Legal Defense of the U.S. Section 232 National Security Action on Steel Imports

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I. INTRODUCTION AND OVERVIEW

Domestic manufacturing capacity for essential needs is key to national economic security:

> Not only the wealth, but the independence and security of a country, appear to be materially connected with the prosperity of manufactures. Every nation, with a view to these great objects, ought to endeavor to possess within itself all the essentials of national supply. These comprise the means of subsistence, habitation, clothing and defense.[1]

No, it was not a tweet; it is from the first U.S. Treasury Secretary Alexander Hamilton's seminal "Report on the Subject of Manufactures" (manufacturers), delivered to the first Congress in 1791 in response to the U.S. House of Representatives' request for Secretary Hamilton to focus on "the subject of manufactures, and particularly to the means of promoting such as will tend to render the United States independent of foreign nations for military and other essential supplies."[2] Presciently, Hamilton advocated for import duties on iron and steel, the foundational key to manufacturing and developing our country:

> [T]he principal raw material of which each manufacture is composed . . . As, in the first place—Iron: The manufactures of this article are entitled to preeminent rank. None are more essential in their kinds, nor so extensive in their uses. They constitute in whole or in part the implements or the materials or both of almost every useful occupation. Their instrumentality is everywhere conspicuous . . .
>
> The only further encouragement of manufactories of this article, the propriety of which may be considered as unquestionable, seems to be an increase of the duties on foreign rival commodities.
>
> Steel is a branch, which has already made a considerable progress, and it is ascertained that some new enterprises, on a more extensive scale, have been

1. *Alexander Hamilton's Final Version of the Report on the Subject of Manufactures*, NAT'L ARCHIVES (Dec. 5, 1791), https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007. The author credits U.S. Court of International Trade Judges Katzmann and Gordon for highlighting Hamilton's report in their recent concurring opinion in *Universal Steel Prod., Inc. v. United States*, No. 19-00209, slip op. 21-12 (Ct. Int'l Trade, Feb. 4, 2021) [hereinafter *Universal Steel*].

2. *Universal Steel*, No. 19-00209, slip op. at 29.

> lately set on foot. The facility of carrying it to an extent, which will supply all internal demands . . . cannot be doubted. The duty upon the importation of this article, which is at present seventy five cents per Cwt., may it is conceived be safely and advantageously extended to 100 Cents. It is desirable, by decisive arrangements, to second the efforts, which are making in so very valuable a branch.[3]

Though much has changed since the 1790s, one thing has not: iron and steel are still the conspicuous backbone of manufacturing and thus national economic security for the United States and all other major economies. In 1951, the strategic importance of the steel industry to prosperity and security (peace) led to the Treaty of Paris between Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany to create the European Steel and Coal Community, the predecessor to the European Union.[4] China's modern rise has been in no small part through building more steel capacity than the rest of the world combined and becoming the lead exporter of steel and steel-intensive products.

In 2018, in response to massive global steel overcapacity and relentless steel imports that supplant American steel mills and jobs and threaten the United States' ability to meet critical infrastructure and defense needs, President Donald Trump invoked Section 232 of the Trade Expansion Act of 1962 to impose national security tariffs and quotas on steel imports [hereinafter the Steel 232 action].[5] The Steel 232 action is working to reduce imports and continues to support the American steel industry's investments in advanced (sustainable and "green") steel capacity, jobs, skills, and technology, thus strengthening America's ability to mine iron and coal and melt and pour the most advanced steels right here at home, all which strengthens U.S. national and economic security.[6] The Section 232 statute and Steel 232 action, however, are frequently misunderstood and unfairly criticized by some as an abuse of power, a bad economic policy, an improper invocation of national security for protectionist purposes, unconstitutional, posing the risk of a global trade war, and threatening the entire world trading system, to name some of the primary critiques without attribution to their typical sources.

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3. *Alexander Hamilton's Final Version of the Report on the Subject of Manufactures*, *supra* note 1.

4. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

5. 19 U.S.C. § 1862(a).

6. *See*, *e.g.*, Adam S. Hersh and Robert E. Scott, *Why Global Steel Surpluses Warrant U.S. Section 232 Import Measures*, ECON. POL'Y INST. (Mar. 2021), https://www.epi.org/publication/why-global-steel-surpluses-warrant-u-s-section-232-import-measures/.

This Article focuses on the *legal* challenges and issues related to the Section 232 statute and Steel 232 action, though it should inform relevant *policy* debates:

- Part II of this article walks through the Section 232 statute subsection by subsection and summarizes the historic use of Section 232 before providing an in-depth summary of the current Steel 232 action.
- Part III then examines the constitutionality of the Section 232 statute by reviewing the Supreme Court's seminal case on Section 232 and steel importers' 2018-2020 constitutional challenge to the Section 232 statute.
- Part IV examines the lawfulness of the Steel 232 action through an analysis of the legal challenges to the Steel 232 decided thus far.
- Part V very briefly summarizes the World Trade Organization (WTO) disputes regarding other countries' challenges to the Steel 232 action.
- Part VI concludes with a provocative perspective and recommendation on the Steel 232 action in light of the foregoing legal analysis and overall economic and political conditions.

II. BACKGROUND ON SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

A. Unpacking the Statute (19 U.S.C. § 1862)

U.S. national security tariffs trace back to 1955, in the aftermath of the Cold War.[7] Section 232 begins by both restricting and adding to two other statutory provisions that grant the President certain discretionary authority to enter into trade agreements and proclaim modifications to import tariffs based thereon.[8] Specifically, Section 232 subsection (a) prohibits a "decrease or elimination of duties or other import restrictions" pursuant to 19 U.S.C. §§ 1351 or 1821(a) if "the President determines that

7. Trade Agreements Extension Act of 1954, Pub. L. No. 83-464, 68 Stat. 360 [hereinafter TAEA]. TAEA extended the President's trade promotion authority on the condition that any new trade agreements must include the ability to withdraw tariff reductions if the President found that such reductions threaten domestic capacity to meet national defense requirements. TAEA was amended in 1955 to add the ability to restrict imports that threaten to impair national security, TAEA of 1955, Pub. L. No. 84-86, 69, Stat. 162, and in 1958 to add factors to consider when making national security determinations including the "close relation of the economic welfare of the Nation to our national security."

8. 19 U.S.C. § 1862(a).

such reduction or elimination would threaten to impair the national security."[9]

Section 232 subsections (b) through (d) provide the procedural, temporal, and substantive requirements for the President to adjust imports of an article the Secretary of Commerce (Secretary) finds "threaten to impair the national security."[10] A Section 232 investigation begins with a request from the head of any federal agency, a petition from an interested party, or self-initiation by the Secretary.[11] The Secretary must consult with the Secretary of Defense regarding the "methodological and policy questions" and defense requirements raised in any Section 232 investigation.[12] The Secretary must also "seek information and advice from, and consult with, appropriate officers of the United States" and, "if it is appropriate . . . hold public hearings or otherwise afford interested parties an opportunity to present information and advice."[13] Within 270 days of the investigation initiation, the Secretary must submit to the President a report on the findings of the investigation and recommendations for action or inaction.[14] A public version of the Secretary's report must eventually be published in the Federal Register.[15]

If the Secretary finds that importation of the article threatens to impair national security, within ninety days of receiving the Secretary's report, the President must determine whether he/she concurs with the Secretary's findings and, if so, "the nature and duration of that action that, in the judgement of the President, must be taken to adjust the import of the article and its derivatives so that such imports will not threaten to impair the national security."[16] If the President decides to "take action to adjust imports" (*e.g.*, impose tariffs or quotas, establish a task force, pursue negotiations, *etc.*), the action must begin within fifteen days of the President's determinations.[17] The President must provide Congress a written statement of the reasons the President decided to take or not take action.[18] If the President's action includes the negotiation of an agreement that restricts imports that threatens to impair national security, and no

9. *Id.*
10. *Id.* § 1862(c)(1)(A).
11. *Id.* § 1862(b)(1)(A).
12. *Id.* § 1862(b)(1)-(2).
13. *Id.* § 1862(b)(2).
14. *Id.* § 1862(b)(3)(A).
15. *Id.* § 1862(b)(3)(B).
16. *Id.* § 1862(c)(1)(A).
17. *Id.* § 1862(c)(1)(B).
18. *Id.* § 1862(c)(2).

agreement is reached within 180 days after the President's determination or the agreement is ineffective in eliminating the threat, the President must "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security."[19] The President must publish in the Federal Register any determinations to take or not take additional action.[20]

Moving from process to substance, while neither Section 232 nor its legislative history provide a specific definition of "national security," subsection (d) provides factors the Secretary and President "shall" consider in making their respective determinations:

> domestic production needed for projected national defense requirements, 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, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and 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.[21]

Section 232 subsection (d) also specifically directs the Secretary and the President to "recognize the close relation of the economic welfare of the Nation to our national security" and, when determining whether any "weakening of our internal economy" may impair the national security, to take into consideration:

> 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[22]

Thus, "national security" under Section 232 is much broader than national defense and military requirements: "national security" under Section 232 includes national economic security and the protection of domestic industries from import competition.[23]

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19. *Id.* § 1862(c)(3).
20. *Id.*
21. *Id.*
22. *Id.* § 1862(d).
23. *See id.*

Finally, Section 232 subsection (f) was added in 1980 to provide for Congressional disapproval of import adjustments of petroleum or petroleum products.[24]

B. Historic and Current Section 232 Investigations and Actions

Between 1962 and 2016, twenty-six Section 232 investigations were completed, sixteen of which the Secretary determined that the subject imports did not threaten to impair national security.[25] Of the ten investigations in which the Secretary determined that imports threatened to impair national security and made recommendations to the President, the President concurred and acted on eight recommendations.[26] The President only imposed Section 232 actions to restrict petroleum imports, specifically various licensing fees and supplemental fees on petroleum imports and embargoes on petroleum imports from specific countries.[27] The other pre-2017 Section 232 actions were focused on supporting/developing the relevant domestic industry and/or international negotiations.[28]

The last Section 232 investigation before 2017 was the 2001 investigation of iron and semi-finished steel, in which the Secretary determined that subject imports did not threaten to impair national security.[29] For full context, a concurrent Section 201 (of the Trade Act of 1974, 19 U.S.C. § 2251 *et seq.*) safeguard investigation resulted in President George W. Bush imposing safeguard tariffs on semi-finished and other steel imports from March 2002 to December 2003.[30]

In parallel with its 2017-2018 Section 232 investigation on steel imports, the Commerce Department also conducted a Section 232 investigation of aluminum imports, which resulted in ten percent tariffs on aluminum imports from almost all countries.[31] The aluminum Section 232 tariffs are still in effect and mirror the steel Section 232 action in terms of exclusion request process, country-specific alternative quantitative

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24. *Id.* § 1862(f); Crude Oil Windfall Profit Tax of 1980, P.L. 96-223, 94 Stat. 220.

