The Repercussions of Section 232 Tariffs

XIV SYMPOSIUM ON INTERNATIONAL TRADE

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I. Introduction

On March 8, 2018, under Section 232 of the Trade Expansion Act of 1962, the President announced the imposition of a 25% duty on imports of steel mill products and a 10% duty on imports of aluminum, effective March 23, 2018. This announcement was met by consternation from much of the U.S. business community and the United States' international trading partners. Canada, the European Union ("EU"), China, Mexico, India, Russia, and Turkey decried the moves as unlawful under international law and imposed retaliatory tariffs of their own on various products from the United States. International and domestic media largely adopted that view, painting the United States' actions as illegal and undermining the WTO.

While there are various views on the wisdom, effectiveness, and potential net effects on the U.S. economy, this paper argues that the United States' actions under Section 232 were justified by the statute and not *per se* in violation of WTO rules. Article XXI (the "security exception") of the General Agreement on Tariffs and Trade of 1994 ("GATT 1994") preserves the right of member states to undertake actions they consider essential to their security. Because the current Section 232 actions were undertaken on the basis of the United States' articulated national security concerns, they are likely protected under that provision.

While WTO disputes have been filed both by countries who have retaliated and by others who have not, the correct procedure within the WTO for members unhappy with an action or actions of a trading partner is to pursue consultations and, if necessary, a dispute within the WTO. Retaliation is appropriate only if a violation has been found and the member in question does not bring itself into compliance within a reasonable period of time.

Thus, actions of U.S. trading partners in retaliating against an action taken pursuant to a U.S. law are facially in violation of their WTO obligations when done before resolution within

the WTO dispute settlement system and, assuming arguendo, a finding of U.S. action inconsistent with WTO obligations, after a reasonable period of time for the U.S. to bring itself into compliance.

The U.S. has filed requests for consultations and now formation of panels on the actions of our trading partners who retaliated against the United States. Unlike China, the EU, Canada, Mexico, India, Russia and Turkey, the U.S. has not retaliated against the retaliation of those countries but is pursuing the correct WTO path where dissatisfied with a trading partner's action.

Properly viewed, it is the actions of international trading partners in imposing retaliatory measures which should be condemned as clear violations of the WTO instead of the actions of the United States.

This paper begins by outlining the text, legislative history, and historical uses of Section 232. Next, it addresses the Trump Administration's current use of this provision, noting the ways in which such use broke with historical practice but remained consistent with the text and legislative intent behind the law. Next, the paper outlines the international response to these actions and the repercussions they carry for the legitimacy of the WTO. Finally, the paper provides options for international and domestic actors in moving forward.

II. The Text of Section 232

Section 232 of the Trade Expansion Act of 1962[1] (the "Act") provides broad authorities to the President and the Secretary of Commerce (the "Secretary") to investigate and address threats posed by the importation of any goods they deem to threaten the national security of the United States.[2] The statute provides that the Secretary may initiate an investigation, on his own motion or upon the request of an interested party or the head of any department or agency, to

[1] 19 U.S.C. § 1862 (2012).
[2] *Id.*

"determine the effects on national security of imports of [an] article" of interest.[3] Under the Act, the Secretary has 270 days to conduct such an investigation and must, in doing so, consult with the Secretary of Defense "regarding the methodological and policy questions raised" in the process.[4] The Secretary may also seek information from the "appropriate officers of the United States" and, where warranted, conduct public hearings to receive comments from interested parties.[5] At the conclusion of the investigation, the Act requires that the Secretary submit a report to the President outlining his findings and specifying whether he recommends action on the matter.[6] If the report concludes that importations of the article of interest "threaten to impair the national security," the President then has ninety days to decide upon, and an additional fifteen days to implement, a course of action.[7]

In making their determinations, the Act requires that the President and the Secretary of Commerce consider, "in light of the requirements of national security and without excluding other relevant factors," the following elements:

> [The] 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.[8]

[3] § 1862(b).
[4] § 1862(b)(2)(A)(i).
[5] § 1862(b)(2)(A)(ii)-(iii).
[6] § 1862(b)(3)(A).
[7] § 1862(c).
[8] § 1862(d).

