

## **A Review of American Institute for International Steel Inc. v. U.S.: What are the Implications of President Donald Trump 's Decision to Double Tariffs on Turkish Steel Imports?**

Turkey is a major exporter of steel to the United States. In fact, Turkey ranked 6th as a source of steel imports for U.S. domestic consumption in 2017.[\[1\]](#)

Yet, on August 10, 2018, President Trump doubled the tariff on steel imported from Turkey from 25 percent to 50 percent as part of a broader policy of strengthening the domestic steel industry by reducing steel imports.[\[2\]](#) Interestingly enough, imports from Turkey were penalized more than those from other countries that have traditionally provided greater volumes of U.S. steel imports, such as Brazil, South Korea and Russia.

A party challenging the doubling of tariffs on steel imports from Turkey alone would probably question whether President Trump's action of singling out Turkish imports is arbitrary and capricious. In this context, a crucial question arises: Is Section 232 of the Trade Expansion Act of 1962 authorizing the president to impose import restrictions to protect U.S. national security constitutional in the first place? This issue has now come before the United States Court of International Trade in the case of *American Institute for International Steel Inc. v. U.S.*[\[3\]](#)

### **What is Section 232 of the Trade Expansion Act of 1962?**

The Trade Expansion Act of 1962 is a Cold War-era national security law, which delegates to the president the power to “determine to effects on national security of imports”.[\[4\]](#) That is to say, if certain imports are deemed a threat to U.S. national security, the president may move to adjust those imports through restrictive measures, such as tariffs or quotas. Since its enactment, twenty-six Section 232 investigations have been conducted and in only two cases—embargoes on oil imposed against Iran (1979) and Libya (1982)—has action been taken.[\[5\]](#) Investigation under Section 232 is quite rare. In fact, the last Section 232 investigation before the Trump Administration was in 2001, and ultimately no action was recommended.

### **Congress v. President: Who Decides?**

The Commerce Clause together with the Taxing Clause of the U.S. Constitution give Congress the power “to lay and collect Taxes, Duties, Imports and Excises” and “to regulate Commerce with foreign Nations”. In other words, the legislative branch of the U.S. government, as opposed to the executive branch, is being vested with these powers. In their complaint to the International Trade Court in *American Institute*, the Plaintiffs argue that Section 232 violates the doctrine of separation of powers and the system of checks and balances upon which the U.S. Constitution is grounded.

## The Non-delegation Doctrine and the “Intelligible Principle” Standard

Further, the Plaintiffs support their argument by means of the non-delegation doctrine, whereby Congress improperly delegated its authority to another branch of government when it enacted Section 232 of the Trade Expansion Act of 1962. In fact, Congress may delegate its power to administrative agencies provided that there are “intelligible principle” standards governing the exercise of that delegated power.<sup>[6]</sup> Yet, the test is not a demanding one as the Defendants highlighted in their response.

### What Outcomes Can Turkey Expect from This Legal Battle?

Although it is not a part of the claim in *American Institute*, the Administration also doubled the tariffs on aluminum from Turkey, and again only Turkish imports were penalized to such an extent. Turkey has become signal example of the enormous reach of Section 232’s power in so far as President Trump has applied it with unfettered discretion. In the memorandum supporting their motion for summary judgment, the Plaintiffs highlighted this by noting the Administration’s singling out of one country—Turkey—for a doubling of the tariffs. The Plaintiffs underlined one more time that Section 232 allows president to apply measures to adjust imports with no judicial review, and this delegation violates the separation of powers and non-delegation doctrines.

*American Steel* is a significant case because the court may strike down Section 232 as unconstitutional on the ground that Section 232 delegated legislative powers to the executive branch without providing an “intelligible principle” to decisions of the president on adjusting imports. This case is different than *Severstal*, where the Plaintiffs challenged the president’s action under the statute. *American Steel* directly confronts the statute itself, challenging the constitutionality of Section 232.<sup>[7]</sup> If the Plaintiffs succeed, this may overturn the longstanding deference to Congress in delegating its powers, and the doubling of tariffs on imports from Turkey may become unenforceable. With *American Steel* still pending, on August 20 Turkey filed a request for dispute consultation at the World Trade Organization regarding President Trump’s steel and aluminum tariffs. Similar to the Plaintiffs in *American Steel*, Turkey’s complaint emphasizes the discriminatory nature of the tariffs.

Given that both the *American Steel* case and the Turkey’s World Trade Organization challenge are pending, we must wait to see what the future holds for this crucial aspect of current global politics.

<sup>[1]</sup> United States Department of Commerce, Bureau of the Census, Foreign Trade Division, IHS Global Trade Atlas Database: Revised Statistics for 2011–2017. The 2017 data is annualized based on YTD 2017 through October as discussed in “The Effects of Imports of Steel on the National Security” available at [https://www.commerce.gov/sites/commerce.gov/files/the\\_effect\\_of\\_imports\\_of\\_steel\\_on\\_the\\_national\\_security\\_-\\_with\\_redactions\\_-\\_20180111.pdf](https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf) (Last Visited Sep. 3, 2018).

<sup>[2]</sup> Proclamation No. 9772, 158 Fed. Reg. at 40,429 (Aug. 15, 2018).

<sup>[3]</sup> *American Institute for International Steel Inc. et al. v. U.S. et al.* 1:18-cv-00152 (Ct. Int’l Trade)

(Filed June 27, 2018).

[4] 19 U.S.C.S. § 1862.

[5] Fefer & Jones, Section 232 of the Trade Expansion Act of 1962, Congressional Research Service (Feb 23, 2018) available at <https://fas.org/sgp/crs/misc/IF10667.pdf>

[6] *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

[7] *Severstal Export GMBH, et al. v. United States, et al.*, No. 18-00057 (Ct. Int'l Trade 2018)