25. *See* CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (2020), https://fas.org/sgp/crs/misc/R45249.pdf [hereinafter CRS].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, 67 Fed. Reg. 1958 (Jan. 15, 2002).

30. To Provide for the Termination of Action Taken with Regard to Imports of Certain Steel Products, 68 Fed. Reg. 68483 (Dec. 8, 2003).

31. Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11619 (Mar. 15, 2018).

limitations and exemptions, and subsequent expanded coverage of certain derivative aluminum product imports.[32]

In May 2018, the Commerce Department self-initiated a Section 232 investigation of passenger cars, sports utility vehicles, vans, light trucks, and automotive parts.[33] Secretary of Commerce Wilbur Ross submitted the final Section 232 report on autos to President Trump in February 2019, but the report has not been publicly released to date despite multiple attempts and requests,[34] and the President did not issue a public concurrence or determination in the autos Section 232 investigation.

Based on petitions from the domestic industry, the Commerce Department initiated Section 232 investigations of uranium imports[35] and titanium sponge imports[36] in July 2018 and March 2019, respectively, with Secretary Ross ultimately determining that uranium and titanium sponge imports threaten U.S. national security.[37] Despite the Secretary's conclusions, President Trump declined to enact the recommended Section 232 quotas on uranium and Section 232 tariffs on titanium sponge, instead establishing interagency working groups to address the issues raised in the Secretary's reports.[38]

The Commerce Department has not yet publicly announced the results of its Section 232 investigations of imports of electrical transformers and related parts, including grain-oriented electrical steel or "GOES" (initiated in May 2020)[39] or imports of vanadium (initiated in June 2020),[40] but in November 2020, USTR announced that Mexico

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32. *See* infra subsection c.

33. Notice on Section 232 National Investigation of Imports of Automobiles and Automotive Parts, 83 Federal Register 24735 (May 30, 2018).

34. *See* CRS, *supra* note 25, at 18-19.

35. Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Uranium, 83 Fed. Reg. 35204 (July 25, 2018).

36. Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Titanium Sponge, 84 Fed. Reg. 8503 (Mar. 8, 2019).

37. Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group, 2019 DAILY COMP. PRES. DOC. 470 (July 12, 2019) [hereinafter Uranium Imports Memo]; Memorandum on the Effect of Titanium Sponge Imports on the National Security, 2020 DAILY COMP. PRES. DOC. 103 (Feb. 27, 2020) [hereinafter Titanium Sponge Imports Memo].

38. Uranium Imports Memo, *supra* note 37; Titanium Sponge Imports Meno, *supra* note 37.

39. Notice of Request for Public Comment on Section 232 National Security Investigation of Imports of Laminations for Stacked Cores for Incorporation into Transformers, Stacked Cores for Incorporation into Transformers, Wound Cores for Incorporation into Transformers, Electrical Transformers, and Transformer Regulators, 85 Fed. Reg. 29926 (May 19, 2020).

40. Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Vanadium, 85 Fed. Reg. 34179 (June 3, 2020).

would establish a strict monitoring regime to prevent transshipment of non-North American GOES in exchange for an exemption from any import action resulting from that investigation.[41] Though Secretary Ross also initiated a Section 232 investigation of mobile crane imports in May 2020,[42] it was terminated upon the request of the petitioner in November 2020.[43]

C. Steel 232 Action Status and Chronology of Events (2017-Present)

As of May 16, 2021, the current Steel 232 action subjects U.S. imports of certain steel products to a twenty-five percent *ad valorem* tariff, except for imports from:

- Argentina, Brazil, and South Korea, which are subject to restrictive quotas;
- Canada and Mexico, which are not subject to either tariffs or quotas, but tariffs could be re-imposed on surging product groups after consultations; and
- Australia, which is not subject to tariffs, quotas, or an anti-surge mechanism.[44]

Certain specific steel products are also excluded from the Section 232 tariffs via the Commerce Department's exclusion process and regulations.[45] The below subsections walk through the Steel 232 investigation, report, and proclamations to date.

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41. *See* Press Release, USTR, USTR Statement on Successful Conclusion of Steel Negotiations with Mexico, (Nov. 5, 2020), https://ustr.gov/index.php/about-us/policy-offices/press-office/press-releases/2020/november/ustr-statement-successful-conclusion-steel-negotiations-mexico.

42. Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Mobile Cranes, 85 Fed. Reg. 31439 (May 26, 2020).

43. Press Release, U.S. Department of Commerce, Bureau of Industry and Security, Commerce Department Terminates Section 232 Investigation into Mobile Crane Imports (Dec. 4, 2020).

44. *See* Proclamation No. 9711, 83 Fed. Reg. 13361, 13361-63 (Mar. 28, 2018); Joint Statement by the United States and Canada on Section 232 Duties on Steel and Aluminum, *available at* https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Canada.pdf [hereinafter Joint Statement 1]; Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminum, *available at* https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Mexico.pdf [hereinafter Joint Statement 2]; Proclamation No. 9740, 83 Fed. Reg. 20683, 20684 (May 7, 2018); Proclamation No. 9759, 83 Fed. Reg. 25857 (June 5, 2018).

45. Steel and Aluminum Tariffs: Commerce Should Improve Its Exclusion Request Process and Economic Impact Reviews, GAO (Sept. 15, 2020), https://www.gao.gov/products/gao-20-517.

1. Steel 232 Investigation and Report

In April 2017, pursuant to Section 232, Secretary Ross initiated an investigation into the impact of steel imports on the national security.[46] The Commerce Department published a notice in the Federal Register soliciting public comments and announcing a public hearing in May,[47] which included representatives from foreign and domestic governments, domestic producers, importers, and foreign producers.[48] During the investigation, the Commerce Department held consultations with the Defense Department, including U.S. Army Material Command, the Defense Logistics Agency, the U.S. Navy/Naval Air Systems Command, and the Under Secretary of Defense for Acquisitions & Logistics, Manufacturing and Industrial Base Policy.[49] The Commerce Department also held discussions with the Departments of State, Treasury, Interior (U.S. Geological Survey), Homeland Security (U.S. Customs and Border Protection), the U.S. International Trade Commission, and the United States Trade Representative (USTR).[50]

In January 2018, Secretary Ross provided President Trump the Steel 232 Report of findings and recommendations.[51] Though various parts of the Steel 232 Report are discussed in other relevant sections of this Article, it is worth highlighting the report's key findings, conclusions, and recommendations to truly understand the rationale and factual support for the Section 232 action.[52] Many mistakenly think the reasoning was solely based on the fact that some steel is used by the U.S. military, so the Commerce Department concluded that steel imports are a national security threat and recommended the imposition of tariffs on those imports—but that is not even half of the comprehensive reasoning behind the findings.[53] The Steel 232 Report can be boiled down to five key findings, two key conclusions, and three recommended options for action, described below.

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46. Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19205 (Apr. 26, 2017).

47. *Id.*

48. U.S. Dept. of Commerce, Bureau of Industry and Security, The Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended (2018), at 18 [hereinafter Steel 232 Report]; Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 85 Fed. Reg. 40202 (July 6, 2020).

49. Steel 232 Report, *supra* note 48, at 19-20.

50. *Id.* at 20.

51. *Id.*

52. *Id.*

53. *Id.*

First, Secretary Ross found that steel is important to the "economic welfare of the United States" and U.S. national security, which under the Section 232 statute encompasses not only national defense and military needs that require about three percent of U.S. steel production during peacetime, but also sixteen critical economic sectors that account for over half of U.S. total steel demand (54 million metric tons of the total U.S. steel market of 107 million tons in 2017).[54] The Secretary explained why the United States needs commercially viable steel producers to meet defense needs:

> No company could afford to construct and operate a modern steel mill solely to supply defense needs because those needs are too diverse. In order to supply those diverse national defense needs, U.S. steel mills must attract sufficient commercial (i.e., non-defense) business. The commercial revenue supports construction, operation, and maintenance of production capacity as well as the upgrades, research and development required to continue to supply defense needs in the future.[55]

The Secretary found that steel is increasingly required for U.S. critical infrastructure: "those industries that the U.S. Government has determined are critical to minimum operation of the economy and government."[56] Specifically, the Secretary relied on the sixteen designated critical infrastructure sectors previously identified by the Obama-Biden Administration,[57] many of which use high volumes of steel, including "chemical production, communications, dams, energy, food production, nuclear reactors, transportation systems, water, and waste water systems."[58] The Secretary also found that "increased quantities of steel will be needed for various critical infrastructure applications in the coming years," citing the American Society of Civil Engineers' estimate that the United States needs to invest $4.5 trillion in infrastructure by 2025.[59] The Secretary noted that decades of U.S. Government actions by multiple Administrations to ensure the continued viability of the U.S. steel industry demonstrates bipartisan consensus that domestic steel production is vital to national security.[60]

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54. *Id.* at 2-27.
55. *Id.* at 23.
56. *Id.* at 24.
57. *See* Presidential Policy Directive 21 on Critical Infrastructure Security and Resilience (Feb. 12, 2013), available at https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.
58. Steel 232 Report, *supra* note 48, at 24.
59. *Id.*
60. *Id.*

Second, Secretary Ross found that increasing steel imports had captured more than thirty percent of the U.S. market and damaged the domestic steel industry, manifested in steel mill closures, substantial declines in employment (down thirty-five percent since 2000), lost domestic sales, revenue, market share, and average negative net income for American steel mills since 2009.[61] The Secretary found that the declining domestic steel capacity utilization rate (total production capacity divided by total production; less than seventy percent in 2016) is not economically sustainable given the high capital-intensity of steel production and that capacity utilization rates of "80 percent or greater are necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector."[62] The Secretary noted that, while antidumping and countervailing duties can address certain instances of unfairly traded imports of specific products from specific countries, imports of most types of steel continue to increase and, given the large number of steel-producing and exporting countries and products involved, it would take years and many millions of dollars to identify and investigate every instance of dumped, subsidized, and/or circumventing steel imports.[63]

Finally, Secretary Ross found that growing global excess steel capacity (a.k.a. overcapacity) is a "circumstance that contributes to the weakening of the domestic economy."[64] The G-20 and the Organisation for Economic Cooperation and Development (OECD) Committee on Steel track the global "capacity-production gap" for raw steel.[65] The Secretary found that global steel capacity increased "at a steady rate," but global steel demand "contracted sharply in the aftermath of the global economic and financial crisis of 2008," recovered slowly thereafter, and "flattened" since 2013, resulting in increasing global excess steel capacity.[66] In 2016, global excess steel capacity was 737 million tons, *which is more than five times the total U.S. market for steel products*.[67] In other words, global overcapacity could literally inundate the U.S. market many times over, without diverting one ton of current production or sales.

