

The Wall on Trade: Reconsidering the Boundary of Section 232 Authority under the Trade Expansion Act of 1962

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INTRODUCTION

Mid Continent Nail, the largest nail manufacturer in the heartland of the United States, has laid off 150 of its 500 employees since June 2018.¹ In August 2018, Harley-Davidson, “a true American icon, one of the greats”²—according to President Donald Trump—announced that it would have to shift some production from the United States to other countries,³ such

* J.D. Candidate 2020, University of Minnesota Law School. I would like to thank Professor Oren Gross who guided me during the research and writing of this Note. Thanks also to Professor Christopher Soper, Lauren Graff, Franklin Guenther, and Seung Sub Kim for their invaluable feedback, and the staff and editors of *Minnesota Journal of International Law* for their contributions.

1. Katie Lobosco, *Largest US Nail Manufacturer Clings to Life under Steel Tariffs*, CNN (Sept. 4, 2018), <https://money.cnn.com/2018/09/04/news/companies/tariffs-layoffs-mid-continent-nail/index.html>; Chris Pratt, *When the Only Tool You Have Is a Tariff*, WALL ST. J. (Aug. 1, 2018), <https://www.wsj.com/articles/when-the-only-tool-you-have-is-a-tariff-1533164659> (“Our paper-tape nails became the best in their class. We trounced our foreign competitors. Now, however, our paper-tape plant is idle. On June 1, the U.S. imposed Section 232 duties of 25% on certain kinds of steel, including the wire we use to make nails. Our costs shot up overnight, and it became impossible to sell nails competitively. Orders dropped 70% in two weeks, and our workforce shrank from 500 employees to 370.”).

2. Remarks by President Trump before Meeting with Harley-Davidson Executives and Union Representatives, WHITE HOUSE (Feb. 2, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-harley-davidson-executives-union-representatives/> (“Harley-Davidson is a true American icon, one of the greats. Your motorcycles have carried American service members in the war—in the wars. . . . So thank you, Harley-Davidson, for building things in America. And I think you’re going to even expand—I know your business is now doing very well and there’s a lot of spirit right now in the country that you weren’t having so much in the last number of months that you have right now.”).

3. Harley-Davidson, Inc., Security and Exchange Commission Form 8-K (June 25, 2018), <https://www.sec.gov/Archives/edgar/data/793952/000079395218000038/a8-kitem701tariffdisclosur.htm> (last visited Jan. 6, 2019) (“The

as Brazil, India, and Thailand.⁴ In November 2018, General Motors (“GM”), another highly recognized U.S. company, announced that it would halt production at five North American plants and lay off fifteen percent of its salaried and contract workforce,⁵ which totaled nearly 15,000 people.⁶ GM stated in comments filed with the U.S. Department of Commerce (“Commerce Department”) that President Trump’s tariffs on steel and aluminum imports would impair its ability to compete abroad and could result in “fewer jobs and lower wages.”⁷

All these iconic manufacturers were once staples of the made-in-USA crusade, but now are casualties of the Trump administration’s tariffs on steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962 (“Section 232”). They all have fought hard to survive and thrive in the face of fierce global competition, but today are bleeding profits,⁸ which results in substantial job losses.⁹ It is estimated that the U.S.

European Union has enacted tariffs on various U.S.-manufactured products, including Harley-Davidson motorcycles. These tariffs, which became effective June 22, 2018, were imposed in response to the tariffs the U.S. imposed on steel and aluminum exported from the EU to the U.S. Consequently, EU tariffs on Harley-Davidson motorcycles exported from the U.S. have increased from 6% to 31% To address the substantial cost of this tariff burden long-term, Harley-Davidson will be implementing a plan to shift production of motorcycles for EU destinations from the U.S. to its international facilities to avoid the tariff burden.”).

4. John Cassidy, *Harley-Davidson’s Announcement Shows the Folly of Trump’s Trade War*, NEW YORKER (June 26, 2018), <https://www.newyorker.com/news/our-columnists/harley-davidson-announcement-shows-the-folly-of-trumps-trade-war>.

5. *General Motors Accelerates Transformation*, GEN. MOTORS (Nov. 26, 2018), <https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2018/nov/1126-gm.html>.

6. Ryan Bort, *Is Trump to Blame for GM’s 15,000 Layoffs?*, ROLLING STONE (Nov. 26, 2018), <https://www.rollingstone.com/politics/politics-news/gm-layoffs-trump-tariffs-760003/>.

7. GEN. MOTORS, COMMENT LETTER ON U.S. SECTION 232 NATIONAL SECURITY INVESTIGATION OF IMPORTS OF AUTOMOBILES AND AUTOMOTIVE PARTS 2 (June 19, 2018), <https://assets.bwbx.io/documents/users/ijqWHBFd fxIU/rJBrNbApznVU/v0> (“[I]f prices are not increased and we opt to bear the burden of tariffs or plant moves, this could still lead to less investment, fewer jobs, and lower wages for our employees. The carry-on effect of less investment and a smaller workforce could delay breakthrough technologies and threaten U.S. leadership in the next generation of automotive technology.”).

8. Nathan Bomey, *Trump’s Steel, Auto Tariffs Damage GM, Fiat Chrysler, Ford*, USA TODAY (July 25, 2018), <https://www.usatoday.com/story/money/cars/2018/07/25/gm-ford-fiat-chrysler-trump-tariffs/827983002/>.

9. Mark Sullivan, *The U.S. Job Losses from Trump’s Tariffs Are Starting to Pile Up*, FAST COMPANY (July 3, 2018), <https://www.fastcompany.com/90180122/the-u-s-job-losses-from-trumps-tariffs-are-starting-to-pile-up>.

would lose sixteen jobs for each job gained in the steel and aluminum industries.¹⁰ As taxes on imports, tariffs not only threaten U.S. employment, but also force businesses to raise their prices, and the higher cost will eventually burden every consumer.¹¹

Section 232 provides that the President can impose trade adjustment actions—i.e., tariff, duty, quota, or other trade restrictions—to ensure that the country has reliable supplies of critical materials for national defense in the event of a war.¹² For Section 232 to apply, the executive branch must find a genuine, as opposed to a speculative, threat to national security.¹³ President Trump insisted that, without Section 232 protection, the loss of viable commercial production capacities and related skilled workforce would jeopardize the American steel and aluminum industries' ability to meet the national security requirements.¹⁴ However, the U.S. Department of Defense (“Defense Department”) was skeptical of the real value of Section 232 tariffs.¹⁵ In a memorandum, the then-Secretary of Defense

10. See Stuart Anderson, *Tariffs Are Costing Jobs: A Look at How Many*, FORBES (Sept. 24, 2018); JOSEPH FRANCOIS, LAURA M. BAUGHMAN & DANIEL ANTHONY, ‘TRADE DISCUSSION’ OR ‘TRADE WAR’? THE ESTIMATED IMPACTS OF TARIFFS ON STEEL AND ALUMINUM 2, TRADE PARTNERSHIP (June 5, 2018), <https://tradepartnership.com/reports/round-3-trade-discussion-or-trade-war-the-estimated-impacts-of-tariffs-on-steel-and-aluminum/> (“The tariffs, quotas and retaliation would increase the annual level of U.S. steel employment and non-ferrous metals (primarily aluminum) employment by 26,280 jobs over the first one-three years, but reduce net employment by 432,747 jobs throughout the rest of the economy, for a total net loss of 400,445 jobs.”).

11. See Mary Hanbury, *These Popular Brands Say Trump’s Tariffs Are Forcing Them to Raise Prices*, BUS. INSIDER (Oct. 5, 2018), <https://www.businessinsider.com/trump-tariffs-make-coca-cola-gm-more-expensive-2018-8#pepsi-2> (“Since Trump’s tariffs have been in place, several US companies including Pepsi, Coca-Cola, and Winnebago have said they have been forced to raise prices on the consumer’s side. Others are threatening to follow suit.”); Larry Kudlow, Arthur B. Laffer & Stephen Moore, *Tariffs Are Taxes*, NAT’L REV. (Mar. 3, 2018), <https://www.nationalreview.com/2018/03/tariffs-are-taxes/>; Anderson, *supra* note 10.

12. Zeeshan Aleem, *Trump’s Plan to Make American Steel Great Again Could Set off Global Trade Wars*, VOX (June 26, 2017), <https://www.vox.com/world/2017/6/26/15832710/trumps-plan-to-make-american-steel-great-again-could-set-off-global-trade-wars>.

13. See discussion *infra* Part II.B.

14. *President Donald J. Trump Will Protect American National Security from the Effects of the Unfair Trade Practices*, WHITE HOUSE (Mar. 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-will-protect-american-national-security-effects-unfair-trade-practices/>.

15. Ellen Mitchell, *Trump Tariffs Create Uncertainty for Pentagon*, HILL (Mar. 11, 2018), <https://thehill.com/policy/defense/377697-trump-tariffs-create->

James Mattis stated that the U.S. military only requires about three percent of domestic produced steel and aluminum.¹⁶ He was concerned that labeling imports from strategic allies as a national security threat would cause severe damage to the alliances.¹⁷

The question of whether and to what extent President Trump's Section 232 tariffs adversely affects the economy of the United States is beyond the scope of this Note. Instead, this Note explores the boundary of Section 232 authority. This inquiry is especially timely, not only because of the ongoing disputes at the World Trade Organization ("WTO"), but also because the current administration repeatedly signaled its intention to use Section 232 as a regular tool to slap tariffs on imports.¹⁸ Part I presents an overview of Section 232 tariffs imposed by President Trump and the retaliatory measures taken by the U.S. trading partners. Part II analyzes Section 232's statutory language, legislative history, and past applications, demonstrating that Section 232 should only provide a narrow and exceptional remedy in international commerce. Part III examines Section 232 through the lens of the WTO rules and argues that invoking Section 232 under an overbroad interpretation of national security would lead to an inevitable clash with the international trading system. Ultimately, this Note advocates that in the interests of predictability and certainty of U.S. trade policy, Section 232 should not become a *carte blanche* for protectionism. Among other things, Congress should reconsider the boundary of Section 232 and rebalance presidential trade authority through procedural and substantive constraints.

uncertainty-for-pentagon.

