bush Section 201 action led countries around the world (even China) to implement mirror safeguard/escape clause import restrictions as to steel imports. President Bush lifted the tariffs in December 2003 to avoid over US\$2 billion in retaliatory tariffs approved by the WTO in a case brought by the European Union, where that US 201 action was found contrary to the WTO. President Trump has suggested withdrawing from the WTO, but doing so might just accelerate any foreign retaliatory tariffs, since WTO approval might then no longer be felt necessary before retaliating against the US.

The Trump Administration may have initially chosen the Section 232 route to avoid Section 201 hurdles, and give President Trump more discretion by framing it as a national defense issue. But any Section 232 action might face the same WTO, foreign retaliation and reciprocal responses of the Bush Section 201 action before it.

## Potential Impacts and Next Steps

Despite the publicity surrounding the memorandum, President Trump’s action has simply launched the investigation. It remains to be seen what, if any, official actions may follow the assessment. The Trump Administration may face some political pressure to act in support of the domestic steel industry. US steel interests claim that the current US unfair trade laws, where they must file trade complaints on a country-by-country, product-by-product basis, put them in a position of having to effectively play whack-a-mole. That said, any actions could negatively impact the US economy. Further, any 232 action risks major protests by foreign governments and even retaliatory import restraints on US exports. Foreign countries could also challenge the action at the WTO. Major US corporations that use steel or whose exports are threatened may also protest any Section 232 action.

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