



UPDATE: Threats to National Security Foiled? A Wrap Up of New Tariffs on Steel and Aluminum

Updated March 22, 2018

UPDATE: On March 19, 2018, the U.S. Department of Commerce (“Commerce”) issued an interim final rule concerning product-specific exclusions from the new tariffs on certain steel and aluminum imports. Because these requirements involve “a military or foreign affairs function of the United States,” Commerce determined that certain requirements of the [Administrative Procedure Act](#), such as notice of proposed rulemaking, the opportunity for public comment, and a delayed effective date, were inapplicable. Under the new requirements, requests for exclusions can be filed only by individuals or organizations in the United States that use the specific steel and aluminum products covered by tariffs. Commerce will only grant an exclusion “if an article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration.” The exclusions “will generally be approved for one year.” All exclusion requests, objections, and final responses to such requests will be available [here](#) by searching BIS-2018-0006 for steel and BIS-2018-0002 for aluminum. Denials of such requests will likely be [challengeable](#) in court.

The original post from March 12, 2018, is below.

In accordance with two [presidential proclamations](#) issued on March 8, 2018, new tariffs will be imposed on imports of certain steel and aluminum products beginning on March 23, 2018. As previously discussed in this [post](#), the tariffs come after the U.S. Department of Commerce’s (“Commerce”) [release](#) of two reports that detail the results of its investigations, conducted pursuant to [Section 232 of the Trade Expansion Act of 1962](#), on the effects on national security of (1) [steel imports](#) (the “Steel Investigation”) and (2) [aluminum imports](#) (the “Aluminum Investigation”). In its reports, Commerce concluded that steel and aluminum are “being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” thus triggering the President’s authority under the [statute](#) to determine what “action . . . must be taken to adjust the imports of the article and its derivatives” to address this threat. These tariffs also come about a month after the President, relying on a different statute, [proclaimed](#) a tariff-rate quota on imports of certain [solar energy related products](#) and [large residential washers](#). Taken together, these new tariffs—all of which were imposed under the authority of two

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LSB10097

uncommonly used laws—may be indicative of the Trump Administration’s approach to addressing perceived unfair trade practices, one that relies on less familiar laws allowing for the imposition of trade measures in addition to the more commonly used [antidumping](#) and [countervailing](#) duty statutes.

Evaluating this new approach, [some commentators](#) have suggested the new tariffs will benefit domestic steel and aluminum manufacturers, [while others](#) have noted the tariffs could harm downstream domestic industries that use imported steel and aluminum as inputs. With the United States being the world’s [largest importer of steel](#), [observers have also noted](#) that the tariffs will likely have ramifications for the global economy, possibly leading to [retaliatory tariffs](#) on American exports. The European Union (“EU”), for example, has [already issued a plan](#) to counter the steel and aluminum tariffs with [tariffs on a range of U.S. steel and agricultural products](#), including, among others, bed linens, chewing tobacco, cranberries, and orange juice. [Other commentators](#) have noted that, for consumers, the tariffs might lead to price increases on goods containing these metals. To place this debate in its legal context, this Sidebar begins with a summary of the trade measures Commerce recommended to the President upon conclusion of its Steel and Aluminum Investigations; examines the President’s final trade actions on these imports; and concludes with a discussion of various options for Congress. (For more background on Commerce’s Steel and Aluminum Investigations, as well as the legal framework for Section 232 investigations, see this [CRS Legal Sidebar](#) and this [CRS Insight](#)).

The New Measures

As detailed [here](#), having reached final affirmative determinations in both the Steel and Aluminum Investigations, Commerce recommended one of three measures be imposed on [steel](#) imports: (1) a tariff of *at least* 24% on imports from all countries; *or* (2) a quota on imports from all countries equal to 63% of each country’s 2017 United States exports; *or* (3) a tariff of *at least* 53% on imports from twelve specific countries *combined with* a quota on imports from all other countries equal to 100% of each country’s 2017 United States exports. As to the first option’s recommended tariff in particular, Commerce [determined](#) that “a 24 percent tariff on all steel imports would be expected to reduce imports by 37 percent,” thereby “enabl[ing] an 80 percent capacity utilization rate at 2017 demand levels.” As to [aluminum](#), Commerce also recommended one of three measures be imposed: (1) a tariff of *at least* 7.7% on imports from all countries; *or* (2) a quota on imports from all countries equal to a *maximum* of 86.7% of each country’s 2017 United States exports; *or* (3) a tariff of 23.6% on imports from China, Hong Kong, Russia, Venezuela and Vietnam, *combined with* a quota on imports from all other countries equal to 100% of each country’s 2017 United States exports. With regard to the proposed tariff of the first option, Commerce [determined](#) that a 7.7% tariff “would restrict aluminum imports sufficiently to allow U.S. primary aluminum producers to increase production by about 669,000 metric tons, bringing total production to . . . about 80 percent of existing U.S. primary aluminum production capacity.”