16. Memorandum from James N. Mattis, Sec'y of Def., to Wilbur Ross Jr., Sec'y of Commerce. (Feb. 16, 2018), https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf.

17. Lori Ann LaRocco, *Department of Defense Says Unfair Steel and Aluminum Imports Are a Risk to US National Security*, CNBC (Feb. 22, 2018), <https://www.cnbc.com/2018/02/22/department-of-defense-says-unfair-steel-and-aluminum-imports-are-a-risk-to-us-national-security.html>; Philippe Legrain, *Steeling for a Fight*, FOREIGN POL'Y (Mar. 8, 2018), <https://foreignpolicy.com/2018/03/08/steeling-for-a-fight/> ("If you break down the value of U.S. steel imports in 2017 by country, you get a roll-call of American allies: EU (21.4 percent), Canada (17.6 percent), South Korea (9.6 percent), and Mexico (8.6 percent). Canada in particular is closely integrated with the U.S. defense industry. No wonder the Pentagon is aghast.").

18. See discussion *infra* Part I.B.

I. BACKGROUND: PRESIDENT TRUMP'S NATIONAL SECURITY TARIFFS UNDER SECTION 232 OF THE TRADE EXPANSION ACT

President Trump is on the path to fully execute his “America First” policy by erecting protectionist walls around the economy.¹⁹ Among all trade actions enacted under the Trump administration, the invocation of Section 232, a Cold War-era statute,²⁰ to impose tariffs on steel and aluminum imports (“Section 232 Tariffs”) is one of the most controversial moves.²¹ Section A of this Part provides an overview of the Section 232 investigation procedures. Section B summarizes how the Trump administration imposed tariffs in the name of national security to afford protection to domestic steel and aluminum industries. Section C presents the retaliatory actions and legal proceedings initiated by U.S. trading partners in response to Section 232 Tariffs.

A. OVERVIEW OF SECTION 232 AND ITS INVESTIGATIVE PROCEDURE

Section 232, the national security provision, has been known as the “nuclear option” on trade.²² The statute provides that, upon a finding that the targeted products are being imported in such quantities or under such circumstances as to threaten to impair the national security, the President has the authority to take necessary trade action to adjust imports.²³ Unlike other

19. See Charles Hankla, *Economic History Shows Why Trump's 'America First' Tariff Policy Is So Dangerous*, CONVERSATION (Mar. 1, 2018), <https://theconversation.com/economic-history-shows-why-trumps-america-first-tariff-policy-is-so-dangerous-92715>.

20. Shawn Donnan & Jude Webber, *Donald Trump Links Planned Steel Tariffs to NAFTA Talks*, FINANCIAL TIMES (Mar. 5, 2018), <https://www.ft.com/content/ff6123b2-2078-11e8-9efc-0cd3483b8b80>.

21. See Philip Gordon, *Get Ready for Trump 2.0*, POLITICO (Mar. 14, 2018), <https://www.politico.com/magazine/story/2018/05/14/donald-trump-foreign-policy-20-218366>; Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST. (June 5, 2019), <https://www.cato.org/publications/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale>.

22. Daniel Flatley, *Oil to Steel: History of the 'Nuclear Option' in Trump Trade Kit*, BLOOMBERG (Sept. 27, 2018), <https://www.bloomberg.com/news/articles/2017-07-06/oil-to-steel-history-of-the-nuclear-option-in-trump-trade-kit>.

23. 19 U.S.C. § 1862(b) (2012); see Craig Anderson Lewis, *Waiting for the*

major trade laws, which generally require the U.S. International Trade Commission, an independent, quasi-judicial agency, to determine whether the trade restriction is warranted, Section 232 grants the executive branch a power, which could be invoked at any time with minimal congressional oversight.²⁴

Section 232 investigation can be initiated by an interested party or “self-initiated” by the executive branch.²⁵ Self-initiated investigations generally represent the wants of conglomerates in politically connected industries.²⁶ Prior to the Trump administration, most investigations were launched in response to petitions filed by industry groups.²⁷ At the inception phase, the Secretary of Commerce (“Commerce Secretary”) must immediately notify the Defense Department of the investigation and consult with the Secretary of Defense (“Defense Secretary”) regarding the methodological and policy questions raised in the investigation.²⁸ Upon request, the Defense Secretary shall provide an assessment of the defense requirements of the targeted products.²⁹ The Commerce Secretary shall also seek information and advice from appropriate officers of other federal agencies.³⁰

Big One: Principle, Policy, and the Restriction of Imports under Section 232, 22 LAW & POL'Y INT'L BUS. 357, 357 (1991).

24. See *id.* at 358; Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1347 (Ct. Int'l Trade 2019) (Katzmann, J., dissenting); Press Release, Rob Portman United States Senator for Ohio, Portman Delivers Remarks on Need to Reform National Security Tariff Process, Protect American Jobs (Feb. 8, 2019), <https://www.portman.senate.gov/newsroom/press-releases/portman-delivers-remarks-need-reform-national-security-tariff-process>.

25. 19 U.S.C. § 1862(b)(1); see Chad P. Bown, *Trump's Threat of Steel Tariff's Heralds Big Changes in Trade Policy*, PETERSON INST. FOR INT'L ECON. (Apr. 21, 2017), <https://www.piie.com/commentary/op-eds/trumps-threat-steel-tariffs-heralds-big-changes-trade-policy> (discussing self-initiated cases under different administrations).

26. See *id.* (“In general, industry doesn't really need the US government to initiate cases for it; firms do most of the initiating themselves. Contrary to myth, self-initiated cases don't much help small and medium-sized enterprises (SMEs) to afford legal action—a Government Accountability Office study from 2013 estimates that most legal costs arise well after the case has started. Indeed, the 19 self-initiated cases since 1980 seem to represent the wants of big firms in politically connected industries that could easily have started the cases themselves.”).

27. Doug Palmer, *The Cold War Origins of Trump's Favorite Trade Weapon*, POLITICO (Jul. 5, 2018), <https://www.politico.eu/article/cold-war-origins-of-donald-trump-favorite-trade-weapon/>.

28. 19 U.S.C. § 1862(b).

29. *Id.*

30. *Id.*

The Commerce Department must prepare a report within 270 days from the initiation date.³¹ This report should advise the President whether the targeted imports threaten to impair national security and whether the President should take trade actions.³² After receiving the Commerce Department's report, the President has ninety days to decide whether he or she concurs with the Commerce Department's findings and recommendations, and to determine the nature and duration of the necessary action to adjust the imports.³³ The President may implement the recommendations put forward by the Commerce Department, take other actions, or decide to take no action.³⁴

Without a clear definition of national security, Section 232 provides a list of considerations that are important to determine whether the targeted imports threaten to impair national security.³⁵ These considerations include (1) domestic production needed for projected national defense requirements; (2) the capacity of domestic industries to meet such requirements; (3) existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; (4) the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and (5) 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.³⁶ In a separate sentence, Section 232 provides that "the [Commerce] Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security," and

shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment,

31. *Id.*

32. *Id.*

33. 19 U.S.C. § 1862(c).

34. 19 U.S.C. § 1862(b).

35. 19 U.S.C. § 1862(d); see Richard O. Cunningham, *Leverage Is Everything: Understanding the Trump Administration's Linkage Between Trade Agreements and Unilateral Import Restrictions*, 51 CASE W. RES. J. INT'L L. 49, 56 (2019); see also RACHEL F. FERER ET AL., CONG. RESEARCH. SERV., REPORT NO. R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 2 (2019).

36. § 1862(d).

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 shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.³⁷

It is unclear how to weigh and balance different considerations. Until the Trump administration, all Section 232 determinations have turned on national defense consideration—namely, whether imports threaten the availability of sufficient supply of the targeted product to meet national security needs, in particular, military requirements.³⁸ The Commerce Department first assesses whether domestic industries can produce a given product in quantities sufficient to meet the anticipated defense needs.³⁹ If, and only if, there is a shortfall between the estimate of domestic production capacity and national defense demand, the Commerce Department will then analyze the nexus between imports and the shortfall.⁴⁰

Over the years, a variety of industries and interested parties sought protection for a wide range of products, including everything from photograph shutters to wooden boats.⁴¹ However, in only a few investigations, the Commerce Department concluded that certain imports adversely impacted national security.⁴² In many cases, even though domestic producers could not provide products in adequate quantities, the Commerce Department still concluded that there were no national security threats based on the availability of imports from U.S. allies and other “safe and reliable” trading partners.⁴³ Before the Trump administration, the Commerce Department conducted fourteen Section 232 investigations, and none of them resulted in the imposition of tariffs or other non-tariff barriers

37. *Id.*

38. *See* Cunningham, *supra* note 35.

39. Lewis, *supra* note 23.

40. *Id.*

41. *See generally* Flatley, *supra* note 22.

