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Commerce Announces Two New Section 232 National Security Investigations

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May 8, 2020 – This week, the U.S. Department of Commerce announced two new investigations under Section 232 of the Trade Expansion Act of 1962, as amended, to determine the effects of certain imports on U.S. national security.

New Investigations of Electrical Generation Equipment and Mobile Cranes

On May 4, 2020, U.S. Secretary of Commerce Wilbur Ross announced a new investigation of certain inputs for electrical generation equipment, described as “laminations for stacked cores for incorporation into transformers, stacked and wound cores for incorporation into transformers, electrical transformers, and transformer regulators.” According to the announcement, “[t]ransformers are part of the U.S. energy infrastructure. Laminations and cores made of grain-oriented electrical steel are critical transformer components. Electrical steel is necessary for power distribution transformers for all types of energy – including solar, nuclear, wind, coal, and natural gas – across the country. An assured domestic supply of these products enables the United States to respond to large power disruptions affecting civilian populations, critical infrastructure, and U.S. defense industrial production capabilities.” The investigation was encouraged by “inquiries and requests from multiple members of Congress as well as industry stakeholders.”

On May 6, 2020, the Commerce Secretary announced a second investigation of mobile crane imports. Manitowoc Company, Inc., a domestic producer, filed a petition in December 2019, “alleg[ing] that increased imports of low-priced mobile cranes, particularly from Germany, Austria, and Japan, and intellectual property (IP) infringement by foreign competition, have harmed the domestic mobile crane manufacturing industry.” Reportedly, mobile cranes have been identified as a critical industry by the U.S. Department of Homeland Security for their use in defense applications and critical infrastructure projects.

Section 232 authorizes Commerce, in consultation with the Defense Department and other U.S. officials, to determine the effect of imports “in such quantities or under such circumstances” on U.S. national security and to make recommendations to the President for action or inaction. Factors include (1) existing domestic production of the product; (2) future capacity needs; (3) manpower, raw materials, production equipment, facilities, and other supplies needed to meet projected national defense requirements; (4) investment, exploration, and development needs to meet future requirements; and (5) any other relevant factors. The President may, but is not required to, take action upon an affirmative determination. Actions may be permanent or “for such time{} as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.”

In Section 232 investigations, the Commerce Department’s Bureau of Industry and Security holds public hearings and allows written submissions in support and opposition to any import relief. Otherwise, deliberation and sometimes even the report to the President are not made public. Once an investigation is initiated, a report to the President is due within 270 days, including Commerce’s determination and recommended actions, such as tariffs or quotas. The President then has 90 days to determine whether he agrees with the findings and, if so, whether to take action. The President has 15 days to implement the action and 30 days to inform the Congress.

Scheduling notices will be published in the Federal Register, providing the opportunity for companies and other groups to submit written comments and participate in a public hearing to provide input on the question of whether these imports pose a threat to U.S. national security, as well as any possible actions to adjust the level of imports. It is unclear how the current situation with the coronavirus will affect the public comment process. Other agencies have replaced in-person public hearings with phone and video conferences or additional opportunities for written submissions. Although the official dates of initiation are not yet available, the Commerce Department’s reports are expected sometime in January-February 2021 and the President’s action (if any) would likely be announced in April-May 2021.

Other Section 232 Investigations by the Trump Administration

Until the Trump Administration, Section 232 was rarely used. During the first 50 years the provision was in force, there were only 26 investigations, with the most recent occurring in 2001. The investigations announced this week bring the number of cases to seven in just three years.

In 2017, the steel and aluminum Section 232 investigations resulted in affirmative determinations, based on a relatively broad definition of “national security” to include “the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical for minimum operations of the economy and government.” The President thereafter imposed 25% tariffs on steel imports and 10% tariffs on aluminum, exercising his discretion to exempt countries temporarily (including Canada, Mexico, and the European Union) or permanently (Australia). Argentina, Brazil, and South Korea negotiated quotas in the place of tariffs. In response to U.S. industry concerns about short or inadequate domestic supply, the Administration also set up a process to request exclusion of particular products.

Since the measures were first imposed, the President has made several changes to the scope of the steel and aluminum tariffs. Canada and Mexico negotiated permanent exemptions as part of the U.S.-Mexico-Canada trade deal. The President temporarily raised the tariffs on imports from Turkey due to concerns over the volume of imports upon devaluation of the Turkish lira. Turkey, like other countries, retaliated with its own tariffs on imports from the United States. But when imports from that country declined significantly, the President reduced the tariffs back to the original rates. Most recently, in January 2020, President Trump expanded the scope of the tariffs to include products made from steel or aluminum, such as nails, staples, electrical wire, and parts for automobiles and tractors (known as “derivatives”). The Administration imposed additional tariffs without further

investigation by the Commerce Department, citing concern that imports of derivatives circumvent the steel and aluminum tariffs. Legal challenges to the tariffs are still ongoing.

Another ongoing Section 232 case concerns automobiles, including SUVs, vans and light trucks, and automotive parts. The Commerce Department issued its report to the President on February 17, 2019, which has not been released to the public. The determination was affirmative and therefore the President's decision to take action was due May 18, 2019. As of yet, the President has not decided whether to impose tariffs, quotas, or other measures on such imports, but has instead sought a negotiated solution with Japan, the European Union, and other countries. Any measures would be widely controversial – opposed by the U.S. automotive industry and major trading partners, including Canada, Mexico, and the European Union.

In January 2018, uranium mining companies, Energy Fuels Inc. and Ur-Energy, petitioned for a Section 232 investigation of uranium imports. On July 12, 2019, the President declined to take action after the Commerce Department made an affirmative determination on the effect of uranium imports on national security. The President disagreed with Commerce's findings, but established a National Fuel Working Group to "examine the current state of domestic nuclear fuel production to reinvigorate the entire nuclear fuel supply chain."

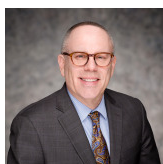
On February 27, 2020, the President agreed with Commerce's recommendation and declined to take action to adjust imports of titanium sponge after an investigation petitioned by Titanium Metals Corp. (known as "Timet"). The President noted the financial strain caused by such imports and the possibility that the remaining U.S. production facility could cease operations. However, the President highlighted the fact that most imports of titanium sponge are from Japan, with which the United States has an important security relationship. The Secretaries of Defense and Commerce were directed to form a working group and invite their counterpart agencies in Japan to participate "in order to agree upon measures to ensure access to titanium sponge in the United States for use for national defense and critical industries in an emergency." The case followed Timet's unsuccessful petition for import relief in the 2017 antidumping and countervailing duty investigations of imports from Japan and Kazakhstan, which resulted in a negative determination by the U.S. International Trade Commission.

Please contact the experienced attorneys in Hughes Hubbard's International Trade practice with any questions or to learn more about providing comments to Commerce during this process.

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