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61. *Id.* at 3-4, 27-41.
62. *Id.* at 4, 47-49.
63. *Id.* at 3, 28-29.
64. *Id.* at 4.
65. *See*, *e.g.*, DAICHI MABASHI, LATEST DEVELOPMENTS IN STEELMAKING CAPACITY, OECD Doc. DSTI/SC(2019)3/FINAL, available at https://www.oecd.org/industry/ind/recent-developments-steelmaking-capacity-2019.pdf.
66. Steel 232 Report, *supra* note 48, at 51.
67. *Id.* at 5.

The Secretary found that Chinese *excess* capacity of more than 300 million tons "dwarfs total U.S. production capacity."[68] The Secretary noted that foreign steel industries had significantly increased their production capacity since 2001, "with China alone able to produce as much steel as the rest of the world combined," which means that the domestic steel industry "will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives and offset loss of markets to Chinese steel imports."[69]

In other words, the Secretary found that domestic steel capacity is fundamental to national security (which includes not only national defense and military needs, but also critical infrastructure, economic security, and the viability of the defense industrial base) and the domestic steel industry has been significantly adversely impacted by imports and massive global steel overcapacity, which threaten the sustainability of the industry and national security.

Based on the above findings, Secretary Ross concluded that "present quantities and circumstances of steel imports are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232" and that "the only effective means of removing the threat of impairment is to reduce imports to a level that . . . enable U.S. steel mills to operate at 80 percent or more of their rated production capacity."[70] Through an econometric modeling analysis from Purdue University, the Commerce Department calculated that steel import volumes needed to decline by thirty-seven percent to achieve eighty percent domestic capacity utilization under then-current conditions.[71] The Secretary recommended three options for achieving the needed thirty-seven percent reduction in imports:

- Quantitative restrictions (quotas) equal to sixty-three percent of current import volumes on imports from all countries;
- Twenty-four percent tariffs on imports from all countries; or
- A hybrid of fifty-three percent tariffs on imports from twelve countries perceived as the worst offenders (*i.e.,* Brazil, Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica) and a 100 percent quota on all other countries.[72]

68. *Id.* at 52.
69. *Id.* at 5 and 51-54.
70. *Id.* at 5.
71. *Id.* at 8.
72. *Id.* at 7-9.

2. Proclamation 9705 Establishing the Steel 232 Action (2018)

In March 2018, President Trump established the Steel 232 action with his first of a series of presidential proclamations.[73] Proclamation 9705 began by quoting the Secretary's most important findings, conclusions, and recommendations included in the Steel 232 Report:

> The Secretary found that the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy," resulting in the "shrinking [of our] ability to meet national security production requirements in a national emergency." Because of these risks and the risk that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," and taking into account the close relation of the economic welfare of the Nation to our national security, see 19 U.S.C. 1862(d), the Secretary concluded that the present quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.[74]

Proclamation 9705 highlighted that the Steel 232 Report considered the 2001 Section 232 investigation of iron and semi-finished steel imports and noted "dramatic changes" in the steel industry since then, including increased global steel excess capacity, increased U.S. imports, the reduction in U.S. integrated steel facilities, the number of idled steel mills despite increased demand for steel in critical industries, and the potential impact of further closures on capacity needed in a national emergency.[75] Proclamation 9705 then summarized the Steel 232 Report's recommendations to adjust steel imports to eliminate such imports' threat to national security with "a global tariff of 24 percent on imports of steel . . . to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production."[76]

After concurring in the Secretary's finding that steel imports threaten to impair the national security (as required by the statute), President Trump provided a detailed substantive explanation for why he was imposing a twenty-five percent tariff on steel imports from all countries except

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73. Adjusting Imports of Steel into the United States, Proclamation 9705, 83 Fed. Reg. 11625 (Mar. 15, 2018).

74. *Id.*

75. *Id.*

76. *Id.*

Canada and Mexico.[77] The President found this action "necessary and appropriate" based on the factors he considered including Steel 232 report, updated import and production data for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high levels of imports since the beginning of the year, and special circumstances for Canada and Mexico.[78] The President also found that this action will

> help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.[79]

President Trump justified Canada and Mexico's temporary exemption during ongoing discussions based on "shared commitments" to address national security concerns and global steel overcapacity, "the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security."[80] The President noted that he expected that Canada and Mexico "will take action to prevent transshipment of steel articles through Canada and Mexico to the United States."[81]

Proclamation 9705 recognized that the United States has "important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security," as well as "our shared concern about global excess capacity."[82] Proclamation 9705 then invited any "country with which we have a security relationship" to discuss "alternative ways to address the threatened impairment of the national security based by imports from that country" that, if agreed upon, could lead the President to "remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require."[83]

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77. *Id.* at 11626.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

The Proclamation concluded by defining the scope of the Steel 232 action's product coverage and directing the Secretary to establish procedures for a product exclusion process that the Secretary will administer.[84] The scope of the Steel 232 action is coextensive with that in the Steel 232 Report: carbon and alloy flat-rolled products; certain bars, rods, wire, sheet piling, and processed plates; tubes, pipes and hollow profiles; ingots, other primary and semi-finished products; and stainless steel products.[85]

3. Subsequent Steel 232 Proclamations, Quotas, and Exemptions

In the second Section 232 Proclamation of March 2018, President Trump temporarily exempted Australia, Argentina, South Korea, Brazil, and the European Union (EU) from the Steel 232 tariffs to continue negotiations regarding alternative means to address imports' threat to national security until May 1, 2018.[86] On April 30, 2018, the President issued Proclamation 9740, announcing an agreement for alternative means with South Korea, including quotas on imports from South Korea (in lieu the Section 232 tariffs).[87] Proclamation 9740 also continued the exemptions for Argentina, Australia, and Brazil, which had reached an agreement in principle with the United States, and extended the exemption for Canada, Mexico, and the EU until June 1, 2018, to complete negotiations on alternative means.[88]

On May 31, 2018, President Trump issued Proclamation 9759, announcing an agreement for alternative means with Argentina, Australia, and Brazil, including quotas on imports from Argentina and Brazil (but no quotas on imports from Australia).[89] By not further extending the exemption for Canada, Mexico, and the EU, the Steel 232 tariffs began applying to imports from Canada, Mexico, and the EU on June 1, 2018.[90]

The Section 232 quotas are absolute, meaning no entries are permitted after a quota is filled each quarter or year.[91] There are actually 54 quotas for each product group covered by the Steel 232 (*e.g.*, carbon hot-rolled sheet, alloy cold-rolled strip, oil country tubular goods) for each

84. *Id.* at 11627.
85. *Id.* at 11629.
86. Proclamation No. 9711, *supra* note 44.
87. Proclamation No. 9740, *supra* note 44.
88. *Id.* 20684-85.
89. Proclamation No. 9759, *supra* note 44.
90. *Id.*
91. 19 U.S.C. § 1862(a).

quota country (Argentina, Brazil, and South Korea).[92] The annual quotas are based on a certain percentage of historic levels and combine for roughly 7 million tons, approximately twenty percent of total imports.[93] Of that total Steel 232 quota volume, 3.5 million tons, or half of the total, are for semi-finished steel from Brazil, which, in most cases, is finished into flat-rolled and tubular steel products in the United States by foreign-owned "re-rollers."[94] South Korea has over 2.2 million tons of quotas for flat-rolled and tubular steel products.[95] To prevent massive import surges due to exporters fighting for quota volume, no more than thirty percent of an annual quota is permitted per quarter.[96]

In August 2018, President Trump issued Proclamation 9772, announcing the increase of the Section 232 tariff on Turkish steel from twenty-five to fifty percent. Proclamation 9772 stated that Secretary Ross informed the President that imports had not declined enough to "allow domestic capacity utilization to reach the target level," and recalled that the Steel 232 Report recommended applying higher tariffs to certain specific countries including Turkey.[97] Two weeks later, the President issued Proclamation 9777, permitting companies to submit product exclusion requests (effectively quota extensions) for products covered by Section 232 quotas that are not domestically available.[98] Proclamation 9777 also directed the Secretary to provide expedited product exclusions to the Section 232 quotas on steel products that were contracted for prior to March 2018 and imported by March 2019 for specific construction projects.[99]

In May 2019, President Trump issued Proclamation 9886, reducing the Section 232 tariff on Turkish steel back to twenty-five percent after Secretary Ross advised the President that:

> [S]ince the implementation of the higher tariff under Proclamation 9772, imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48 percent in 2018, with the result that the domestic industry's capacity utilization has improved at this point to approximately the target level recommended in the Secretary's report. This target level, if maintained for an appropriate period,

92. *See, e.g.*, Proclamation 9740, *supra* note 44; Proclamation 9759, *supra* note 44.
93. *Id.*
94. *Id.*
95. Proclamation No. 9740, *supra* note 44.
96. *Id.*; Proclamation No. 9759, *supra* note 44.
97. Proclamation No. 9772, 83 Fed. Reg. 40429 (Aug. 15, 2018).
98. Proclamation No. 9777, 83 Fed. Reg. 45025 (Sept. 4, 2018).
99. *Id.*

> will improve the financial viability of the domestic steel industry over the long term.[100]

Also in May 2019, after a year of U.S. Section 232 tariffs and Canadian and Mexican retaliatory tariffs and six months after the three countries signed the United States-Mexico-Canada Agreement (USMCA) that updated the North American Free Trade Agreement (NAFTA), a major change to the Steel 232 was announced via Proclamation 9894: the exemption of Canada and Mexico, the first and third largest import sources accounting for approximately one third of all steel imports.[101] Recalling the above quoted advice from the Secretary regarding the domestic industry's capacity utilization improvement and the invitation in the original Proclamation 9705 for countries to negotiate alternative means, the President described the "range of measures" agreed to with Canada and Mexico that, in the President's judgment, would provide "effective, long-term alternative means to address the contribution of these countries' imports to the threatened impairment of the national security."[102] Specifically, the three countries agreed to "prevent the importation of steel articles that are unfairly subsidized or sold at dumped prices, to prevent the transshipment of steel articles, and to monitor for and avoid import surges."[103] The measures are expected to allow imports from Canada and Mexico "to remain stable at historical levels without meaningful increases, thus permitting the domestic industry's capacity utilization to continue at approximately the target level."[104]

In addition to Proclamation 9894, the United States issued joint statements with Canada and Mexico further describing the "range of measures" causing the exemptions.[105] The joint statements explain that the three countries agree to eliminate (a) Section 232 tariffs on imports from Canada and Mexico; (b) the retaliatory tariffs that Canada and Mexico had imposed on imports from the United States; and (c) the pending WTO disputes regarding the Steel 232 action.[106] As referenced in Proclamation

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100. Proclamation No. 9886, 84 Fed. Reg. 23421 (May 21, 2019).
101. Proclamation No. 9894, 84 Fed. Reg. 23987 (May 23, 2019).
102. *Id.*
103. *Id.*
104. *Id.*
105. Joint Statement 1, *supra* note 44; Joint Statement 2, *supra* note 44. The joint statements are identical except that the U.S.-Mexico joint statement contains one additional sentence regarding the anti-surge mechanism: "In assessing whether there has been a surge in steel imports, the United States will consider that new investment in the United States may require an additional 225,000 metric tons of billet from Mexico; Mexico will consider that new investment in Mexico may require an additional 200,000 metric tons of cold-rolled steel from the United States."
106. Joint Statement 1, *supra* note 44; Joint Statement 2, *supra* note 44.