42. *Id.*

43. Cunningham, *supra* note 35; U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF IRON ORE AND SEMI-FINISHED STEEL ON THE NATIONAL SECURITY 27 (2001) [hereinafter 2001 SECTION 232 INVESTIGATION REPORT]; U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF GEARS AND GEARING PRODUCTS ON THE NATIONAL SECURITY VII-17 (1992).

on trade.⁴⁴ Most notably, in 2001 investigation on steel imports, the Commerce Department explicitly stated that “[t]he issue [of] whether imports have harmed or threaten to harm U.S. producers writ large is beyond the scope of the Department’s inquiry.”⁴⁵

B. PRESIDENT TRUMP’S SECTION 232 INVESTIGATIONS AND NATIONAL SECURITY TARIFFS

In April 2017, President Trump instructed the Commerce Department to investigate the national security threats posed by steel and aluminum imports under Section 232.⁴⁶ The Commerce Department broadly interpreted Section 232’s “national security” in two key ways. First, unlike previous investigations, which primarily focused on U.S. military requirements and vulnerability to supply disruption,⁴⁷ the Commerce Department expanded the definition of national security by including “the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements.”⁴⁸ Second, the scope of Section 232 investigations extended to current and future requirements for national defense and sixteen specific infrastructure sectors, such as electric transmission, transportation systems, food and agriculture, and critical manufacturing, including domestic production of machinery and electrical equipment.⁴⁹

During the steel and aluminum investigation, the Commerce Department held public hearings, solicited public comments, and consulted with the Defense Department.⁵⁰ Stakeholders submitted approximately 300 comments.⁵¹ Many

44. U.S. DEP’T OF COMMERCE, SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECTS OF IMPORTS ON THE NATIONAL SECURITY 13–20 (2007) [hereinafter SECTION 232 INVESTIGATIONS PROGRAM GUIDE].

45. 2001 SECTION 232 INVESTIGATION REPORT, *supra* note 43, at 27.

46. Chad P. Bown & Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT’L ECON. (Sept. 11, 2019), <https://piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

47. See U.S. DEP’T OF COMMERCE, THE EFFECTS ON THE NATIONAL SECURITY OF IMPORTS OF CRUDE OIL AND REFINED PETROLEUM PRODUCTS II-17 (1999) [hereinafter 1999 SECTION 232 INVESTIGATION REPORT].

48. See FERER ET AL., *supra* note 35; U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY 1 (2018) [hereinafter 2018 STEEL INVESTIGATION REPORT].

49. See FERER ET AL., *supra* note 35, at 24.

50. *Id.*

51. *Id.* at 5.

domestic steel producers supported trade actions to limit steel imports, while representatives of the steel-consuming industries opposed any additional tariffs or quotas.⁵² As for aluminum imports, most producing and consuming industries opposed any additional tariffs or quotas.⁵³ Overall, many interested parties voiced caution in the use of Section 232 authority and warned against adopting an overly broad scope of “national security” for the protectionist purpose.⁵⁴

Nevertheless, the Commerce Department concluded that the present quantities and circumstances of steel and aluminum imports were “weakening our internal economy” and threatened to impair the national security.⁵⁵ The Commerce Secretary recommended that President Trump take immediate action to adjust the level of steel and aluminum imports through quotas or tariffs.⁵⁶ However, the security analysis in the report hardly justifies such recommendations. In response to Section 232 investigation, the Defense Department concluded that steel and aluminum imports did not impair its ability to obtain resources for defense needs.⁵⁷ In 2017, domestic manufacturers produced seventy percent of the steel⁵⁸ and forty percent of the aluminum.⁵⁹ Only about three percent of U.S. steel and aluminum production is used for military purposes.⁶⁰ Moreover, the United States can easily obtain steel and aluminum supplies from reliable foreign countries. In 2018, U.S. allies contributed

52. *Id.*

53. *Id.*; see Matthew Philips & Joe Deaux, *The Metal That Started Trump's Trade War*, BLOOMBERG (Sep. 27, 2018), <https://www.bloomberg.com/news/features/2018-09-27/the-metal-that-started-trump-s-trade-war> (detailing that President Trump passed a global tariff against the broader wishes of the aluminum industry).

54. FERER ET AL., *supra* note 35.

55. 2018 STEEL INVESTIGATION REPORT, *supra* note 48, at 5; U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY 5 (2018) [hereinafter 2018 ALUMINUM INVESTIGATION REPORT].

56. 2018 ALUMINUM INVESTIGATION REPORT, *supra* note 55; 2018 STEEL INVESTIGATION REPORT, *supra* note 48, at 5.

57. See Memorandum from James N. Mattis, *supra* note 16; Mitchell, *supra* note 15.

58. Chad P. Bown & Douglas A. Irwin, *Trump's Assault on the Global Trading System and Why Decoupling from China Would Change Everything*, FOREIGN AFF., Oct. 2019, at 127; Veronique De Rugy, *The U.S. Steel Industry: A Reality Check*, NAT'L REV. (Mar. 8, 2018, 4:39 PM), <https://www.nationalreview.com/corner/the-u-s-steel-industry-a-reality-check>.

59. See CONG. RESEARCH SERV., REPORT NO. IF10998, EFFECTS OF U.S. TARIFF ACTION ON U.S. ALUMINUM MANUFACTURING 1 (2018).

60. FERER ET AL., *supra* note 35, at 7.

over sixty-five percent of the total steel imports and over fifty-five percent of the total aluminum imports.⁶¹ The then-Senate Armed Services Committee Chairman John McCain argued that the idea that Section 232 tariffs would protect American interests was “simply not supported by the evidence.”⁶² On the contrary, Section 232 tariffs could harm national security by raising the cost of production for critical military supply and by “alienating key international partners that contribute to our ability to defend our nation and maintain international stability.”⁶³

Despite strong pushback from influential industry leaders,⁶⁴ lawmakers,⁶⁵ and even labor unions,⁶⁶ President Trump insisted that the Section 232 tariffs were “necessary and appropriate to address the threat that imports [of steel and aluminum] pose to the national security.”⁶⁷ On March 8, 2018, President Trump slapped a twenty-five percent tariff on steel imports and a ten percent tariff on aluminum imports from virtually every country in the world.⁶⁸ Instead of focusing on the type of imports that directly relate to security purposes, the Trump administration’s

61. *Id.* at 45.

62. Mitchell, *supra* note 15.

63. *Id.*

64. Alexia Fernández Campbell, *Trump’s Steel Tariffs Are Hated by Almost Every US Industry*, VOX (Mar. 8, 2018, 10:49 PM), <https://www.vox.com/policy-and-politics/2018/3/2/17070816/trump-steel-aluminum-tariffs-businesses>.

65. Joel Gehrke, *Top Senate Republican Unveils Bill to Overturn Trump Tariffs*, WASH. EXAMINER (June 6, 2018, 7:15 PM), <https://www.washingtonexaminer.com/policy/defense-national-security/top-senate-republican-unveils-bill-to-overturn-trump-tariffs> (“A top Senate Republican unveiled a bipartisan bill Wednesday that would allow Congress to overturn President Trump’s recent burst of tariffs with a simple-majority vote.”).

66. Bown & Irwin, *supra* note 58, at 128 (“Trump also went so far as to impose tariffs on steel and aluminum imports from Canada, something that even the domestic industry and labor unions opposed. Over the last 30 years, the U.S. steel and aluminum industries had transformed to become North American industries, with raw steel and aluminum flowing freely back and forth between Canadian and U.S. plants. The same union represents workers on both sides of the border.”).

67. Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11,619, 11,620 (Mar. 15, 2018); Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018).

68. FERER ET AL., *supra* note 35, at 7–9 (South Korea and Brazil agreed to an absolute annual quota for certain steel products and were permanently exempted from the steel tariffs, but South Korea and Brazil did not negotiate an agreement on aluminum and have been subject to the aluminum tariffs. Argentina is permanently exempt from the aluminum tariffs subject to an absolute quota. Australia is permanently exempt from the steel and aluminum tariffs.).

Section 232 tariffs apply to a wide class of products, including many products that have little or no relationship to national security.⁶⁹ In the case of steel, the tariff encompasses more than 170 sub-categories of steel products, ranging from flat-rolled steel to pipes and tube products, and semi-finished products to stainless products.⁷⁰ Many commentators believed that the real motive behind the tariffs is not to protect national security, but to afford protection to domestic steel and aluminum industries.⁷¹

On May 23, 2018, President Trump instructed the Commerce Secretary to initiate another Section 232 investigation into imports of automobiles, including trucks, and automotive parts.⁷² On February 17, 2019, the Commerce Department, without publicly releasing its report,⁷³ concluded that imports of the automobile and automobile parts pose a national security threat because they affect “American-owned” producers’ global competitiveness, research, and development on which U.S. “military superiority” depends.⁷⁴ The President repeatedly signaled his intention to impose a twenty-five percent

69. EUR. STEEL ASS'N, LETTER RE SECTION 232 NATIONAL SECURITY INVESTIGATION OF IMPORTS OF STEEL 12–14, <https://www.bis.doc.gov/index.php/232-steel-public-comments/1787-eurofer-written-submission-public-version/file>.

70. 2018 STEEL INVESTIGATION REPORT, *supra* note 48, at 21–22.