In general, once Commerce has reached a final affirmative determination and made its recommendations, [case law](#) suggests that [Section 232](#) gives the President “a measure of discretion in determining the method to be used to adjust imports,” indicating that the President is not strictly bound to Commerce’s proposals. Here, [the proclamations](#) take a broader approach than Commerce’s recommendations, generally imposing a tariff of 25% on imports of steel and 10% on imports of aluminum, from all countries except for Canada and Mexico. The proclamations state that Canada and Mexico “present a special case,” given, among other factors, a “shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel [and aluminum], the physical proximity of our respective industrial bases, [and] the robust economic integration between our countries.” Thus, the President concluded that “the necessary and appropriate means to address the threat to the national security posed by imports of steel [and aluminum] articles from Canada and Mexico is to continue ongoing discussions with these countries,” possibly via the [ongoing renegotiation](#) of the North American Free Trade Agreement.

With regard to other countries with which the United States has “a security relationship,” the proclamations state that any such country “is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country.” Talks between countries that might be eligible for such an exception are [reportedly](#) already underway. If such discussions lead to “a satisfactory alternative means to address the threat to the national security such that [the President] determine[s] that imports from that country no longer threaten to impair the national security, [he] may remove or modify the restriction on steel [and aluminum] articles imports from that country.” It is unclear what test would be used to determine when imports no longer threaten to impair the national security for purposes of this provision. The criteria [Commerce used](#) during its Steel and Aluminum Investigations, however, might be a possibility. Specifically, Commerce employed a fairly broad definition of “national security”: “[I]n addition to the satisfaction of national defense requirements, the term ‘national security’ can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements that are critical to the minimum operations of the economy and government.”

As to the types of products that will be subject to the tariffs, the new measures will take effect on the particular product types specified in Commerce’s investigation reports. For [steel](#), this includes certain carbon, alloy, and stainless steel products; for [aluminum](#), the covered products include both unwrought aluminum and certain wrought aluminum products, such as bars, rods, wire, and foil. Importantly, however, both proclamations authorize Commerce to provide relief from the tariffs “for any steel [or aluminum] article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” or “based upon specific national security considerations.” Such exemptions will be provided “only after a request for exclusion is made by a directly affected party located in the United States” and “Commerce determines that the article shall be excluded.” The proclamations direct the Secretary of Commerce to issue procedures for such exclusion requests within ten days of the proclamations’ issuance.

Options for Congress

[Section 232](#) directs the President to submit to Congress a written statement of “the reasons why the President has decided to take action” within thirty days of the date such determinations are made. While the [statute](#) allows Congress to pass a joint resolution of disapproval of actions the President takes, this provision is limited to instances when the President adjusts “imports of petroleum or petroleum products,” and therefore does not apply to the Steel and Aluminum Investigations. Congress could, however, pass other legislation. As discussed in this [CRS report](#), “Congress is constitutionally authorized to raise revenue through taxes, tariffs, duties, and the like, and to regulate international commerce” and “has the accompanying authority to ‘make all Laws which shall be necessary and proper for carrying into Execution’ these powers.” In the context of the new tariffs, Congress could pass legislation that imposes a different trade remedy, and could also amend or repeal Section 232. Legislative efforts are [reportedly already](#) underway, but any such action on the part of Congress would be subject to the [President’s veto](#).

Some may wonder whether a cancellation of the President’s Proclamations might be available under the [Congressional Review Act](#) (“CRA”), which allows Congress to overturn certain agency actions, subject to the [President’s veto](#). (For a discussion of the CRA generally, see these [CRS products](#)). The CRA, however, applies to an agency “[rule](#)” that the Act requires *administrative agencies* (i.e., not the President) to submit to Congress. As such, it is questionable whether this mechanism is available to counteract a *presidential* proclamation of a trade measure imposed pursuant to Section 232.

It is also possible that a foreign country may challenge the President’s actions before one of the various dispute settlement mechanisms established by trade agreements to which the United States is a party. For example, a member of the World Trade Organization (“WTO”) could challenge the President’s actions in a [dispute before the WTO](#), and an adverse ruling could

eventually lead to authorization for the prevailing country to impose retaliatory measures against U.S. exports. However, as relevant here, the WTO's primary agreement governing the imposition of tariffs contains a [national security exception](#) under which its provisions will not "be construed . . . to prevent any [member country] from taking any action which it considers necessary for the protection of its essential security interests." Though this exception has been invoked several times throughout the history of the [WTO and its predecessor agreement](#), it has yet to be [interpreted by a WTO dispute settlement panel](#). Accordingly, there is little guidance as to: (1) whether a WTO panel would decide, as a threshold matter, that it has authority to evaluate whether the United States' invocation of the national security exception is proper; and (2) how a panel might interpret the exception if it were invoked in a dispute before the WTO involving the new steel and aluminum tariffs. On the other hand, a foreign country could also resort to self-help by retaliating with its own trade measures without awaiting the outcome of a dispute settlement proceeding. In that instance, it is unclear whether the country would follow international trade rules, such as those governing [antidumping and countervailing duties](#), in pursuing such self-help measures.

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