9894, the joint statements also state the three countries will prevent dumped and subsidized steel imports and the "transshipment" of steel made outside the three countries to the one of the other countries.[107] The three countries also agreed to establish a process for monitoring import surges, including surges of "products made with steel that is melted and poured in North America separately from products that are not."[108] Most importantly, if imports surge "meaningfully beyond historic volumes of trade over a period of time, with consideration of market share," after consultations, the importing country may impose twenty-five percent tariffs on the surging steel imports from the exporting country, and the exporting country can only retaliate on steel imports.[109]

Consistent with the joint statements, in September 2020, the Commerce Department modified its regulations and made other changes to its Steel Import Monitoring and Analysis (SIMA) system to enhance monitoring and analysis of steel import surges and prevent transshipment, including regulations that "require steel import license applicants to identify the country where the steel used in the manufacture of the imported steel product was melted and poured (the country of melt and pour)" and expand the scope of steel products subject to the SIMA licensing requirements to cover the full scope of steel products subject to Section 232 tariffs.[110]

In January 2020, President Trump issued Proclamation 9980, imposing Section 232 tariffs on certain downstream derivative steel articles.[111] The President noted that Secretary Ross informed him that domestic steel producers' capacity utilization has not stabilized for an extended time at or above the eighty percent target set by the Secretary in the original Steel 232 Report.[112] The President then proclaimed that the domestic industry stabilizing at the eighty percent utilization level "is important to provide the industry with a reasonable expectation that market conditions will prevail long enough to justify the investment necessary to ramp up production to a sustainable and profitable level."[113] Further, though imports of certain steel articles declined since the imposition of the Section 232 tariffs, imports of certain steel derivative products had increased, eroding the customer base for U.S. steel producers

107. Joint Statement 1, *supra* note 44; Joint Statement 2, *supra* note 44.
108. Joint Statement 1, *supra* note 44; Joint Statement 2, *supra* note 44.
109. Joint Statement 1, *supra* note 44; Joint Statement 2, *supra* note 44.
110. Steel Import Monitoring and Analysis System, 85 Fed. Reg. 56162 (Sept. 11, 2020).
111. Proclamation No. 9980, 85 Fed. Reg. 5281 (Jan. 29, 2020).
112. *Id.*
113. *Id.*

and undermined the purpose of the Steel 232 action to remove imports' threat to national security.[114] Specifically, imports of steel nails, tacks, drawing pins, corrugated nails, staples, and similar derivative articles increased between twenty-three percent and thirty-three percent depending on the time period compared, while imports of steel bumper and body stampings for motor vehicles and tractors increased between thirty-seven percent to fifty-six percent.[115] Proclamation 9980 noted that it is the Secretary's assessment that foreign producers of these derivative articles increased imports into the United States to circumvent and undermine the Steel 232 tariffs and the Secretary assessed that reducing imports of the covered derivative articles would reduce circumvention and increase domestic capacity utilization.[116]

In September 2020, President Trump issued Proclamation 10064, reducing the quota for Brazilian semi-finished steel for the fourth quarter of 2020.[117] The President noted that Secretary Ross advised him that the U.S. steel market underwent the following significant changes since Brazil was excluded from the Steel 232 tariffs:

> The United States steel market has contracted in 2020. After increasing in 2018 and 2019, steel shipments by domestic producers through June of this year are approximately 15 percent lower than shipments for the same time period in 2019, with shipments in April and May of this year more than 30 percent lower than the shipments in the same months in 2019. The Secretary has further advised me that domestic producers' adjusted year-to-date capacity utilization rate through August 15, 2020, is below 70 percent and that the current rate has been near or below 60 percent since the second week of April. Brazil is also the second largest source of steel imports to the United States and the largest source of imports of semi-finished steel products. Moreover, imports from most countries have declined this year in a manner commensurate with this contraction, whereas imports from Brazil have decreased only slightly.[118]

In light of the above, the President determined that the current Steel 232 quota on Brazilian semi-finished steel, without modifications, would be ineffective in eliminating Brazilian steel imports' threat to the national security.[119] Following consultations with Brazil, the President decided to reduce the Steel 232 quota for Brazilian semi-finished steel for the fourth

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114. *Id.*
115. *Id.*
116. *Id.*
117. Proclamation No. 10064, 85 Fed. Reg. 54877 (Sept. 2, 2020).
118. *Id.*
119. *Id.*

quarter of 2020 to "preserve the effectiveness of the alternative means to address the threatened impairment to our national security by further restraining steel article exports to the United States from Brazil during this period of market contraction."[120] Proclamation 10064 noted that the United States and Brazil would hold further consultations in December 2020 to discuss bilateral steel trade and then-prevailing market conditions.[121] Finally, Proclamation 10064 directed the Secretary to expedite product exclusions (effectively exceptions to or extensions of the Section 232 quota) for up to 60,000 tons of semi-finished steel from Brazil.[122] Based on the remaining Steel 232 quota for Brazilian semi-finished steel for 2020, Proclamation 10064 resulted in a net reduction of approximately 290,000 tons of Brazilian semi-finished steel imports for the fourth quarter of 2020.[123]

4. Steel 232 Product Exclusion Process

As instructed by Proclamation 9705, in March 2018, the Commerce Department published regulations and procedures for a process for temporarily excluding from the Section 232 tariffs certain specific steel products that the Commerce Department determines are not "produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality or based upon specific national security considerations."[124] These regulations outlined the initial requirements and procedures for companies to request that a particular steel product be excluded from Section 232 tariffs or oppose a particular request and requested public comments on the interim final rules.[125] Section 232 product exclusions are limited to a specific steel product (*e.g.*, a product that matches the requested dimensional, chemical, and mechanical specifications), quantity, U.S. importer, source country/s and supplier/s, and are valid for one year after the exclusion is granted.[126]

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120. *Id.*

121. *Id.*

122. *Id.*; Procedures to Grant Relief from the Quantitative Limitation Applicable to Certain Steel Article for Brazil for Parties with Preexisting Contracts that meet Specified Criteria, 85 Fed. Reg. 64377 (Oct. 13, 2020) [hereinafter Procedures to Grant Relief].

123. *See* Proclamation No. 9759, *supra* note 44; Procedures to Grant Relief, *supra* note 122.

124. Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, 83 Fed. Reg. 12106 (Mar. 19, 2018).

125. *Id.*

126. *Id.*

In September 2018, in response to its request for public comments, the Commerce Department updated its product exclusion process to allow for the submission of rebuttals to objections and surrebuttals.[127] Unlike the process for submitting exclusion requests and objections thereto, the rebuttal and surrebuttal process allowed parties to submit confidential business information with their otherwise public submissions.[128] In June 2019, the Commerce Department announced the implementation of the Section 232 exclusions "portal" to replace regulations.gov as the host for exclusion dockets.[129] Though the implementation of this portal did not change any of the requirements with respect to the process itself, it created a centralized site and system, separate from the prior regulations.gov system, to house all relevant submissions and replaced the previously used excel forms with web-based forms in an effort to "enhance data integrity and quality controls."[130] All exclusion requests filed before June 12, 2019 remained on regulations.gov for all stages of the process.[131] Since June 13, 2019, all exclusion requests are required to be filed on the new Section 232 exclusions portal.[132] In December 2020, the Commerce Department announced certain revisions to product exclusion process regulations, the most significant of which being the implementation of certain "General Approved Exclusions" (GAEs).[133] The GAEs are not retroactive, went into effect as of December 29, 2020, and consist of blanket exclusions for 108 steel products.[134] While the GAEs do not have a specified expiration, the Commerce Department noted that the list of GAEs may be revised, added to, or removed from at any time.[135]

From March 2018 through April 27, 2021, approximately 241,000 exclusion requests were filed, of which roughly 165,000 requests have been granted, roughly 61,000 requests have been denied, and roughly 14,000 requests pending a decision.[136] Thus, the Commerce Department's

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127. Submission of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46026 (Sept. 11, 2018).

128. *Id.*

129. Implementation of New Commerce Section 232 Exclusions Portal, 84 Fed. Reg. 26751 (June 10, 2019).

130. *Id.*

131. *Id.*

132. *Id.*

133. Section 232 Steel and Aluminum Tariffs Exclusions Process, 85 Fed. Reg. 81060 (Dec. 14, 2020).

134. *Id.*

135. *Id.*

136. *See* Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the filing of Objections to Submitted

product exclusion process provides relief from the Steel 232 action to U.S. companies that require niche specialty steel that is not domestically available (which also mitigates against political pressure and certain economic arguments against the Steel 232) and safeguards against further reduction of the Steel 232's overall import coverage (*i.e.*, broad exclusions in addition to the current country-wide quotas and exemptions discussed above) that would diminish the overall purpose and objectives of the Steel 232.

III. THE U.S. SECTION 232 STATUTE IS CONSTITUTIONAL

Notwithstanding opponents' best efforts to challenge the constitutionality of the Section 232 statute itself over the past three years, the courts have re-confirmed that the Section 232 statute is a constitutional delegation of Congressional authority with the necessary intelligent principle to guide the Executive branch.

Article I of the Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," "regulate Commerce with foreign Nations, and among the several States," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[137] Article I's Origination Clause also provides that "all bills for raising revenue shall originate in the House of Representatives."[138] On the other hand, Article II of the Constitution makes the President the "Commander in Chief" and provides the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two third of the Senators present concur."[139] The Supreme Court has recognized that the President has some independent constitutional authority over "national security" and dealings with foreign nations, including executive agreements.[140]

Congress has also from time to time delegated authority over trade and national security to the President. In 1928, in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (*Hampton*), the Supreme Court

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Exclusion Requests for Steel and Aluminum, https://www.regulations.gov/docket/BIS-2018-0006 for first 76,000 requests; Section 232 Steel and Aluminum Published Exclusion Requests, USPTO BIS-2018-006 folder, https://232app.azurewebsites.net/steelalum (last visited Apr. 27, 2021) for all other requests.