71. See Lakshmikumaran & Sridharan, *US Steel and Aluminium Tariffs and the WTO's Security Exception: Unsecuring Multilateral Trade?*, LEXOLOGY (Apr. 30, 2018), <https://www.lexology.com/library/detail.aspx?g=2deb59a4-7ff6-4fb3-8a6c-b56310ee52dd>; Phil Levy, *The Commerce Department Makes a Feeble National Security Plea for Steel Protection*, FORBES (Feb. 16, 2018), <https://www.forbes.com/sites/phillevy/2018/02/16/the-commerce-departments-feeble-national-security-plea-for-steel-protection/#2425a42842dc>; John Brinkley, *Trump's National Security Tariffs Have Nothing to Do with National Security*, FORBES (Mar. 12, 2018), <https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/#64f22c2e706c>.

72. Statement from the President on Potential National Security Investigation into Automobile Imports, WHITE HOUSE (May 23, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-potential-national-security-investigation-automobile-imports/>.

73. Eliana Johnson & Andrew Restuccia, *Trump Administration Withholds Report Justifying 'Shock' Auto Tariffs*, POLITICO (Mar. 20, 2019), <https://www.politico.com/story/2019/03/20/trump-tariffs-automobiles-commerce-1228344>.

74. Adjusting Imports of Automobiles and Automobile Parts Into the United States, WHITE HOUSE (May 17, 2019), <https://www.whitehouse.gov/presidential-actions/adjusting-imports-automobiles-automobile-parts-united-states/>; RACHEL F. FERER ET AL., CONG. RESEARCH SERV., REPORT NO. IF10971, SECTION 232 AUTO INVESTIGATION 1 (2019).

tariff on future imports of autos, trucks, and auto parts.⁷⁵ Nevertheless, the belief that imported autos threaten to impair national security may seem “absurd.”⁷⁶ In 2018, more than half of imported vehicles are manufactured in Canada or Mexico with substantial U.S. content, and General Motors, Ford, and Fiat-Chrysler produce more than half of U.S. imports from Canada and Mexico.⁷⁷

C. RETALIATORY MEASURES AND LEGAL DISPUTES AT THE WORLD TRADE ORGANIZATION

Not surprisingly, U.S. trading partners did not respond favorably to Section 232 tariffs and immediately challenged them at the WTO.⁷⁸ Some trading partners have threatened or enacted retaliatory measures against the United States, risking escalation of a tit-for-tat trade war.⁷⁹

1. Retaliatory Actions

On May 31, 2018, Canada published two tables of goods to

75. William Mauldin, Timothy Puko, & Kate O’Keefe, *Trump Administration Looks into New Tariffs on Imported Vehicles*, WALL ST. J. (May 23, 2018); Adriene Roberts & Chester Dawson, *Trump Targets Foreign Auto Makers For Not Building Enough in U.S.*, WALL ST. J. (update May 11, 2018, 10:44 PM), https://www.wsj.com/articles/auto-makers-meet-with-donald-trump-on-emissions-nafta-1526063070?mod=article_inline&mod=article_inline.

76. Paul Krugman, *Trump’s Manchurian Trade Policy*, N.Y. TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/28/opinion/trump-china-trade-policy.html> (“The idea that imported cars pose a national security threat is absurd. We’re not about to refight World War II, converting auto plants over to the production of Sherman tanks. And almost all the cars we import come from U.S. allies. Clearly, Trump’s invocation of national security is a pretext, a way to bypass the rules that are supposed to limit arbitrary executive action.”).

77. FERER ET AL., *supra* note 74.

78. FERER ET AL., *supra* note 35, at 20 (listing ten WTO members, Canada, China, India, European Union, Mexico, Norway, Russia, Switzerland and Turkey, which requested for establishment of dispute settlement panel); John Bowden, *Trudeau: Trump Tariffs ‘Are an Affront’ to Canadian Soldiers Who Fought and Died’ Alongside Americans*, HILL (May 31, 2018), <https://thehill.com/policy/international/390106-trudeau-trump-tariffs-are-an-affront-to-canadian-soldiers-who-fought-and> (speaking at a press conference, Canadian Prime Minister Justin Trudeau said, “These tariffs are an affront to the long-standing security partnership between Canada and the United States, and in particular, to the thousands of Canadians who have fought and died alongside American comrades-in-arms.”).

79. Mark K. Neville, Jr., *U.S. Trade Policy and National Security: Backwards or Upside Down?*, 29 J. INT’L TAX’N 26, 27 (2018).

be subject to retaliatory tariffs, representing the value of Canadian goods subject to the steel and aluminum tariffs, respectively, or about \$12.8 billion.⁸⁰ On the same day, the European Union announced plans to place a twenty-five percent tariff on about 200 U.S. products, including denim, bourbon, motorcycles, and peanut butter.⁸¹ The total value of the goods subject to the tariffs is \$3.3 billion.⁸²

Mexico imposed a tariff of twenty-five percent on products like cheese, steel, and Tennessee whiskey, and a twenty percent tariff on goods such as pork, apples, and potatoes.⁸³ The value of imports subject to these tariffs is \$3 billion.⁸⁴

Turkey initially implemented tariffs that cover goods such as coal, paper, walnuts and almonds, tobacco, whiskey, automobiles, cosmetics, machinery equipment, and petrochemical products for about \$266.5 million in value.⁸⁵ On August 14, 2018, after President Trump increased tariffs to fifty percent on Turkish steel and twenty percent on Turkish aluminum, the President of Turkey announced a plan to double tariffs on twenty-two U.S. products, including cars, alcohol, coal, and tobacco.⁸⁶

80. DEP'T OF FIN. CANADA, NOTICE OF INTENT TO IMPOSE COUNTERMEASURES ACTION AGAINST THE UNITED STATES IN RESPONSE TO TARIFFS ON CANADIAN STEEL AND ALUMINUM PRODUCTS (Oct. 12, 2019), <https://www.fin.gc.ca/activity/consult/cacsap-cmpcaa-eng.asp>; Andrew Mayeda, Jenny Leonard, & Joe Deaux, *U.S. Allies Hit Back as Trump Revokes Steel Tariff Reprieve*, BLOOMBERG (May 31, 2018), <https://www.bloomberg.com/news/articles/2018-05-31/ross-announces-u-s-imposing-steel-tariffs-on-eu-canada-mexico>.

81. Alanna Petroff, *Here's How Europe Is Punishing the US for Steel Tariffs*, CNN (June 1, 2018), <https://money.cnn.com/2018/06/01/news/economy/trade-war-tariffs-eu-canada-mexico-response/index.html?iid=EL>.

82. *Id.*

83. Chris Isidore, *Mexico Imposes Tariffs on \$3 Billion Worth of US Exports*, CNN (June 6, 2018), <https://money.cnn.com/2018/06/06/news/economy/mexico-us-tariffs-retaliation/index.html>.

84. *Id.*

85. Ezgi Erkoyun, *Turkey to Start Implementing Retaliatory Tariffs Against United States*, REUTERS (June 21, 2018), <https://www.reuters.com/article/us-usa-trade-turkey/turkey-to-start-implementing-retaliatory-tariffs-against-united-states-idUSKBN1JH0DY>; Erica York, Kyle Pomerleau & Scott Eastman, *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUND. (June 22, 2018), <https://taxfoundation.org/tracker-economic-impact-tariffs/>.

86. Natasha Turak, *Turkey Slaps Tariffs on American Booze, Cars as Business Groups Urge Diplomacy*, CNBC (Aug. 15, 2018), <https://www.cnbc.com/2018/08/15/turkey-slaps-tariffs-on-us-booze-cars-business-groups-urge-diplomacy.html>.

In response to Section 232 tariffs, China announced retaliatory tariffs on about \$3 billion worth of U.S. products, including a fifteen percent tariff on 120 products, such as fruit and wine, and a twenty-five percent tariff on eight other products such as recycled aluminum and pork.⁸⁷

Russia announced its decision to implement tariffs on U.S. goods such as fiber optics and different types of equipment at rates of twenty-five to forty percent.⁸⁸ Russia plans to collect \$87.6 million in retaliation and could impose additional tariffs, up to \$537.6 million, commensurate to Section 232 tariffs' economic effect on Russia.⁸⁹

India announced its plan to increase tariffs on thirty U.S. products to collect \$241 million in revenue.⁹⁰ The increased tariffs target almonds, walnuts, apples, and some chemical and metal products.⁹¹

2. WTO Disputes: *United States—Certain Measures on Steel and Aluminum Products*

While the retaliatory measures would result in significant economic impacts, the legal battle at the WTO, *United States—Certain Measures on Steel and Aluminium Products*,⁹² would be even more damaging. After unsuccessful consultations, ten WTO members brought dispute settlement cases against the United States.⁹³ The complaint primarily focuses on three alleged violations.⁹⁴ First, Section 232 tariffs violate Article II of the

87. Chris Buckley, *China Slaps Tariffs on 128 U.S. Products, Including Wine, Pork and Pipes*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/world/asia/china-tariffs-united-states.html>; MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA, <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201803/20180302723376.html>.

88. York, Pomerleau & Eastman, *supra* note 85.

89. *Id.*

90. Rishi Iyengar, *India Moves Ahead with Tariffs on US Goods*, CNN (June 18, 2018), <https://money.cnn.com/2018/06/17/news/economy/india-us-tariffs-steel-aluminum-wto/index.html>.

91. *Id.*

92. *DS548: United States — Certain Measures on Steel and Aluminum Products*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm (last visited Oct. 26, 2019).