The Act also requires that, "[i]n the administration of this section, the Secretary and the President . . . recognize the close relation of the economic welfare of the Nation to our national security" and "consider[] the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of the government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports."[9] As this language demonstrates, Section 232 adopts a broad construct of (1) national security as including economic security, and (2) the scope of the executive's authority to address concerns relating to such matters.

III. The Legislative Background of Section 232

The Tariff Act of 1930 provided the President with the authority to enter into trade agreements with foreign nations for a period of three years.[10] Congress continuously extended that authority until 1954, at which time it added a provision prohibiting the President from reducing duties applicable to an import where that import threatened "domestic production needed for national defense requirements."[11] One year later, in 1955, Congress again amended the statute, this time adding the provisions that form the building blocks of Section 232 today.[12] In this iteration, Congress granted the "Director of the Office of Defense Mobilization" the authority to conduct investigations and the President to take action where they had reason to believe that an article was being imported "in such quantities as to threaten to impair the national

[9] *Id.*

[10] *See* Edward E. Groves, *A Brief History of the 1988 National Security Amendments*, 20 LAW & POL'Y INT'L BUS. 589, 589 (1989) (citing An Act to Amend the Tariff Act of 1930, H.R. 8687, 73d Cong. (1934)) [hereinafter Groves].

[11] H.R. 9474, 83d Cong. (1954).

[12] H.R. 1, 84th Cong. (1955).

security."[13] Despite proposals to include provisions relating to specific industries such as petroleum, Congress passed the statute without such limiting language.[14]

When Congress again extended this authority in 1958 in the Trade Agreements Extension Act, it did so with the stated intent of "giv[ing] the President unquestioned authority to limit imports which threaten to impair defense-essential industries" and to provide "a potentially fast-moving vehicle for guarding our national security in this respect."[15] Congress also adopted the broad concept of national security present in the current version of Section 232 by noting an intent to authorize action "whenever danger to our national security result[ed] from a weakening segment[] of the economy through injury to any industry, whether vital to the direct defense or a part of the economy providing employment and sustenance to individuals or localities."[16] The 1954, 1955, and 1958 amendments were later combined to comprise the current Trade Expansion Act of 1962.

It was not until 1974 that Congress enacted the first limits on the President's authority in this arena by limiting the time for the completion of the investigation to one year.[17] Since that time, few additional limits have been placed on this authority except for those enacted in 1980 in subsection (f) of the Act, nullifying actions taken by the President with respect to imports of petroleum.[18] Nevertheless, by and large, both the current text of and legislative intent behind Section 232 grant wide latitude to the executive to address national security threats arising from the import of goods into the United States.

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[13] S. REP. NO. 232, at 4 (1955).
[14] *Id.*
[15] S. REP. NO. 1838, at 5-6 (1958).
[16] *Id.*
[17] Trade Act of 1974, Pub. L. No. 93-618, § 127(d)(3), 88 Stat. 1978, 1993-994 (1975).
[18] Trade Act of 1974, Pub. L. No. 96-264, § 2, 94 Stat. 439 (1980).

IV. Historical Applications of Section 232

Despite this significant grant of authority, Section 232 has until now played a minor role in the U.S. trade and national security landscape. Prior administrations have seldom employed the statute, and when they have, they have rarely reached affirmative determinations regarding the need for import adjustments. Since 1963, Section 232 had been invoked to conduct only thirty investigations.[19] Out of those thirty, only nine occurred after 1988, and only two resulted in any significant import relief.[20] For example, in 1987, the Antifriction Bearing Manufacturers Association filed a petition requesting an investigation into the import of miniature and instrument precision bearings.[21] After a nearly two-year-long investigation and significant pushback from other agencies, the Department of Commerce postponed any determination while a Defense Federal Acquisition Regulation giving a preference for domestic miniature ball bearings was being implemented.[22] Similarly, in 1983, the National Machine Tool Builders' Association petitioned the Department of Commerce for an investigation on machine tool imports.[23] Secretary of Commerce Malcolm Baldrige determined that the import of such tools posed a national security threat to the United States and recommended banning 90% of all imports of such products.[24] However, after facing pushback from other departments within the U.S. government, the Reagan Administration deferred a formal decision on the investigation and

[19] Office of Tech. Evaluation, Section 232 Investigations Program Guide: The Effect of Imports on the National Security, Investigations Conducted under the Trade Expansion Act of 1962, as Amended (2007), *available at* https://www.bis.doc.gov/index.php/forms-documents/section-232-investigations/86-section-232-booklet/file [hereinafter Section 232 Program Guide]; *see also* RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 31-35 (2018).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See* Groves, *supra* note 10, at 593.