137. U.S. CONST. art. I, § 8, cl. 1, 3, 18.

138. *Id.* at article I, § 7.

139. *Id.* at article II, § 2, clause 2.

140. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (national security); Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 414-15 (2003) (executive agreements).

laid down the intelligible principle for the non-delegation doctrine for Congressional delegation of power to the Executive: "If Congress shall lay down by legislative act an intelligible principle to which the [President] is directed to conform, such legislative action is not a forbidden delegation of legislative power." The Supreme Court has not found a statute to be an unconstitutional delegation since 1935.[141] Several Justices, however, have recently expressed an interest in revisiting *Hampton* and the non-delegation doctrine.[142]

Setting aside for a moment non-legal arguments about whether the Section 232's delegation is the best *policy,* the Supreme Court's 1976 decision in *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (*Algonquin*) that the 232 law does not violate constitutional separation of powers continues to control, as confirmed by U.S. Court of International Trade (CIT) in 2019 and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in 2020, as explained below.[143]

A. Algonquin (1976)

In *Algonquin*, eight States and their Governors, ten utility companies, and one Congressman challenged President Nixon's imposition of license fees on imports of certain petroleum products pursuant to Section 232.[144] The district court found that Section 232 was a valid delegation to the President of the power to impose license fees on oil imports and that the President and Secretary[145] followed the proper statutory procedures in imposing the license fees.[146] The U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit), however, held that Section 232 does not authorize the President to impose a license fee scheme as a method of adjusting imports because such action "would be an anomalous departure" from "the consistently explicit, well-defined manner in which Congress

141. *See* Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

142. *See* Gundy v. United States, 139 S. Ct. 2116, 2131-42 (2019) (Gorsuch, J., dissenting). *Id.* at 2130-31 (Alito, J., concurring); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement re denial of certiorari) (stating that the issues raised in the *Gundy* dissent "may warrant further consideration in future cases").

143. *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

144. *Id.* at 556.

145. At the time of *Algonquin*, the Secretary of the Treasury had the responsibilities under Section 232 that the Secretary of Commerce has had since 1980. *See* Reorganization Plan No. 3 of 1979—Reorganization of Functions Relating to International Trade, § 5(a)(1)(B), 93 Stat. 1381, 1383.

146. *Algonquin*, 426 U.S. at 556-57.

has delegated control over foreign trade and tariffs."[147] The DC Circuit found that Section 232's legislative history indicated that Congress authorized the President to adjust imports only via "direct" controls such as quotas and not via license fees.[148] The Government appealed and the Supreme Court granted certiorari.[149]

In an opinion for a unanimous Supreme Court, Justice Marshall began his analysis by reciting the intelligible principle test for legislative delegations to the Executive branch first articulated by the Court in *Hampton* in 1928 (see above) and then found that the standards provided in Section 232 are "clearly sufficient to meet any delegation attack:"

> [Section 232] establishes clear preconditions to Presidential action—inter alia, a finding by the Secretary . . . that an 'article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.' Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.' And [Section 232] articulates a series of specific factors to be considered by the President in exercising this authority . . . In light of these factors and our recognition that '[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules,' we see no looming problem of improper delegation . . .[150]

Thus, the Court found that Section 232 "easily fulfills" the intelligible principle test because the statute contained "clear preconditions" to action, bounded discretion, and a "series of specific factors to be considered."[151] The Court then found that Section 232's legislative history supported its conclusion that Section 232 allows "monetary exactions" such as the license fees at issue in *Algonquin* as a means of adjusting imports.[152]

B. AIIS (2019)

Fast forward over 40 years to June 2018. Following Russian steelmaker Severstal's failed attempt to enjoin collection of Section 232 tariffs on steel imports,[153] a group of steel importers led by the American

147. *Id.* at 557.
148. *Id.*
149. *Id.*
150. *Id.* at 561 (internal citations omitted).
151. *Id.*
152. *Id.* at 561-71.
153. *See* discussion *infra* Section IV.A.

Institute for International Steel (AIIS) challenged the Section 232 statute on its face, claiming the law was an improper delegation of legislative authority in violation of Article 1, Section 1 of the U.S. Constitution and the doctrine of separation of powers.[154] AIIS argued that Section 232 provides the President such "broad" authority, "essentially unlimited definition of national security," and "limitless grant of discretionary remedial powers" that the statute does not include an intelligible principle and violates the separation of powers.[155]

Though a three-judge panel[156] at the CIT expressed some concern regarding the "broad guideposts" and flexibility that Section 232 provides the President, including a *dubitante* opinion by Judge Katzman,[157] the CIT ultimately found that *Algonquin* controlled and the Section 232 statute was a constitutional delegation.[158] AIIS promptly appealed to the Federal Circuit, which in February 2020 confirmed that *Algonquin* still controlled:

> The Court's ruling in *Algonquin* answers the question of the constitutionality of section 232 presented here. The Court's rejection of the nondelegation-doctrine challenge to section 232 was a necessary step in the Court's rationale for ultimately construing the statute as it did, and the constitutional ruling is therefore binding precedent . . . Moreover, the rational of the Court's rejection of the nondelegation-doctrine challenge rests on the determination that the standards governing the President's and Secretary's determinations under section 232 are constitutionally adequate. The same standards are at issue here.[159]

The Federal Circuit properly rejected AIIS' other arguments. First, the Federal Circuit rejected AIIS' attempt to also argue that the Steel 232 action demonstrates the statute is unconstitutional by noting that the steel tariffs are "monetary exactions" just like the license fees in *Algonquin* and that "AIIS's claim is a claim of unconstitutionality of the statutory provision on its face, that is, in all its applications."[160] Second, the Federal

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154. Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1337 (2019) [hereinafter *AIIS I*].

155. *Id.*

156. Most CIT cases are heard and decided by one judge, but parties may request a three-judge panel in cases that raise an issue of constitutionality of a federal statute, a proclamation of the President or an executive order, or if the case has broad or significant implications in the administration or interpretation of the law. 18 U.S.C. § 255; Ct. Int'l Trade R. 77-2(e)(2).

157. While agreeing that *Algonquin* controlled, Judge Katzman expressed doubt that Section 232 would be deemed constitutional absent *Algonquin*. *AIIS I*, 376 F. Supp. 3d at 1345-52.

158. *Id.* at 1345.

159. Am. Inst. for Int'l Steel, Inc. v. United States, 806 Fed. App'x. 982, 989 (Fed. Cir.) (2020) [hereinafter *AIIS II*].

160. *Id.*

Circuit rejected AIIS' argument that post-*Algonquin* Supreme Court jurisprudence rendered the delegation-doctrine standard stated in *Hampton* in 1928 no longer binding by noting that Courts of Appeals must follow Supreme Court precedent that directly controls (*Algonquin*) and that the Supreme Court's most recent nondelegation case did not change the nondelegation doctrine precedent or provide any new standard to apply.[161] Specifically, the Federal Circuit found that five Supreme Court Justices' interest in exploring a possible reconsideration of the *Hampton* delegation doctrine standard[162] did not change the standard.[163] The Federal Circuit did, however, offer several potential issues to consider if the Supreme Court moved away from the *Hampton* or *Algonquin* standards, including "the significance of text, history, and precedent bearing on circumstances in which Congress, exercising its constitutional power, strengthens authority within the President's 'independent' constitutional power."[164]

Finally, the Federal Circuit rejected AIIS' argument that *Algonquin* is distinguishable from the challenge at hand because, at the time of *Algonquin*, there was more judicial review of Presidential actions pursuant to Section 232: "there has been no material change to the judicial review of presidential action pursuant to section 232 that undermines the controlling force of *Algonquin*."[165] In June of 2020, the Supreme Court denied AIIS' petition for *writ of certiorari*, removing any doubt that *Algonquin* continues to control and the Section 232 statute is a constitutional delegation of authority consistent with the separation of powers doctrine.[166]

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161. *Id.* at 989-90.

162. *See* Gundy v. United States, 139 S. Ct. 2116, 2131-42 (2019) (Gorsuch, J., dissenting); *Id.* at 2130-31 (Alito, J., concurring); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement re denial of certiorari) (stating that the issues raised in the *Gundy* dissent "may warrant further consideration in future cases").

163. *Id.* at 989.

164. *AIIS II*, 806 Fed. Appx at 989-90, citing Loving v. United States, 517 U.S. 748, 772 (1996) (explaining that the delegation doctrine is less restrictive in such circumstances); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Justice Jackson's famous tripartite framework under which the President's authority is greatest when supported by Congress).

165. *AIIS II,* 806 Fed. Appx at 990.

166. Am. Inst. for Int'l Steel, Inc. v. United States, 141 S. Ct. 133, 207 L. Ed. 2d 1079 (2020).

IV. THE U.S. SECTION 232 NATIONAL SECURITY ACTION ON STEEL IMPORTS IS LAWFUL

Beyond AIIS' unsuccessful constitutional challenge to the Section 232 statute, opponents of the Steel 232 action have filed over thirty-five different challenges to various parts of the Steel 232 based on various legal theories.[167] Though it is beyond the scope of this paper to specifically respond to each of the pending challenges, the decisions from the CIT and the Federal Circuit thus far affirm the lawfulness of the current Steel 232 action. In doing so, the CIT has also provided some guidance on how the President may amend existing Section 232 actions in terms of scope of product coverage, level of tariffs, and countries.

A. Severstal (2019)

The first legal challenge to the Steel 232 action was filed in March of 2018 by affiliates of Russian steel producer PAO Severstal ("Severstal"), which challenged the lawfulness of Proclamation 9705 announcing the Steel 232 action and sought a preliminary injunction to prevent U.S. Customs and Border Protection from collecting the Section 232 tariffs pending the challenge.[168] Specifically, Severstal argued that the President's Steel 232 action exceeded his statutory authority because steel imports could not constitute a threat to national security under the Section 232 statute and that the Steel 232 action is based on allegedly improper motivations.[169] Notably, Severstal did not even try to challenge the constitutionality of the Section 232 statute's delegation of authority or the procedure followed by the Commerce Department or President in executing the Steel 232 action.[170] In denying Severstal's motion for a preliminary injunction, the CIT found that Severstal's likelihood of success on the merits was "very low," owing to the highly deferential standard of review for Presidential actions, the Section 232 statute's "quite broad and permissive" language including many economic factors beyond national defense requirements, and the Presidential statements relied on by Severstal did not demonstrate that the Steel 232 action exceeded the President's authority under Section 232.[171] The CIT reiterated that it lacks the power to review a President's lawful exercise of discretion, factual

167. *See, e.g.* the CIT docket containing thirty-eight appeals regarding Section 232 as of May 8, 2021, at https://www.cit.uscourts.gov/case-info/cm-ecf-case-info.