93. FERER ET AL., *supra* note 35, at 20.

94. Request for the Establishment of a Panel by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (Oct. 18, 2018).

General Agreement on Tariffs and Trade (“GATT”).⁹⁵ This Article prohibits member countries from imposing duties on imports in excess of their tariff commitment.⁹⁶ Second, Section 232 tariffs are essentially safeguard measures (Article XIX of the GATT) intended to alleviate injury to domestic steel and aluminum industries from increased quantities of imports,⁹⁷ but the United States failed to comply with all procedural requirements for invoking Article XIX.⁹⁸ Third, the United States failed its obligation to ensure that Section 232 complies with Article XVI: 4 of the WTO Agreement, which explicitly provides that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”⁹⁹

In response, the Trump administration cited the national security exception under Article XXI of the GATT,¹⁰⁰ which

95. *Id.*

96. *Members Commitments*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited Oct. 26, 2019) (“WTO negotiations produce general rules that apply to all Members, and specific commitments made by individual Member governments. The specific commitments are listed in documents called ‘schedules of concessions’, which reflect specific tariff concessions and other commitments that they have given in the context of trade negotiations.”).

97. *Members Commitments*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited Oct. 26, 2019) (“A WTO member may take a ‘safeguard’ action (i.e., restrict imports of a product temporarily) to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry.”).

98. Request for the Establishment of a Panel by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (Oct. 18, 2018); WORLD TRADE ORG., *Agreement on Safeguards*, https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited Oct. 26, 2019) (“The Agreement on Safeguards sets forth the rules for application of safeguard measures pursuant to Article XIX of GATT 1994. Safeguard measures are defined as ‘emergency’ actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member’s domestic industry.”).

99. Request for the Establishment of a Panel by the European Union, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (Oct. 18, 2018); WORLD TRADE ORG., ARTICLE XVI (JURISPRUDENCE) 1, WTO ANALYTICAL INDEX, https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art16_jur.pdf (last visited Oct. 26, 2019).

100. Communication from the United States, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/14 (Oct. 18, 2018); Manuel Sanchez Miranda, *Seven WTO Members Pursue Challenges of the Trump Administration’s Imposition of Section 232 Tariffs on Steel and Aluminum*, JDSUPRA (Nov. 8, 2018), <https://www.jdsupra.com/legalnews/trade->

permits countries to take trade actions for the protection of its essential security interests.¹⁰¹ The United States contended that the Section 232 tariffs are necessary to ensure the long-term viability of the domestic steel and aluminum industries, which must meet national defense requirements, by protecting the industries from foreign competition.¹⁰² The United States further argued that Section 232 tariffs are not susceptible to review or capable of resolution by the WTO, because “[e]very [m]ember of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests.”¹⁰³ However, if the WTO chooses to do nothing in this dispute, it may create a dangerous loophole for any member country to adopt overtly protectionist measures by claiming national security grounds.¹⁰⁴ On November 21, 2018, the WTO’s Dispute Settlement Body agreed to establish a panel to examine U.S. tariffs on steel and aluminum imports and Section 232.¹⁰⁵

II. TRACING THE HISTORY OF SECTION 232 AUTHORITY

The development of Section 232 authority deeply connects with the process of liberalizing international trade through coordinated multilateral tariff reductions and the negotiation of the GATT.¹⁰⁶ This process, led by the United States, was driven

manufacturing-news-of-note-56905.

101. See Alan S. Alexandroff & Rajeev Sharma, *The National Security Provision--GATT Article XXI*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 1572, 1572 (Patrick F. J. Macrory et al. eds., 2005).

102. BRANDON J. MURRILL, CONG. RESEARCH. SERV., REPORT NO. LSB10223, *THE “NATIONAL SECURITY EXCEPTION” AND THE WORLD TRADE ORGANIZATION* 1 (2018).

103. Communication from the United States, *United States — Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS548/13 (Jul. 6, 2018); see Tom Miles, *U.S. Steel Tariff Fight Stirs up a Swarm of WTO Litigation*, REUTERS, (Oct. 29, 2018, 8:23 AM), <https://www.reuters.com/article/us-usa-trade-wto/u-s-steel-tariff-fight-stirs-up-a-swarm-of-wto-litigation-idUSKCN1N31NN>.

104. See Alan Beattie, *US Bullying on Trade Deals Undermines Global Rule Book*, FINANCIAL TIMES (Mar. 4, 2019), <https://www.ft.com/content/79997886-3c44-11e9-b72b-2c7f526ca5d0>.

105. WORLD TRADE ORG., *supra* note 92.

106. See *National Security Tariffs: Section 232*, SENATE REPUBLICAN POLY COMM., <https://www.rpc.senate.gov/policy-papers/national-security-tariffs-section-232> (last visited June 26, 2019).

by the view that international trade cooperation is necessary to prevent “beggar-thy-neighbor” policies.¹⁰⁷ Global Protectionism peaked in the 1930s when the United States passed the Smoot-Hawley Tariff Act, which imposed draconian tariffs on imports.¹⁰⁸ Other countries soon erected similar punitive tariffs in retaliation, which had prolonged the Great Depression and eventually created an atmosphere favorable to the outbreak of World War II.¹⁰⁹

The global nature of the Great Depression and the subsequent disasters forced leaders and politicians of the United States to appreciate the fact that protectionism could have a profound effect on the world.¹¹⁰ In the meantime, there was a genuine concern that over-dependence on imports for essential war materials may weaken national defense if the United States loses reliable supply in the event of a war.¹¹¹ With such consideration in mind, Congress passed Section 232 to constrain the presidential power to cut tariffs if the President determines that such reduction would adversely impact national defense.¹¹² To fully understand Section 232 authority, it is crucial to understand the history and past practice.

107. ANDREW GUZMAN ET AL., *INTERNATIONAL TRADE LAW* 86 (3rd ed. 2016) (“The commercial policies of the 1930s became characterized as ‘beggar-thy-neighbor’ policies because many countries sought to insulate their own economy from the economic downturn by raising trade barriers. Blocking imports proved to be a futile method of increasing domestic employment because one country’s imports were another country’s exports. The combined effect of this inward turn of policy was a collapse of international trade and a deepening of the slump in the world economy.”); see Lewis, *supra* note 23, at 360.

108. Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. INT’L L. J. 1, 3 (2019).

109. GUZMAN ET AL., *supra* note 107; Lewis, *supra* note 23, at 360.

110. See JOHN M. DOBSON, *TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION* 71 (1975); DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* 10 (“The economic distress of the [1930s] also had political consequences, undermining faith in democratic governments to manage their economics and hence abetting a turn to more authoritarian in Germany and elsewhere.”).

111. See David D. Knoll, *Section 232 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond*, 10 MD. J. INT’L L. 55, 57–58 (1986).

112. *National Security Tariffs: Section 232*, *supra* note 106; Knoll, *supra* note 111, at 57.

A. HISTORY OF SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

Congressional passage of the Trade Expansion Act of 1962 (“1962 Act”) authorized the President to conduct tariff negotiations with foreign countries.¹¹³ The 1962 Act, enacted just three days before the Cuban Missile Crisis,¹¹⁴ was widely regarded as the most important piece of legislation passed by the 87th Congress.¹¹⁵ The aim was to increase international commerce, primarily by giving the President the authority to cut tariffs and to promote global trade liberalization.¹¹⁶ This Section examines historical sources to understand the original meaning and the development of Section 232. This insight may help explain how the current administration fundamentally departs from the underlying purpose of Section 232.

1. The Early Development of the National Security Exception

The concept of national security exception was first introduced into domestic statutes as a response to the inception of the GATT.¹¹⁷ During the GATT negotiations, while recognizing the relationship between global economic collaboration and enduring peace, the United States and other countries felt the need to preserve some flexibility for security and defense policy.¹¹⁸ This view eventually led to the creation of Article XXI of the GATT, which specifically provides that a contracting country shall not be prevented “from taking any

113. Palmer, *supra* note 27.

114. *Id.* (“Then, just days after Kennedy signed the bill in October 1962, he discovered the Soviets had secretly moved nuclear missiles into Cuba, beginning a tense 13-day confrontation that many feared could escalate into a full-blown nuclear war.”).

115. *The Trade Expansion Act*, CONG. Q. ALMANAC (1962), <https://library.cqpress.com/cqalmanac/document.php?id=cqal62-1326212> (last visited June 26, 2019).

116. *National Security Tariffs: Section 232*, *supra* note 106.

117. Jaemin Lee, *Commercializing National Security? National Security Exceptions’ Outer Parameter under GATT Article XXI*, 13 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 277, 282.