[24] *Id.*

instead sought voluntary restraint agreements ("VRAs") with West Germany, Switzerland, Taiwan, and Japan.[25] On December 16, 1986, the Reagan Administration announced that it had reached VRAs with Japan and Taiwan for a five-year period.[26] However, by and large, such outcomes, modest as they were, were the exception, not the rule, as in the majority of investigations conducted by the Department of Commerce no import adjustments were made.[27]

V. Current Application of Section 232

The Trump Administration has, however, broken from this historical trend and made unprecedented use of Section 232 to impose tariffs on imports of steel and aluminum. Such actions arose in April 2017 after Secretary of Commerce Wilbur Ross initiated investigations to determine the effect of imported steel and aluminum on U.S. national security under Section 232.[28] In so doing, the Administration embraced Section 232's broad concept of national security as including the "national defense, . . . critical infrastructure needs," and "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."[29] Further evidencing the Administration's broad interpretation of U.S. national security, the investigations explicitly reference the obligations of the President and the Secretary of

[25] *Id.; see also* Section 232 Program Guide, *supra* note 19.

[26] *See also* Section 232 Program Guide, *supra* note 19.

[27] *Id.*; *see also* RACHEL F. FEFER & VIVIAN C. JONES, CONG. RESEARCH SERV., 7-5700, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 1-2 (2018).

[28] 82 Fed. Reg. 19,205 (Apr. 26, 2017) (steel); 82 Fed. Reg. 21,509 (May 19, 2017) (aluminum).

[29] BUREAU OF INDUS. & SEC., OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, 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 at 13-14 (2018) [hereinafter STEEL REPORT]; BUREAU OF INDUS. & SEC., OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED at 12-13 (2018) [hereinafter ALUMINUM REPORT].

Commerce "to 'take into consideration the impact of foreign competition on the economic welfare of individual domestic industries' and any 'serious effects resulting from the displacement of any domestic products by excessive imports' in 'determining whether such weakening of our internal economy may impair the national security.'"[30]

Within this framework, the investigations found that in both the steel and aluminum industries, current levels of imports "threaten to impair the national security."[31] In the steel industry, the investigation shows, the United States remains the world's largest importer of steel.[32] Since 2000, six large basic oxygen furnace facilities, comprising 25% of such facilities existing in the United States, have shut down.[33] An additional four electric arc furnace steel facilities and one plate rolling mill were forced into closure due to the surge in the import of cheap steel products.[34] Such closures resulted in more than 14,100 lost jobs between 2015 and 2016, amounting to a 35% decline in employment in the industry.[35] Since 2010, the net income of U.S.-owned steel companies has averaged only $162 million annually, evidencing significant challenges to the industry's long-term viability.[36] Given such declining trends, the report concludes, the U.S. steel industry will be unable to satisfy current and future demands from the military and the critical infrastructure sector, posing serious national security threats to the United States.[37]

[30] STEEL REPORT, *supra* note 29 at 15; ALUMINUM REPORT, *supra* note 29 at 10.
[31] STEEL REPORT, *supra* note 29 at 5; ALUMINUM REPORT, *supra* note 29 at 5.
[32] STEEL REPORT, *supra* note 29 at 3.
[33] *Id.* at 33.
[34] *Id.*
[35] *Id.* at 35.
[36] *Id.* at 37.
[37] *Id.* at 56.