168. *Severstal*, 2018 Ct. Intl. Trade LEXIS 38 (2018).

169. *Id.* at 18-19.

170. *Id.*

171. *Id.* at 21-31.

findings, or motivations, and instead reviews Presidential actions only for clear misconstructions of the governing statute or action outside delegated authority.[172] The CIT also noted the Section 232 statute's requirements, factors, and authority, as noted in the above discussion regarding *Algonquin* and *AIIS*.[173]

Following the CIT's denial of Severstal's preliminary injunction, Severstal withdrew its appeal in May 2018.[174] No party filed any other legal challenges against the Steel 232 action for the remainder of 2018, which in retrospect was the calm before the storm of Steel 232 litigation.

B. Transpacific (2020)

In January 2019, Transpacific Steel LLC (Transpacific), a U.S. importer of steel, challenged President Trump's increase of Section 232 tariffs on steel imports from Turkey from twenty-five percent to fifty percent pursuant to Presidential Proclamation 9772 and sought a refund of the additional twenty-five percent tariffs paid.[175] Transpacific argued that Proclamation 9772 was unlawful because it lacked a nexus to national security, was issued without following mandated statutory procedures and temporal conditions, and singled out U.S. importers of Turkish steel products in violation of Fifth Amendment equal protection and due process guarantees.[176]

Ultimately, a three-judge CIT panel found that Proclamation 9772 imposing additional Section 232 tariffs on Turkish steel violated statutorily mandated procedures and the Fifth Amendment's guarantee of equal protection under law (without ruling on the due process claim).[177] In so ruling, the CIT found that the Section 232 statute's procedural and temporal provisions—especially the temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary, the focus of the 1988 amendment to the statute—were mandatory, not guidelines, and require strict adherence.[178] The CIT noted that in *Algonquin,* the Supreme Court "stressed the importance of the

172. *Id.* at 19-21 (internal citations omitted).

173. *Id.* at 22-28.

174. Joint Stipulation of Dismissal, Severstal Export GmbH v. United States, (No. 18-00057) (Ct. Int'l Trade) (May 2, 2018); Order Granting Joint Stipulation of Dismissal, Severstal Export GmbH v. United States, (No. 18-00057) (Ct. Int'l Trade) (May 2, 2018).

175. Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1249 (Ct. Int'l Trade 2020).

176. *Id.*

177. *Id.* at 1258.

178. *Id.* at 1252

procedural safeguards in holding that Section 232 was not an impermissible delegation of congressional authority over imports."[179] The CIT also interpreted the 1988 amendments to Section 232 as eliminating any prior authority under Section 232 for "modifications" of existing Proclamations without following the statutory procedures.[180]

The CIT then turned to the specific action at issue—Proclamation 9772 doubling the Section 232 tariffs on Turkish steel imports—and found President Trump's action *ultra vires*: "In addition to acting outside of the time limitations as noted above, [the President] acted without a proper report and recommendation by the Secretary on the national security threat posed by imports of steel products from Turkey."[181] The CIT noted that the original Section 232 Steel Report assesses the impact of total steel imports without a separate specific finding on Turkish steel imports and that Proclamation 9772 only mentions "informal discussions" between the President and the Secretary and an "off-handed suggestion by the Secretary" regarding Turkey.[182] The CIT emphasized that was it not considering the President's motives, questioning his fact-finding, foreign policy, or whether there was a sufficient nexus to a national security threat in issuing Proclamation 9772.[183] Instead, the CIT "simply [held] that there was no procedurally proper finding of that threat."[184]

Though the CIT panel in *Transpacific* found Proclamation 9772 *ultra vires*, it also provided a rough roadmap on how to properly amend an ongoing Section 232 action: by the Secretary providing an updated report and recommendation to the President who concurs and decides on any action within ninety days and acting within fifteen days of the President's decision.[185] In fact, the CIT noted that the report issued prior to the Proclamation at issue in *Algonquin* was completed in only ten days.[186]

The CIT also found that Proclamation 9772 violates the Fifth Amendment's Equal Protection guarantee because the Proclamation treats similarly situated classes differently without sufficient justification.[187] In doing so, the CIT examined whether Proclamation 9772's disparate

179. *Id.* at 1253.
180. *Id.*
181. *Id.* at 1254.
182. *Id.* at 1255.
183. *Id.* at 1254.
184. *Id.* at 1255.
185. *Id.* at 1252 ("The President is, of course, free to return to the Secretary and obtain an updated report pursuant to the statute.").
186. *Id.* at 1255, n.9.
187. *Id.* at 1255.

treatment was rationally related to the legitimate government purpose of national security.[188] The CIT concluded that "Section 232 does not ban the President from addressing concerns by focusing on particular exporters, but the decision to increase the tariffs on imported steel products from Turkey, and Turkey alone, without any justification, is arbitrary and irrational."[189] Thus, similar to its explanation of how to properly amend an ongoing Section 232 action (see above), the CIT provides some guidance on how disparate tariff treatment of similar countries or products under Section 232 could rationally relate to national security, such as explaining in another report and proclamation the distinct conditions in each subject country individually and avoiding being both "underinclusive" (increasing tariffs on imports from Turkey, the sixth U.S. import source, but not the first through fifth sources) and "overinclusive" (increasing tariffs on certain imports used in the Puerto Rican economic recovery).[190]

Finally, the CIT declined to rule on Transpacific's claim that Proclamation 9772 violated Constitutional Due Process under the Fifth Amendment because that claim was that the government failed to comply with Section 232's statutory procedures, which the CIT had already found Proclamation 9772 violated the Section 232 statute.[191]

The U.S. government appealed the CIT's ruling in *Transpacific* to the Federal Circuit, where the case is pending.[192] In briefing and oral argument, the U.S. government maintained that the Section 232 statute gives the President the authority to modify existing Section 232 actions without obtaining an additional report.[193] Though the Federal Circuit may affirm the CIT's ruling striking down Proclamation 9772 for failure to comply with the statutory procedural and temporal requirements, in doing so, the Federal Circuit will likely affirm – and possibly further clarify – the CIT's ruling that the President may lawfully amend a Section 232 action to apply different tariffs or other actions to adjust imports that threaten national security to different product groups (*e.g.*, semi-finished steel, oil country tubular goods, or tin mill products) and/or countries (*e.g.*, Russia, Turkey, Vietnam)—if the Secretary provides a reasonable

188. *Id.* at 1257.
189. *Id.* at 1258.
190. *Id.*
191. *Id.*
192. Transpacific Steel LLC v. United States, 415 F. Supp. 3d (Ct. Int'l Trade 2019), *appeal docketed*, No. 20-2157 (Fed. Cir. Dec. 11, 2020).
193. *See* Corrected Brief of Defendants-Appellants, *Transpacific Steel LLC,* 415 F. Supp. 3d (Dec. 17, 2020) (No. 20-2157), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-2157_03182021.mp3.

justification in a new report and the President acts within the statutory timelines.[194]

C. PrimeSource (2020 and 2021)

The largest group of challenges related to the Steel 232 action are focused on President Trump's expansion of the coverage of the Steel 232 to include certain downstream "derivatives of steel articles," announced in Proclamation 9980 of January 2020.[195] *See* above. As of January 30, 2021, there are now over a dozen challenges to Proclamation 9980, but the lead case was filed by PrimeSource Building Products, Inc. (PrimeSource), an importer of steel nails, in February 2020.[196] PrimeSource's complaint raised five claims challenging Proclamation 9980.[197] Specifically, PrimeSource argued:

- Count 1: Secretary Ross violated the Commerce Department regulations and the Administrative Procedure Act (APA) when providing President Trump the "assessments" relied on as the basis for Proclamation 9980;
- Count 2: Proclamation 9980 was issued in violation of Section 232's statutory time limits;
- Count 3: Proclamation 9980 violates PrimeSource's Fifth Amendment due process rights;
- Count 4: "Section 232 is unconstitutional and not in accordance with the law because it represents an over-delegation by Congress to the President of its legislative powers by failing to set forth an intelligible principle for the President to follow when implementing Section 232."
- Count 5: Secretary Ross violated Section 232 by "making assessments, determinations, and providing other information" to President Trump by not following Section 232's statutory procedures and time limits applicable to the Steel 232 action.[198]

194. Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1258 (Ct. Int'l Trade 2020).

195. Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, 85 Fed. Reg. 5281 (Jan. 29, 2020).

196. PrimeSource Bldg. Prod., Inc. v. United States, No. 20-00032, slip op. 21-8 (Ct. Int'l Trade Jan. 27, 2021) [hereinafter *PrimeSource I*].

197. *Id.* at 2-4.

198. *Id.* at 9-11.

In January 2021, another three-judge panel at the CIT issued a 114-page opinion in *PrimeSource I*, dismissing four of five of PrimeSource's claims, leaving only count 2.[199] The CIT's analysis in support of dismissing the APA, due process, and unconstitutional delegation claims once again demonstrate that the Section 232 statute and the overall Steel 232 action are lawful, as discussed below.