118. See Alexandroff & Sharma, *supra* note 101, at 1572; Hunter Nottage, *Trade in War’s Darkest Hour: Churchill and Roosevelt’s Daring 1941 Atlantic Meeting that Linked Global Economic Cooperation to Lasting Peace and Security*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/tradewardarkhour41_e.htm (last visited June 26, 2019).

action which it considers necessary for the protection of its essential security interests.”¹¹⁹

Reflecting this development, the Trade Agreements Extension Act of 1954 became the first U.S. legislation that contains a national security provision, which allows the President to refuse tariff reduction if “such reduction would threaten domestic production needed for projected national defense requirements.”¹²⁰ However, Congress never considered safeguarding national security interests to be in any way inconsistent with its policy to promote trade liberalization.¹²¹ The Commission on Foreign Economic Policy noted that:

[T]he nations of the free world would be stronger and more cohesive if many of the existing barriers to the exchanges of their goods were reduced, if unnecessary uncertainties and delays created by such barriers were eliminated, and if adequate international arrangements for discussing and finding solutions to their common trade problems were developed and maintained.¹²²

In 1955, Congress amended the national security provision to grant the Director of the Office of Defense Mobilization authority to lead the investigation to determine whether a product was imported in such quantities as to threaten the supply of essential war goods.¹²³ The Office of Defense Mobilization, established by President Harry Truman during the Korean War, is an agency of the executive branch to plan, coordinate, direct and control all wartime mobilization activities of the federal government, including human resources, economic stabilization, and transport operations.¹²⁴ This amendment was guided by the view that the national security provision “is not an alternative to the means afforded by the escape clause for providing industries which believe themselves injured a second

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

120. Trade Agreements Extension Act of 1954, ch. 445, § 2, 68 Stat. 360 (1954); Lee, *supra* note 117.

121. Knoll, *supra* note 111, at 58.

122. H.R. Doc. No. 290, at 45 (1954).

123. See Trade Agreements Extension Act of 1955, Pub. L. No. 86, § 7, 69 Stat. 166 (1955).

124. See Exec. Order No. 10193, 3 C.F.R., 1949–53 (1950); ELLIOTT V. CONVERSE III, REARMING FOR THE COLD WAR 1945–1960 80 (2011).

court in which to seek relief.”¹²⁵ Rather, the national security provision should “provide those best able to judge national security needs . . . a way of taking whatever action is needed to avoid a threat to national security through imports.”¹²⁶

2. The Trade Agreements Extension Act of 1958

In extending the President’s authority to enter into new trade agreements and further reduce the tariff level, Congress passed the Trade Agreement Extension Act of 1958 (“1958 Act”).¹²⁷ Under the 1958 Act, Congress amended the national security provision, introducing two sets of considerations—national defense and economic welfare—in determining whether certain imports threaten national security.¹²⁸

With respect to national defense consideration, Congress specified that the Director of the Office of Defense Mobilization and the President must consider “domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resource, products, raw materials, and other supplies and services essential to the national defense.”¹²⁹ This specification is consistent with the stated purpose of this amendment to strengthen presidential authority to “limit imports which threaten to impair defense-essential industries.”¹³⁰

Disagreement arose in the Senate with respect to the meaning of the economic welfare consideration,¹³¹ which provides that the President shall recognize “the close relation of the economic welfare of the [n]ation to our national security” and shall take into consideration:

125. H.R. REP. NO. 1761, at 8, 13 (1958) (“[Under the escape clause,] the President is authorized to raise duties or impose quotas if such action is necessary to prevent increased imports of articles subject to trade agreement concessions from causing or threatening serious injury to a domestic industry producing like or directly competitive products.”).

126. *Id.*

127. Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673 (1958); S. REP. NO. 85-1838, at 2 (1958).

128. Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 8, 72 Stat. 673, 678–79.

129. S. REP. NO. 85-1838, at 11.

130. *Id.* at 5–6, 11.

131. *Id.* at 23–24.

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 any other serious effects resulting from the displacement of any domestic products by excessive imports.¹³²

Read unqualifiedly, this language would extend national security protection to “virtually every industry” for claiming that its injury “weakens the economic welfare of the country” and thus “affects the national security.”¹³³ However, Senator Paul H. Douglas opposed such overbroad interpretation and argued that “[t]he question of injury, while it might be a factor in the consideration, was not the object of the provision as such.”¹³⁴

The House was very straightforward with the purpose of the national security provision, stating that “the interest to be safeguarded is the security of the Nation, *not the output or profitability of any plant or industry except as these may be essential to national security.*”¹³⁵ Recognizing “the fluid and complex interests involved,” the House “considered it paramount to emphasize . . . that any [trade adjustment] action, large or small, for a short or long time, can be taken only if warranted by national security considerations.”¹³⁶ A House report succinctly summarizes the core difference between the escape clause and the national security provision, providing that “[s]erious injury to a particular industry, which is the principal consideration in the escape-clause procedure, may also be a consideration bearing on the national security position in particular cases, but the avoidance or remedy of injury to industries is not the object per se.”¹³⁷ Therefore, the mere existence of injury caused by imports to the domestic industries, regardless of how severe, does not by itself merit national security protection.¹³⁸

132. Trade Agreements Extension Act of 1958 § 8, 72 Stat. at 679.

133. S. REP. NO. 85-1838, at 23–24.

134. *Id.* at 23.

135. H.R. REP. No. 85-1761, at 14 (1958) (emphasis added).

136. *Id.*

137. *Id.* at 13.

138. *See id.*

3. The Trade Expansion Act of 1962

The Trade Expansion Act of 1962 (“1962 Act”) granted the President more tariff-cutting power than ever before.¹³⁹ In particular, the President has the authority to cut tariffs generally by fifty percent, to eliminate tariffs on certain categories of goods produced by the United States and the European Economic Community,¹⁴⁰ and to eliminate tariffs on certain non-competitive agricultural and forest products.¹⁴¹ Congress transferred the investigative authority to another agency of the executive branch, the Office of Emergency Planning, which coordinates “emergency preparedness activities, principally in areas of resource utilization, civil defense, economic stabilization, postattack rehabilitation, and government organization and continuity.”¹⁴²

Congress approved the 1962 Act by the largest majority in the history of the trade legislations.¹⁴³ Upon signing, President John F. Kennedy emphasized that “[t]his act recognizes, fully and completely, that *we cannot protect our economy by stagnating behind tariff walls*, but that the best protection possible is a mutual lowering of tariff barriers among friendly nations so that all may benefit from a free flow of goods.”¹⁴⁴ This remark demonstrates that President Kennedy was interested in bringing down the trade barriers to promote international cooperation rather than erecting tariff walls around U.S.

139. Joanne Thornton, *Section 232: U.S. Trade and National Security*, GLOB. BUS. DIALOGUE (July 3, 2018), <https://www.gbinc.org/section-232-u-s-trade-and-national-security/>.

140. The European Economic Community (EEC) was a regional organization that aimed to create a common market among its members through the elimination of most trade barriers and the establishment of a common external trade policy. Upon the formation of the European Union (EU), the EEC was incorporated and renamed the European Community (EC). In 1993, the EC was subsumed under the EU. Matthew J. Gabel, *European Community*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/European-Community-European-economic-association> (last visited Feb. 7, 2020).

141. *The Trade Expansion Act*, *supra* note 115; Thornton, *supra* note 139.

142. NATIONAL ARCHIVES, REC. OF THE OFF. OF EMERGENCY PREPAREDNESS, <https://www.archives.gov/research/guide-fed-records/groups/396.html> (last updated Feb. 18, 2019).

143. DOBSON, *supra* note 110, at 41–42.

144. Recording: John F. Kennedy, Remarks upon Signing the Trade Expansion Act (Oct. 11, 1962), <https://www.jfklibrary.org/asset-viewer/archives/JFKWHA/1962/JFKWHA-136-002/JFKWHA-136-002> (emphasis added).

economy.¹⁴⁵

The passage of the 1962 Act paved the way for the success of the 1964 GATT negotiation round, which was referred to as the “Kennedy Round” for the President who had been instrumental in getting the trade legislation enacted.¹⁴⁶ The Kennedy Round was one of the most comprehensive rounds of trade negotiations ever held in history.¹⁴⁷ The major trading countries made cuts across-the-board ranging from thirty-six to thirty-nine percent of previous tariff rate levels on most products.¹⁴⁸ Ironically, the same statute that was designed to promote the development of an open and nondiscriminatory trading system is now being invoked to protect the U.S. economy by stagnating behind tariff walls.¹⁴⁹

4. Amendments to Section 232

Section 232 has been amended three times over the years.¹⁵⁰ However, the rationale and the presidential authority under the statute have remained virtually unchanged.¹⁵¹ Under the Trade Act of 1974, Congress transferred the investigating authority to the Department of Treasury (“Treasury Department”).¹⁵² This Act requires the Secretary of the Treasury (“Treasury Secretary”) to consult with the Defense Secretary, the Commerce Secretary, and other appropriate officers during the Section 232 investigations and to hold public hearings, which allow interested parties to present information relevant to the investigation.¹⁵³

In 1980, Congress passed an amendment to limit presidential Section 232 authority on petroleum imports under the Crude Oil Windfall Profit Tax Act.¹⁵⁴ This amendment established a congressional review procedure, allowing Congress

145. Palmer, *supra* note 27.

146. DOBSON, *supra* note 110, at 41.

147. *Id.*

148. *Id.* at 41–42.

149. *See* Palmer, *supra* note 27.

150. Thornton, *supra* note 139.

151. *Id.*

152. Trade Act of 1974, Pub. L. No. 93-618 § 135.

153. *Id.* § 133.

154. General Explanation of the Crude Oil Windfall Profit Tax Act of 1980, H.R. 3919, 96th Cong., Pub. L. 96-223, 119.

to nullify trade actions on petroleum imports.¹⁵⁵ Congress believed that “an orderly and specific procedure should be established for reviewing presidential actions taken to adjust oil imports.”¹⁵⁶

In 1988, Congress further amended Section 232 under the Omnibus Trade and Competitiveness Act, transferring the investigative responsibility from the Treasury Department to the Commerce Department.¹⁵⁷ The most significant change was the addition of a formal procedure to involve the Defense Department in the Section 232 investigation.¹⁵⁸ This amendment confirmed the essential role that the Defense Department plays during the investigation, mandating that the Commerce Secretary should immediately notify the Defense Secretary of any investigation initiated and consult with the Defense Secretary regarding the methodological and policy questions.¹⁵⁹ Upon request by the Commerce Secretary, the Defense Secretary should assess the defense requirements of the targeted products.¹⁶⁰

Overall, this review of legislative development shows that Congress intended to use Section 232 only under exceptional circumstances after a thorough investigation by the Commerce Department, the Defense Department, and other relevant federal agencies.¹⁶¹ Granted, a close relationship exists between the welfare of domestic industries and national security, but Congress never intended to make Section 232 an alternative to the relief available to domestic industries as an escape clause.¹⁶²

B. PRESIDENTIAL TRADE ACTIONS IMPOSED UNDER SECTION 232 AUTHORITY

Regardless of what Congress’s original conception of Section 232 was, it “has been the least utilized of the major trade laws.”¹⁶³ Until the Trump administration, there were only

155. *Id.*

156. *Id.*

157. H.R. REP. NO. 100-576, at 160 (1988).

158. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 1501 (1988).