All the while, global excess production capacity continues to rise despite various attempts at negotiations to curb such excess.[38] Market distortions resulting from non-market economies such as China, the world's largest producer and exporter of steel, evade correction by market forces, and numerous negotiations with and programs established by the Chinese government have proven unfruitful.[39] World steelmaking capacity is up 127% from 2000 at 2.4 billion metric tons, and global excess capacity is at 700 million tons, almost seven times the annual total of U.S. steel consumption.[40] Despite China's alleged attempts at reducing steel production, steel capacity has steadily risen from 278 million metric tons in 2003 to 1.12 billion metric tons in 2016.[41] China's excess capacity alone exceeds the United States' total steel-making capacity, and in an average month, China produces nearly as much steel as the U.S. does in an entire year.[42] For certain types of steel, such as electrical transformers, only one U.S. producer remains.[43] As Chinese exports of steel flood the global market, the United States suffers losses in its domestic market share, resulting in lower capacity utilization, closures, and lay-offs.

The Department of Commerce's investigation found similar trends in the aluminum industry. In 2016, the United States imported more than 90% of its primary aluminum, up from 66% in 2012.[44] Such near total reliance on imported aluminum leaves both the Department of Defense and critical infrastructure projects vulnerable.[45] In the Defense sector, aluminum is

[38] *See generally id.* at App'x L.
[39] STEEL REPORT, *supra* note 29 at 51.
[40] *Id.* at App'x L, p. 3.
[41] *Id.* at App'x L, p. 4.
[42] Press release, Department of Commerce, Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House (Feb. 16, 2018), *available at* https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination.
[43] *Id.*
[44] ALUMINUM REPORT, *supra* note 29 at 3.
[45] *Id.* at 3, 5.

needed for maintenance of effective military capabilities including manufacturing armor plates for armored vehicles, aircraft structural parts and components, naval vessels, space and missile structural components, and propellants.[46] In the United States, there are currently five smelting facilities left, only two of which operate at full capacity.[47] Of these five, only one produces high-purity aluminum needed in critical infrastructure and defense aerospace applications.[48] Should this single facility close, the United States would be left without a domestic producer of the aluminum vital to its national security.[49] Nevertheless, in 2016, the domestic production of primary aluminum decreased to half of its 2015 amount and even further in 2017.[50] Six aluminum smelters, employing a total of 3,500 people, have shut down since 2012,[51] and employment in the primary aluminum sector more broadly decreased by 58% from approximately thirteen thousand to five thousand between 2013 and 2016.[52]

Like in the steel industry, in the aluminum industry, there exists massive foreign excess capacity in producing aluminum. China alone produces as much aluminum as the rest of the world combined.[53] This excess production capacity has remained unresponsive to market forces.[54] China's industrial policies and programs incentivize the export of semi-finished downstream aluminum products, evidencing China's growing inroads into higher value-added, downstream sectors.[55] Such policies risk the viability of U.S. downstream producers that

[46] *Id.* at 2.
[47] *Id.* at 3.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 15.
[54] *Id.* at 4.
[55] *Id.*

currently supply the defense sector.[56] In sum, "th[e] overhang of excess capacity means that U.S. aluminum producers . . . will face increasing competition from imported aluminum, . . . as other countries export more downstream products to the United States to bolster their own economic objectives and offset loss of markets to Chinese aluminum exports."[57] It is in response to these legitimate and intractable problems that President Trump imposed the current Section 232 tariffs.

VI. The Repercussions of Section 232 Tariffs

Despite such reasons for the United States' actions, the reaction from U.S. trading partners has been negative as they have characterized the U.S. as undermining the world trading order and the WTO. China, the EU, Canada, Mexico, India, Russia, and Turkey have all announced retaliatory actions all the while pretending that such retaliation is fully justified and consistent with WTO rules and the GATT 1994.[58] The EU, for example, has characterized its actions as lawful "rebalancing measures" that are "proportionate and fully in line with WTO rules,"[59] while characterizing those of the United States as "unjustified" and in violation of "the rules of international trade."[60]

However, that characterization is incorrect. Nothing in the imposition of Section 232 tariffs *per se* violates WTO rules. Article XXI of the WTO ("the security exception") protects the right of member states to take actions they consider necessary for the protection of their