First, the CIT dismissed PrimeSource's APA claims because the Secretary's assessments are not final agency actions under APA 5 U.S.C. § 704 or judicially reviewable because the "assessments did not themselves impose the tariffs on derivatives or implement any other measure."[200] Instead, the assessments "merely provided facts and recommendations for potential action by the President rather than impose duties under the authority of Section 232 . . . [and] had no direct or independent effect on PrimeSource."[201] The CIT found the "legal consequence"—the imposition of tariffs on PrimeSource's imports—resulted from exercise of Presidential discretion, not from the Secretary's assessment.[202] The assessments "did not 'implement, interpret, or prescribe law or policy' within the meaning of the APA, 5 U.S.C. § 551(4)."[203]

Second, the CIT easily dismissed PrimeSource's due process claim based on the President's failure to provide parties with notice and the opportunity to comment before issuing Proclamation 9980 because neither the Due Process Clause of the Fifth Amendment nor the Section 232 statute *required* notice or the opportunity to comment before "imposing duties on imported merchandise under delegated legislative authority" and PrimeSource did not have a "protected property interest in maintaining the tariff treatment applicable to its imported merchandise that existed prior to Proclamation 9980."[204] The CIT also summarily dismissed PrimeSource's unconstitutional delegation claim as "foreclosed by the decision of the U.S. Supreme Court in [*Algonquin*]."[205]

Third, the CIT's analysis supporting its denial of the Government's motion to dismiss PrimeSource's second claim is worth unpacking. The CIT observed that Proclamation 9980 refers to the Secretary's "assessments" but does not state that the President was acting pursuant to

199. *Id.*
200. *Id.* at 14, 16.
201. *Id.* at 12.
202. *Id.*
203. *Id.* at 14.
204. *Id.* at 14-15.
205. *Id.* at 16.

any "report" issued by the Secretary under Section 232 (19 U.S.C. § 1862(b)(3)(A)) after the January 2018 Steel 232 Report.[206] The CIT identified the first question before it as the narrow issue of "whether the President's having characterized the articles affected by Proclamation 9980 as 'derivatives of the steel products affected by Proclamation 9705 is, by itself, sufficient for us to conclude that Proclamation 9980 was timely according to Section 232."[207] After an in-depth review of Section 232's legislative history, the CIT concluded that characterizing the products covered by Proclamation 9980 as "derivatives" of the products covered by Proclamation 9705 did not, *by itself*, establish that Proclamation 9980 was timely according to Section 232.[208] Likewise, the CIT found that Section 232's statutory deadlines are mandatory, not directory.[209] One the other hand, the CIT denied PrimeSource's motion for summary judgement on the second claim because there remained genuine issues of material fact, specifically regarding the Secretary's "assessments," "preparations," and "recommendations" leading up to Proclamation 9980—which, according to the CIT, may have met the fundamental requirements of a "report" made pursuant to Section 232.[210]

In April 2021, in *PrimeSource II*, the CIT granted summary judgment in favor of PrimeSource on the remaining count 2, finding Proclamation 9980 expanding the Steel 232 to certain derivative articles unlawful and directed the refund of any duties paid on entries pursuant to Proclamation 9980.[211] In the joint status report and conference, the U.S. government continued to rely on the original 232 Steel Report and Proclamation 9705 as providing the procedural preconditions and authority for issuing Proclamation 9980 and expanding the Steel 232 to certain derivative articles—and specifically waived the opportunity to provide any additional assessments, information, or recommendations from the Secretary to the President leading up to Proclamation 9980.[212] The CIT granted summary judgment *sua sponte* because the U.S. government's position created no material facts in dispute, and, as the CIT previously found in *Transpacific I* and *PrimeSource I*, the CIT found that any determination and action to modify the original 2018 Steel 232 action

206. *Id.* at 20.
207. *Id.* at 23.
208. *Id.* at 23-45.
209. *Id.* at 45.
210. *Id.* at 50-55.
211. PrimeSource Bldg. Prod., Inc. v. United States, No. 20-00032, Slip Op. 21-36 (Ct. Int'l Trade Apr. 5, 2021) [hereinafter *PrimeSource II*].
212. *Id.* at 6-7.

must occur within 90 and 105 days, respectively, of the President receiving a report from the Commerce Secretary.[213] Now the U.S. government may appeal to the Federal Circuit and take a similar position to that taken in *Transpacific*, but slightly different given that *PrimeSource* focuses on "derivative" products. As noted above in subsections b. and c., regardless of the outcome, any Federal Circuit decision in *PrimeSource* should provide further guidance on how the Secretary and President can amend an existing Section 232 action, in this instance to cover "derivative" products.

D. Universal Steel (2021)

In February 2021, another three-judge panel at the CIT issued a *per curiam* decision in *Universal Steel Prods., Inc. v. United States*, rejecting yet another attempt to dismantle the Steel 232 action.[214] In December 2019, Universal Steel Products, Inc. led a group of U.S. importers to challenge the Steel 232, this time claiming that

- the Steel 232 Report is procedurally deficient and invalidates the Steel 232 action;
- the Secretary and President misinterpreted the statute by failing to base their determinations on an "impending threat;"
- the President violated Section 232 by failing to set a finite "duration" of the Steel 232 action; and
- Section 232 tariffs on Canada, Mexico, and the EU violated Section 232's temporal requirements.[215]

The CIT rejected all four claims, affirming the Steel 232 action.[216] What is particularly notable, however, is that the CIT provided additional insight into these four weak claims, presumably to dissuade future similar challenges.

First, the CIT re-confirmed—as it just had done a week earlier in *PrimeSource*—that the Steel 232 Report is not reviewable as a final agency action under the APA because the report is an advisory recommendation with no direct legal consequences, not a binding determination, because "action to adjust imports" under Section 232 is left to the discretion of the President.[217] In a footnote, the CIT went a step

213. *Id.* at 10-11.

214. Universal Steel Prods., Inc. v. United States, No. 19-00209, slip Op. 21-12 at 9 (Ct. Int'l Trade Feb. 4, 2021).

215. *Id.*

216. *Id.*

217. *Id.* at 10-15.

further and explained that "[e]ven if Plaintiffs' challenge to the Steel Report were reviewable (under the APA or otherwise) and even if the court were to the find that the Steel Report was procedurally flawed, precedent reveals that such a finding would not allow the court to invalidate the subsequent Presidential action."[218] These findings should eliminate any future challenges to the Steel 232 Report itself.

Second, the CIT found that Universal Steel's claim that the President failed to identify an "impending threat" is not reviewable because the President's exercise of discretion and factual findings under Section 232 are not subject to review.[219] The CIT also noted that neither "impending" nor "threat" appear in Section 232(d) (instead the statute uses the phrase "threaten to impair" which has different meanings than Universal Steel's terms) and the President concurred with the Secretary's finding that a threat to impair *already existed*.[220]

Third, the CIT found that the "duration" set forth in Proclamation 9705 did not violate the Section 232 statute.[221] Proclamation 9705 states that the Steel 232 tariffs "shall continue in effect, unless such actions are expressly reduced, modified, or terminated" and instructs the Secretary to "inform the President of any circumstances that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary."[222] The CIT emphasized that Section 232 specifically left the determination of duration to the judgment of the President and does not require setting a specific termination date or even specifying the circumstances that would end the threat:

> [W]hen the President is required "to determine the . . . duration" of the action, he must state and decide at that time the action's continuance in time, or the time for which the action will last. There are multiple ways that the President could feasibly do so, especially because the statute explicitly states that he shall make the determination "in his judgement." . . . For example, he could identify criteria or conditions which, if met, would end the action's continuance. Either of these options is consistent with the plain meaning of the word "duration" and allows the President a great deal of flexibility, as he may determine the duration based solely on his judgment.[223]

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218. *Id.* at 15, n. 10 (citing Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1345 (Fed. Cir. 2018)).

219. *Id.* at 17 (citing United States v. George S. Bush & Co., 310 U.S. 371, 379 (1940)).

220. *Id.* at 18, n. 14.

221. *Id.* at 19-24.

222. *Id.* at 21.

223. *Id.*

The CIT explained that there is an important difference between "the indefinite and the undefined," namely that in this case "even if the duration may be unlimited, it is not undefined, but bounded by whether, in the President's judgment, the threat to impair national security exists."[224] Thus, the Steel 232 action will continue until the President decides that, in his judgment, the Steel 232 action is no longer necessary or appropriate to address steel imports' threat to national security, a judgment which is not judicially reviewable.

Finally, the CIT rejected Universal Steel's argument that the President violated Section 232 by letting the temporary exemptions granted to Canada, Mexico, and the EU expire earlier than 180 days after the President's decision.[225] The CIT explained that Section 232 clearly provides for a delay in the action to adjust imports for the President to negotiate an agreement that limits or restricts imports that threaten to impair national security of up to 180 days after the President makes his initial determination.[226]

E. Thyssenkrupp (2021)

In March 2021, another CIT panel affirmed the lawfulness of the Commerce Department's overall 232 exclusion process in importer Thyssenkrupp's challenge.[227] Specifically, Thyssenkrupp argued that the exclusion process creates a non-uniform tax across the United States by granting exclusions on an application basis to specific requestors and not automatically to all importers of a particular product, in violation of the Uniformity Clause of the Constitution[228] and Proclamations 9704 and 9705 and Section 232.[229] The CIT rejected Thyssenkrupp's Uniformity Clause argument because the "exclusion process 'operates with the same force and effect in every place where the subject of it is found'," *i.e.*, the exclusion process does not discriminate based on a requestors' geographic location in the United States.[230] Then, after confirming that the Section 232 statute is silent regarding an exclusion process and the Commerce

224. *Id.* at 22.
225. *Id.* at 24-27.
226. *Id.*
227. Thyssenkrupp Materials NA Inc., v. United States, No. 20-000093, slip op. 21-29 (Ct. Int'l Trade Mar. 10, 2021) [hereinafter *Thyssenkrupp*].
228. The Uniformity Clause requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art I., § 8, cl. 1.
229. *Thyssenkrupp*, No. 20-000093, slip op. at 3.at 3.
230. *Id*. at 13 (quoting Edye v. Robertson, 112 U.S. 580, 594 (1884) (Head Money Cases).

Department's interpretations of Proclamations 9704 and 9705 qualify for Chevron deference, the CIT also rejected Thyssenkrupp's other claims by finding that the regulations creating and amending the 232 exclusion process were permissible interpretations of Proclamations 9704 and 9705 and the Section 232 statute.[231] The CIT specifically found that "no indication that Congress in Section 232 or the President in the Proclamations required broader product-based exclusions or that not doing so would be inconsistent with the purpose of Section 232 duties in advancing national security."[232] Thyssenkrupp may now appeal to the Federal Circuit, or return to the drawing board.

Most of the remaining legal challenges will be settled by the final outcome of *Transpacific* and *PrimeSource* or are focused on the Commerce Department's product exclusion decisions,[233] not challenges to the overall Steel 232 action. Thus far, the courts have affirmed the original Steel 232 in its current form and explained how to amend the Steel 232 action going forward in compliance with the Section 232 statute. There is no reason to believe that the remaining pending challenges will be resolved differently.

V. WTO DISPUTES REGARDING THE STEEL 232 ACTION

This paper focuses on legal challenges to the Steel 232 action in U.S. courts for several reasons, including because that is where such activity is currently focused. The WTO, however, has also received formal challenges to the Steel 232 action from several countries,[234] and the United States has challenged its trading partners' unilateral retaliation to the Steel 232 action.[235] The disputes regarding the Steel 232 action revolve around the WTO's exception to its rules for "essential security interests"

231. *Id*. at 16-21.

232. *Id.* at 21.