159. H.R. REP. NO. 100-576, at 160 (1988).

160. *Id.*

161. See *National Security Tariffs: Section 232*, *supra* note 106.

162. See H.R. REP. NO. 85-1761, at 8–13 (1988).

163. Chad Bown & Cathleen Cimino-Issacs, *Will Trump Involve National*

twenty-six investigations, under which the executive branch narrowly applied national security provision and only imposed unilateral trade actions to restrict petroleum imports.¹⁶⁴ The first twenty-four cases occurred from 1963 to 1994 before the establishment of the WTO.¹⁶⁵ In nine investigations, the Commerce Department (or the Treasury Department before it) determined that the subject imports threatened to impair national security.¹⁶⁶ The President only took unilateral trade actions in five of these cases.¹⁶⁷ In the first three cases, the executive branch imposed licensing fees and additional supplemental fees on petroleum imports in response to the sharp oil price increase related to the Arab Oil Embargo.¹⁶⁸ In two cases, the executive branch imposed oil embargoes targeting petroleum imports from specific countries (Iran and Libya).¹⁶⁹ In general, the economic welfare consideration does not play a role in the national security determination until it is evident that domestic industries could not produce a given product in quantities sufficient to meet the anticipated defense needs.

Since 1980, while the Commerce Department continued to find that petroleum imports threaten national security, the executive branch, instead of imposing tariffs or quotas, generally sought less-disruptive domestic measures and international cooperation to enhance security.¹⁷⁰ This Section examines presidential actions and inactions on petroleum imports in turn, demonstrating that the Trump administration's Section 232 tariffs represent a radical break with past U.S. trade practice.

Security to Start a Trade War?, PETERSON INST. FOR INT'L ECON. (Jul. 5, 2017 4:45 PM), <https://www.piie.com/blogs/trade-investment-policy-watch/will-trump-invoke-national-security-start-trade-war>.

164. See SECTION 232 INVESTIGATIONS PROGRAM GUIDE, *supra* note 44.

165. *Id.*; *History of the Multilateral Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited Nov. 29, 2019).

166. See SECTION 232 INVESTIGATIONS PROGRAM GUIDE, *supra* note 44.

167. *Id.*

168. *Id.*; See Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L L. 235, 246–48 (1989).

169. See SECTION 232 INVESTIGATIONS PROGRAM GUIDE, *supra* note 44.

170. U.S. DEP'T OF COMMERCE, THE EFFECT OF CRUDE OIL AND REFINED PETROLEUM PRODUCT IMPORTS ON THE NATIONAL SECURITY at ES-6 (1994) [hereinafter 1994 SECTION 232 INVESTIGATION REPORT].

1. The Arab Oil Embargo, Section 232 Investigations, and Presidential Trade Actions (1973–1980)

In the early 1970s, the United States' reliance on oil imports totaled around thirty-seven percent of domestic consumption at a negative trade balance of \$25 billion.¹⁷¹ Members of the Organization of Petroleum Exporting Countries (OPEC) controlled the bulk of the world petroleum supply.¹⁷² During the 1973 Arab–Israeli War, Arab members of the OPEC imposed an oil embargo against the United States.¹⁷³ This embargo denied the United States about 2.4 million needed barrels of oil per day.¹⁷⁴ The price of imported oil quadrupled from \$2.90 a barrel before the embargo to \$11.65 a barrel in January 1974, which imposed skyrocketing costs on U.S. consumers and challenged the stability of the economy.¹⁷⁵ This oil embargo is widely blamed for causing the 1973–1975 recession, during which 2.3 million jobs were lost and the unemployment rate reached nine percent.¹⁷⁶

Amid severe recession, the Ford administration conducted a full-scale investigation of imported petroleum under Section 232.¹⁷⁷ This investigation primarily focused on the risk of interruption of the supply of petroleum imports and the impact

171. H.R. REP. No. 94-340, at 2 (1976); Bialos, *supra* note 168, at 245–46.

172. Bialos, *supra* note 168, at 246 (“As a consequence of post-World War II economic expansion, U.S. consumption of oil had grown substantially—from 6.56 million bbl/d in 1950 to 17.3 million bbl/d in 1973.”).

173. *Oil Embargo, 1973–1974*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1969-1976/oil-embargo> (last visited Feb. 18, 2019).

174. Effects of Imported Articles on the National Security, 40 Fed. Reg. 4457 (Jan. 30, 1975).

175. OFF. OF THE HISTORIAN, *supra* note 173; see Michael Corbett, *Oil Shock of 1973–74*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/oil_shock_of_1973_74.

176. Andrew DePietro, *Why the 1970s Was the Worst Decade for the US Economy*, MSN (Feb. 9, 2019), <https://www.msn.com/en-us/money/markets/why-the-1970s-was-the-worst-decade-for-the-us-economy/ar-BBST6Nv>; Mark Koba, *Recession: CNBC Explains*, CNBC EXPLAINS (July 21, 2011, 12:52 PM), <https://www.cnbc.com/id/43563081>; Michael A. Urquhart & Marillyn A. Hewson, *Unemployment Continued to Rise in 1982 as Recession Deepened*, Feb. 1983 MONTHLY LAB. REV. 3, <https://stats.bls.gov/opub/mlr/1983/02/art1full.pdf>; Victor Zarnowitz & Geoffrey H. Moore, *The Recession and Recovery of 1973–1976*, 4 EXPLORATIONS IN ECON. RES. 489, <https://www.nber.org/chapters/c9101.pdf>; *The Recession of 1973–75 in the U.S.*, SAN JOSE ST. U. DEPT ECON., <http://www.sjsu.edu/faculty/watkins/rec1974.htm> (last visited Feb. 18, 2019).

177. Bialos, *supra* note 168, at 245.

of such interruption on national defense.¹⁷⁸ The Defense Department found that “the nation faces a period of several years during which dependence on insecure imported oil will exceed levels which we would consider acceptable from a national security viewpoint.”¹⁷⁹ Explaining further, the Defense Department stated that “to the extent that demand for the petroleum imports causes increasing reliance on insecure sources of fuel, then such reliance is a severe threat to our security.”¹⁸⁰ The Treasury Department, which led Section 232 investigation at the time, also concluded that continued reliance on oil imports, especially from the OPEC countries, threatened national security.¹⁸¹ Based on a thorough analysis of the supply and demand for petroleum products, the Treasury Secretary found a significant risk of another supply disruption.¹⁸² In particular, the Treasury Department noted that “in the event of a worldwide political or military crisis, it is not improbable that a more complete interruption of the flow of imported petroleum would occur” and “[i]n that event, the total U.S. production of about 11 million barrels per day might well be insufficient to supply adequately a war-time economy, even after mandatory conservation measures are imposed.”¹⁸³

Based on the Treasury Department’s recommendations, President Gerald Ford invoked Section 232 to increase the import license fees and to impose an additional \$1 to \$3 per barrel fee on oil that entered the United States.¹⁸⁴ However, Congress was deeply concerned that the Ford administration’s trade actions would damage the already weakened economy.¹⁸⁵ Soon after President Ford announced these import duties on oil, Congress passed the Energy Policy and Conservation Act of 1975 to require congressional approval for any gasoline rationing, tax, tariff, user fee, or price control.¹⁸⁶ In March 1979, the Treasury

178. *Id.* at 247.

179. Effects of Imported Articles on the National Security, 40 Fed. Reg. 4457, 4462 (Jan. 30, 1975).

180. *Id.*

181. *Id.* at 4457.

182. Bialos, *supra* note 168, at 247.

183. Effects of Imported Articles on the National Security, 40 Fed. Reg. 4457, 4457 (Jan. 30 1975).

184. Proclamation No. 4341, 89 Stat. 1224 (Jan. 23, 1975).

185. See H.R. Rep. No. 94-340, at 9 (1975), reprinted in U.S.C.C.A.N. 1762, 1771.

186. See *id.* at 22; Earle H. O'Donnell & Laurel W. Glassman, *After the Epaa: What Oil Allocation and Pricing Authorities Remain?*, 2 ENERGY L. J. 33, 39

Department again found that petroleum imports threaten to impair national security.¹⁸⁷ President Jimmy Carter announced a license fee on petroleum imports under his Section 232 authority.¹⁸⁸ This trade action was immediately challenged both in court and in Congress.¹⁸⁹ Members of Congress introduced multiple joint resolutions of disapproval.¹⁹⁰ On June 19, 1980, Congress terminated President Carter's petroleum import adjustments.¹⁹¹

2. The Application of Section 232 on Petroleum Imports since the 1980s

Since the 1980s, the economy's overall dependence on oil was less intense.¹⁹² The United States consumed only as much energy in 1987 as it did in 1973, even though the entire economy grew forty percent over the same period.¹⁹³ More significantly, petroleum imports from sources outside of the Middle East accounted for a larger share of total imports.¹⁹⁴ In particular, Canada, Mexico, and the United Kingdom supplied thirty-one percent of net petroleum imports as compared to fifteen percent in 1979.¹⁹⁵ Even with importation from the Middle East, the construction of additional crude oil pipelines had diversified oil transportation patterns and reduced the share of Persian Gulf

(1981) (“[The Energy Policy and Conservation Act of 1975] gave the President discretionary authority, subject to congressional review and possible one-House veto, to place price and allocation controls on crude oil and petroleum products.”).