[56] *Id.* at 5.
[57] *Id.* at 15.
[58] Industry & Analysis, *Current Foreign Retaliatory Actions*, Int'l Trade Admin. (Oct. 1, 2018, 8:52 AM), https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp.
[59] Press Release, Eur. Comm'n, EU Adopts Rebalancing Measures in Reaction to US Steel and Aluminium Tariffs (June 20, 2018), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1868.
[60] *Id.*

essential security interests.[61] It has long been the position of the United States[62] that this right is, under both the text and drafting history of Article XXI, not subject to review by the WTO.[63] As the United States has argued, this is evidenced by (1) Article XXI's intentional reference to the right of a member state to take actions "it considers necessary" for the protection of its essential security, and (2) the removal of this exception from the list of those subject to review under the Chapeau of Article XX in the drafting process.[64] In light of this plausible interpretation of the

[61] Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS556/4 (July 20, 2018).

[62] The United States adopted this argument in relation to disputes over its enactment of the Helms-Burton Act in 1997. *See* Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel; Move Escalates Fight with European Union over Cuba Sanctions*, WASH. POST, Feb. 21, 1997, at Al (quoting unnamed senior administration official). Moreover, the United States also adopted this position as a third party to the WTO dispute between Russia and Ukraine, stating that the security exception is "self-judging," "non-justiciable," and "unreviewable" by any WTO panel. Responses of the United States of America to Questions From the Panel and Russia to Third Parties, *Russia – Measures Concerning Traffic in Transit*, at 1-5, WT/DS512 (Feb. 20, 2018), *available at* https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.(public).pdf; *see also* Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/13 (Oct. 15, 2018) (declining Russia's request to join consultations because "[i]ssues of national security are political matters not susceptible to review or capable of resolution by the WTO dispute settlement"); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/14 (Oct. 15, 2018) (same with regards to Thailand); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/12 (Oct. 15, 2018) (same with regards to Mexico); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/11 (Oct. 15, 2018) (same with regards to the European Union); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/10 (Oct. 15, 2018) (same with regards to China); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS564/9 (Oct. 15, 2018) (same with regards to Canada).

[63] Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS556/4 (July 20, 2018).

[64] *See* Responses of the United States of America to Questions From the Panel and Russia to Third Parties, *Russia – Measures Concerning Traffic in Transit*, at 1-5, DS512 (Feb. 20, 2018), *available at* https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.(public).pdf. As originally proposed, the language of what later became Article XXI provided that "[n]one of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the

security exception, there is a reasonable argument, never conclusively settled by the WTO or the Appellate Body, that the United States' imposition of tariffs for national security reasons is a matter for it alone to decide and certainly not facially WTO inconsistent.

Furthermore, whatever dispute there may be as to the merits of the above reading of Article XXI, trading partners did not, as required, bring the matter before the WTO for a determination and resolution before any retaliation could be justified. Instead, seven WTO members elected to impose retaliatory measures without awaiting any result from the dispute settlement process.[65] In an attempt to justify the plainly unjustifiable, the European Union (and most others) have resorted to mischaracterizing Section 232 tariffs as unlawfully undertaken safeguard measures.[66] In so doing, they have argued that the U.S. has failed to follow the appropriate procedures for implementing such measures and gone beyond that necessary to protect its interests.[67] However, such attempts are unsuccessful as the U.S. did not undertake its current tariffs as safeguard measures. The U.S. provision for the imposition of safeguards is contained in Section 201 of the Trade Act of 1974[68] but the current tariffs were imposed under Section 232 of the Trade Expansion Act of 1962, which is specifically reserved for addressing

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purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member." *Id.* at 2. However, in 1947, the United States proposed additional text to make clear the non-justiciability of the security exception by referring to the right of member states to take actions they deem necessary to protect their essential security. *Id.* at 3. Moreover, the drafters also adopted the United States' suggestion to separate the essential security provision from other articles so that it would apply to the Charter as a whole. *Id.* at 1.

[65] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; DSU art. 22.

[66] *See, e.g.*, Request for Consultation from Switzerland, *United States – Certain Measures on Steel and Aluminum Products*, WT/DS556/1 (July 12, 2018).