233. Current challenges to the exclusion decisions include the following: N. Am. Interpipe, Inc. v. United States, No. 20-03825 (Ct. Int'l Trade filed Nov. 5, 2020); Evraz, Inc. NA v. United States, No. 20-03869 (Ct. Int'l Trade filed Nov. 20, 2020); AM/NS Calvert v. United States, No. 21-00005 (Ct. Int'l Trade filed Jan. 8, 2021); Cal. Steel Indus., Inc. v. United States, No. 21-00015 (Jan. 14, 2021); Valbruna Slater Stainless, Inc. v. United States, No. 21-00027 (Ct. Int'l Trade filed Jan. 26, 2021); Voestalpine High Performance Metals Corp. et al v. United States, No. 21-00093(Ct. Int'l Trade filed Mar. 5, 2021).

234. China, India, the European Union, Norway, Russia, Switzerland, and Turkey have pending challenges to the Steel 232 action at the WTO. *See* WTO Dispute Docket, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited May 11, 2021).

235. The United States has challenged Section 232 retaliation of China, the EU, Turkey, and Russia; *Id.*

contained in the General Agreement on Tariffs and Trade (GATT) Article XXI, which reads:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations[236]

The United States' long-held position, has been that defining its own national security interests is a fundamental sovereign right that the United States did not cede to the WTO and, thus, invocation of the Article XXI exception is self-judging and non-justiciable in WTO dispute settlement.[237] In 2019, however, one WTO panel in a separate dispute between Ukraine and Russia found that the WTO's security exception is not completely self-judging, is limited to the above three enumerated specific circumstances, and must be applied in good faith.[238] The WTO panels for the Steel 232 challenges and U.S. challenges to others 232 retaliation have not yet issued reports, and when they do, it remains to be seen whether there will be a functioning Appellate Body by then.[239]

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236. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

237. *See* United States—Certain Measures on Steel and Aluminum Products, Responses of the United States of America to The Panel's Questions To The Parties, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products.

238. Report of the Panel, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/7 (adopted Apr. 29, 2019).

239. The WTO's Appellate Body has been without a quorum of members to hear appeals since December 2019, due to the United States' blocking the appointment of new members, a policy that the Biden Administration has continued. *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body 12 (Feb. 22, 2021), https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb22.DSB_.Stmt_.as_.deliv_.fin_.public.pdf (in response to Appellate Body appointments proposed by some members, the United States responded "The United States is not in a position to support the proposed decision. The United States continues to have systemic concerns with the Appellate Body. As Members know, the United States has raised

Further, the United States would ultimately decide whether to implement any adverse WTO decision on Section 232, which it may decide not to do given that its trading partners are already imposing unilateral (WTO-inconsistent) retaliation and the United States may decide to prioritize its sovereign right to determine its essential security interests over complying with a ruling from Geneva. Any adverse WTO decision on Section 232 would be added to the long list of examples of WTO and Appellate Body overreach and further threaten the legitimacy of both institutions.[240]

VI. CONCLUSION

The Section 232 statute and Steel 232 action are constitutional, legal, and effective tools for the United States to address imports that damage national economic security. The legal review and analysis in Parts II-IV demonstrates that the Section 232 statute is not only constitutional, but the current Steel 232 action is also lawful, hopefully assuaging any lingering concerns of the legality of the Steel 232 action under U.S. law. Constitutional separation of powers and checks and balances are alive and well with Section 232: Congress lawfully granted the President the authority and discretion to act to adjust imports that threaten national economic security. The Section 232 statute been challenged, thoroughly reviewed, and upheld in the U.S. federal courts, all the way to the U.S. Supreme Court.

Though in some ways the President's Section 232 power is broad—with non-exhaustive factors such as "national security," "economic welfare," and "weakening of our internal economy," and wide discretion in terms of the coverage, form, and duration of remedies—Congress has also included significant procedural, temporal, substantive requirements, restrictions, and intelligible principles in the Section 232 statute. Of course, Congress always retains its constitutional right to amend Section 232 as it has done before, or even revoke Section 232 altogether. Despite calls from opponents of Section 232 for Congress to remove or restrict the current authority and discretion provided to the President under Section 232, Congress has thus far declined. It is notable that Section 232

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and explained its systemic concerns for more than 16 years and across multiple U.S. Administrations. We look forward to further discussions with Members on those concerns.").

240. For the most recent comprehensive summary of U.S. concerns with the WTO's Appellate Body, *see* USTR, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

legislation introduced in the current Congress is prospective only and specifically does not impact the current Steel 232 action.[241]

Moreover, despite Steel 232 critics' claims that President Trump abused or exceeded his authority and discretion under Section 232, the courts have thus far only found issue with the President's temporary increase of the Section 232 tariffs on Turkish steel (in *Transpacific*) and expansion to certain downstream "derivative" steel products (in *PrimeSource II*), primarily because the CIT found that the President failed to strictly follow Section 232's statutory procedural requirements, namely making a determination on the increase/expansion within ninety days of receiving a report from the Secretary and acting within fifteen days of that determination. The CIT's current Section 232 jurisprudence can be summarized as follows (subject to Federal Circuit modification):

- The Section 232 statute is a constitutional (*AIIS I*);
- The Commerce Department's Section 232 exclusion process is lawful (*Thyssenkrupp*);
- The Secretary's 232 reports and assessments are not reviewable final agency actions under the APA (*PrimeSource I*, and *Universal Steel*);
- CIT review of Presidential action under Section 232 is only for clear misconstructions of the statute or action outside delegated authority (*Severstal*, *Transpacific*, and *PrimeSource I and II*);
- The CIT will not review the President's lawful exercise of discretion, judgment, or factual findings—including whether imports "threaten to impair" national security, as well as the necessity, appropriateness, coverage, form, and duration of any action, and factual findings relied upon (*Severstal*, *Transpacific*, and *Universal Steel*);
- Section 232's procedural and temporal provisions are mandatory, not merely guidelines (*Transpacific*, and *PrimeSource I and II*);
- An ongoing Section 232 action may be amended in terms of country coverage, product scope, and form or level of remedy with an additional report and meeting other statutory requirements, which does not require notice and comment (*Transpacific*, and *PrimeSource I and II*);

241. *See* Trade Security Act of 2021, S. 746, 117th Cong.§2(b)(2) (applying to adjustments of imports under Section 232 on or after July 1, 2018, and not applying to the current Steel 232 action), https://www.portman.senate.gov/sites/default/files/2021-03/Trade%20Security%20Act%20of%202021.pdf.

- A Section 232 action may treat certain covered products or countries differently from others if the report and proclamation provide a rational basis for disparate treatment (*Transpacific*); and
- The President has up to 180 days after his/her determination to negotiate alternative means with countries before imposing the action (without having to obtain another report) (*Universal Steel*).

If one cuts through the cacophony of criticism from opponents of Section 232 and actually look closely at the full and recent history of using Section 232, it has been considered judiciously, actually applied even less frequently, and implemented in a responsible and targeted way that balances all of the various considerations to ensure that Section 232 actions truly do address imports that threaten national economic security. Though the Trump Administration used Section 232 more than recent Presidents, Section 232 was used nearly as often in the late 1970s and early 1980s and, of the eight Section 232 investigations that were initiated under President Trump, only four were self-initiated by Secretary Ross (the other four were initiated based on petitions from the relevant domestic industry) and only two investigations (steel and aluminum) resulted in Section 232 tariffs, quotas, or other actions to adjust imports.[242] As specifically contemplated in the statute,[243] the Trump Administration used at least some of its Section 232 investigations and actions as leverage to negotiate agreements that restrict imports that threaten to impair national security. This was particularly true with the Section 232 investigations on autos, which provided significant leverage to negotiate new rules of origin rules for autos and other provisions in USMCA that restrict both autos and steel imports. Finally, the evolution of the Steel 232 action in terms of country coverage, product coverage, and remedies, calibrated to current economic and security conditions, demonstrates that Section 232 has been and continues to be effectively yet responsibly utilized.

In closing, just as Alexander Hamilton identified 230 years ago and we were recently reminded during the COVID-19 pandemic, reliable national supply chains, manufacturing bases, and critical infrastructure are vital to support our frontline first-responder heroes and all other Americans beginning to recover. The Steel 232 action continues to address the worst impact of global steel overcapacity by reducing imports that

242. *See* CRS, *supra* note 25, at Appendix B.
243. 19 U.S.C. § 1862(c)(3).

impair our nation's ability to make steel from beginning to end in the U.S.A. Though still conducting a top-to-bottom review of current U.S. trade policies and trade measures in place, including the Steel 232 action, within his first two weeks of office, President Joseph Biden invoked his Section 232 authority to continue Section 232 tariffs on aluminum from the United Arab Emirates.[244] Furthermore, both U.S. Commerce Secretary Gina Raimondo and USTR Ambassador Katherine Tai have recently made statements that support the Steel 232 action and need to address global steel overcapacity,[245] which according to the OECD increased last year to 625 million metric tons.[246] For all of the above reasons, the Steel 232 action should continue until there are new and enforceable rules and remedies in place that specifically address and take meaningful steps to solve the global steel overcapacity crisis and alleviate steel imports' threat to national economic security.

244. On January 19, 2021, President Trump issued a proclamation broadly excluding the United Arab Emirates from the Section 232 tariffs on aluminum products, but President Biden reversed course before the effective date of the Trump proclamation and kept the tariffs. Adjusting Imports of Aluminum into the United States, 86 Fed. Reg. 6825 (Jan. 25, 2021); Adjusting Imports of Aluminum into the United States, 86 Fed. Reg. 8265 (Feb. 4, 2021) (revoking the January 19, 2021 proclamation).

245. *See, e.g.*, Jeff Mason and David Shepardson, *U.S. Commerce Chief: Metals Tariffs Saved U.S. Jobs,* REUTERS (Apr. 7, 2021), https://www.reuters.com/article/usa-tariffs-biden/update-1-u-s-commerce-chief-metals-tariffs-helped-save-some-u-s-jobs-idUSL1N2M027O; Hearing to Consider the Nomination of Katherine C. Tai, of the District of Columbia, to be United States Trade Representative, with the rank of Ambassador Extraordinary and Plenipoteniary, 117th Congress (Feb. 25, 2021), https://www.finance.senate.gov/hearings/hearing-to-consider-the-nomination-of-katherine-c-tai-of-the-district-of-columbia-to-be-united-states-trade-representative-with-the-rank-of-ambassador-extraordinary-and-plenipotentiary; and Justine Coyne, *USTR Nominee Says Section 232 Tariffs Only Part of Remedy for Metals*, S&P GLOBAL PLATTS, Feb. 25, 2021, https://www.spglobal.com/platts/en/market-insights/latest-news/metals/022521-ustr-nominee-says-section-232-tariffs-only-part-of-remedy-for-metals.

246. *See, e.g.*, *Latest Developments in Steelmaking Capacity*, OECD STEEL COMM. (Mar. 2021), https://www.oecd.org/industry/ind/Item_8_Capacity.pdf.