[67] *Id.*

[68] 19 U.S.C. § 2251 (2012).

issues raising national security concerns.[69] These unconvincing attempts at justifying unlawful retaliatory actions cover up what is the only conclusion to be drawn from the international communities' actions: in retaliating without regard for the procedures established by the WTO, international trading partners have been the ones undermining an already struggling WTO.

VII. Options Moving Forward

For a number of countries, resolution of the 232 issue with the U.S. on steel and aluminum has occurred through bilateral negotiations resulting in modifications to the Executive Orders.[70] So negotiations are always a mechanism for resolving differences, and the Administration has indicated from the beginning a willingness to consider alternative approaches to address its concerns for the steel and aluminum sectors. Canada and Mexico are in discussions with the U.S. following the completion of the USMCA. Other countries may resolve the specific issues in their ongoing discussions with the U.S.

Dispute settlement through the WTO is a potential option for resolution and there are many cases filed by trading partners as well as cases filed by the U.S. against those who have retaliated. The Director General has recently cautioned members to carefully consider the challenges of pursuing national security issues through the WTO dispute settlement system.[71]

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[69] 19 U.S.C. § 1862.

[70] *See, e.g.*, Press release, Office of U.S. Trade Rep., Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim (Mar. 2018), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade; U.S. Customs & Border Protection, *QB 18-118 Steel Mill Articles (AMENDED)* (May 1, 2018), *available at* https://www.cbp.gov/trade/quota/bulletins/qb-18-118-steel-mill-articles; Proclamation 9759 of May 31, 2018, Adjusting Imports of Steel into the United States, 83 Fed. Reg. 25,857 (June 5, 2018); Proclamation 9758 of May 31, 2018, Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 25,849 (June 5, 2018);

[71] Ana Swanson & Jack Ewing, *Trump's National Security Claim for Tariffs Sets Off Crisis at WTO*, N.Y. TIMES, Aug. 12, 2018, *available at* https://www.nytimes.com/2018/08/12/us/politics/trumps-tariffs-foster-crisis-at-the-wto.html

Such an approach will take time (2020-2022?) and is subject to the other challenges at the WTO at the moment in terms of WTO reform and the continued viability of the WTO Appellate Body.

Should there be an effort at WTO reform, it is possible that members could clarify GATT 1994 Article XXI so there is a better shared understanding of how the provision works and what, if any, limits members accept on protecting their national security as they define that term.

Additional 232 investigations are underway on autos and uranium. There has been Congressional concern expressed about the auto investigation. So if Congress has concerns on the breadth of existing law, Congress can act to amend Section 232 to clarify when action should/can be taken. In fact, Congress undertook such action in 1980 when it passed subsection (f) of 19 U.S.C. § 1862 to provide that passage of a resolution of disapproval by Congress would nullify any presidential action on petroleum.[72]

From the private sector, there has been a lawsuit filed at the U.S. Court of International Trade challenging Congress's delegation of such broad authority as is present in Section 232 to the executive, the outcome of which remains to be seen.[73]

VIII. Conclusion

While many have questioned the effectiveness of 232 tariffs and the implications for global trade if the U.S. approach is emulated by others, the President's actions are authorized under existing U.S. law and pursuant to a process that followed the requirements of U.S. law and developed reports showing the national security implications of the situation before relief. The Trump Administration's approach to use of Section 232 is much more aggressive than that of prior Administrations, but consistent with a broadly written statute. The Congress through

[72] § 1862(f).

[73] *See* Compl., Am. Inst. Int'l Steel, Inc. v. United States, No. 18-00152 (Ct. Int'l Trade June 27, 2018).

oversight, hearings, and consideration of legislative amendments can obviously weigh in on the policy choices that the Administration has chosen if there is Congressional concern. Private litigants can challenge the constitutionality of the statute in court if they have concerns. Our trading partners can seek, through negotiation or through dispute settlement, clarification of rights and obligations. But the U.S. is facing retaliation by many major trading partners – the EU, China, Canada, Mexico, India, Turkey, Russia – that is not appropriate under the WTO. Dislike of one country's interpretation of its rights is not a legitimate basis for the abandonment by others of the fundamental structure for challenging differences within the WTO.