187. Proclamation No. 4744, 94 Stat. 3736 (Apr. 23, 1980).

188. *Id.*

189. FERER ET AL., *supra* note 35, at 37 (“On April 15, 1980, two weeks after the President's proclamation on the crude oil and gasoline license fee, Representative James Shannon introduced House Joint Resolution 531 to disapprove and effectively nullify the presidential action. The House Ways and Means Subcommittee on Trade voted 14 to 4 to disapprove the presidential action; the resolution was favorably reported out of the full committee on a 27 to 7 vote On May 13, 1980, a federal district court struck down the President's action on petroleum imports as unlawful, thereby preventing the government from implementing the program.”)

190. *Id.*

191. *Id.*; Proclamation No. 4766, 94 Stat. 3763 (June 19, 1980).

192. Bialos, *supra* note 168, at 252.

193. *Id.*

194. *See id.* at 253; U.S. DEP'T OF COMMERCE, THE EFFECT OF CRUDE OIL AND REFINED PETROLEUM PRODUCT IMPORTS ON THE NATIONAL SECURITY 4 (1989).

195. *Id.*

production delivered through the straits of Hormuz.¹⁹⁶

However, the overall vulnerability to a major supply disruption was still substantial.¹⁹⁷ Various government agencies reported that the United States would have to import about half or more of total oil consumption by the mid-1990s and beyond, particularly from those OPEC countries located in the Persian Gulf region.¹⁹⁸ In 1987, the National Energy Security Committee petitioned for a Section 232 investigation on petroleum imports.¹⁹⁹ This petition alleged that imports weakened the domestic petroleum industry to the extent that it would not be able to support the United States in the event of a global conventional war.²⁰⁰

Considering the petroleum dependence of the “Free World” on “a small number of suppliers located largely in a volatile region,” the Commerce Department continued to find that petroleum imports threaten to impair national security.²⁰¹ However, the Commerce Department concluded that “the United States would be able to meet defense requirements and essential industrial and civilian needs in a major conventional war from domestic energy production, the Strateg[ic] Petroleum Reserve, and reliable petroleum imports.”²⁰² Therefore, the Commerce Secretary did not recommend any trade actions, concluding that such action would not be “cost beneficial and, in the long run, impair rather than enhance national security.”²⁰³ Instead, the Commerce Department recommended the President to promote several cost-effective domestic measures, such as increasing opportunities for domestic energy production, developing alternative energy sources, decontrolling oil prices, and filling the Strategic Petroleum Reserve.²⁰⁴

Similarly, while the Commerce Department continued to

196. *See id.* at 3.

197. *Id.* at 5.

198. *Id.* at 4.

199. *Id.* at 2.

200. *Id.*

201. *Id.* at 9–10.

202. *Id.* at 5.

203. *Id.* at 7.

204. *Id.* at 6–8; *Strategic Petroleum Reserve*, OFF. OF FOSSIL ENERGY, <https://www.energy.gov/fe/services/petroleum-reserves/strategic-petroleum-reserve> (“President Ford set the SPR into motion when he signed the Energy Policy and Conservation Act (EPCA) on December 22, 1975. The legislation declared it to be U.S. policy to establish a reserve of up to one billion barrels of petroleum.”) (last visited Oct. 26, 2019).

find that petroleum imports threatened to impair national security during 1994 and 1999 investigations, it did not recommend that the President use Section 232 authority to adjust imports.²⁰⁵ The Commerce Department concluded domestic programs that focused on supply enhancement and energy conservations were more appropriate and cost-effective than trade adjustments.²⁰⁶ Moreover, the Commerce Department expressly stressed that the United States should continue its active and sustained participation in international cooperation, which requires

promoting the development of open, competitive international energy markets through U.S. participation in multilateral groups such as the International Energy Agency, the Summit of the America's Hemispheric Energy Initiative, and the Asian Pacific Economic Council (APEC) energy working group; working with our reliable neighbors in Canada and Mexico to establish an efficient and integrated North American natural gas and electricity system; promoting the development of worldwide crude oil and natural gas transportation networks to move South American, Caspian Basin, and Central Asian oil and natural gas, for example, to world markets to further diversify world energy supplies; and emphasize *free trade* and the promotion of American exports to help develop the *world's free market economy* and prevent over reliance on any single region of the world.²⁰⁷

By implementing domestic programs and strengthening multilateral cooperation on energy development, the U.S. dependence on imported petroleum has gradually declined without undermining international trade.²⁰⁸ In 2018, the country's net imports of "petroleum from foreign countries averaged about 2.34 million barrels per day, equal to about eleven percent of U.S. petroleum consumption," which is the

205. 1994 SECTION 232 INVESTIGATION REPORT, *supra* note 170, at ES-6; 1999 SECTION 232 INVESTIGATION REPORT, *supra* note 47, at ES-8.

206. 1994 SECTION 232 INVESTIGATION REPORT, *supra* note 170, at ES-6.

207. 1999 SECTION 232 INVESTIGATION REPORT, *supra* note 47, at ES-11 (emphasis added).

208. See *U.S. Imports from OPEC Countries of Crude Oil and Petroleum Products*, U.S. ENERGY INFO. ADMIN. (Sept. 30, 2019), <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MTTIMXX1&f=M>.

lowest percentage since 1957.²⁰⁹

III. CLASH WITH THE INTERNATIONAL RULES-BASED TRADING SYSTEM

Unlike petroleum imports, steel and aluminum imports entering the United States primarily come from allies and non-hostile trading partners located in secure regions.²¹⁰ Many allies are committed to defending the United States and are parties to reciprocal defense procurement agreements with the United States.²¹¹ This is why they have responded furiously and immediately challenged the Trump administration's Section 232 tariffs under the WTO rules.²¹² To fully understand Section 232 authority, we cannot ignore the United States' obligations under the WTO and its predecessor, the GATT.²¹³ In principle, just as Chief Justice Marshall stressed in *Murray v. The Schooner Charming Betsy*, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," Section 232 should not be interpreted to violate treaties and international agreements ratified by Congress when a construction that is consistent with the treaties is available.²¹⁴ This Part examines Section 232 in the context of the GATT and the WTO Agreements. Section A presents a textual analysis of the national security exception under Article XXI of the GATT, providing an insight into its meaning and purpose. Section B reviews legal precedents in which the WTO members

209. *How Much Oil Consumed by the United States Comes from Foreign Countries?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=32&t=6> (last updated Sept. 4, 2019).

210. Philippe Legrain, *Steeling for a Fight*, FOREIGN POL'Y (Mar. 8, 2018, 4:36 AM), <https://foreignpolicy.com/2018/03/08/steeling-for-a-fight/>.

211. EUR. STEEL ASS'N, *supra* note 69, at 2.

212. Alexandra Ma, *'Totally Unacceptable,' 'Patently Absurd': How US Allies Are Reacting to Trump's Trade War on Them*, BUS. INSIDER (June 1, 2018, 12:14 PM), <https://www.businessinsider.com/how-uk-france-eu-canada-other-us-allies-respond-to-trump-trade-war-2018-6>.

213. See GUZMAN ET AL., *supra* note 107, at 84 ("[T]he WTO is a place where member governments go, to try to sort out the trade problems they face with each other The bulk of the WTO's current work comes from the 1986–94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT) At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce.").

214. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804); see GUZMAN ET AL., *supra* note 107, at 73–74.

cited Article XXI to defend their trade actions. This review shows that applying Section 232 to protect the general economic security of domestic industries would lead to an inevitable clash with the rules-based international trading system. Section C explores a comprehensive solution to prevent further abuse of Section 232 authority in international trade.

A. NATIONAL SECURITY EXCEPTION UNDER ARTICLE XXI OF THE GATT

The GATT seeks to increase economic well-being throughout the world by reducing trade barriers and eliminating discriminatory treatment in international commerce.²¹⁵ To achieve this goal, the GATT obligates all contracting members to follow the general principles of trade,²¹⁶ mainly the “most-favored nation” rule under Article I and “national treatment” rule under Article III.²¹⁷ These principles require members to treat goods coming from other members equally—giving all countries the same treatment as one’s most-favored trade partner—and to treat imports no differently than their domestic products.²¹⁸ Since the creation of the GATT, international trade achieved substantial growth and the average duty on industrial products was reduced from around forty percent to less than four percent.²¹⁹

At the same time, to minimize the strain between sovereign

215. GUZMAN ET AL., *supra* note 107, at 89.

216. *The 128 Countries That Had Signed GATT by 1994*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Apr. 5, 2019) (“On 1 January 1995, the WTO replaced GATT, which had been in existence since 1947, as the organization overseeing the multilateral trading system. The governments that had signed GATT were officially known as ‘GATT contracting parties.’ Upon signing the new WTO agreements (which include the updated GATT, known as GATT 1994), they officially became known as ‘WTO members.’”).

217. GATT, *supra* note 119, art. I, III; *see* GUZMAN ET AL., *supra* note 107, at 323 (“[The most-favored-nation principle] was one of the major demands of the United States when the GATT was negotiated in the 1940s with a view to rid the world of colonial preferences instituted by European countries, often to the detriment of US trade.”).

218. Shannon Togawa Mercer & Matthew Kahn, *America Trades Down: The Legal Consequences of President Trump’s Tariffs*, LAWFARE INST. (Mar. 13, 2018, 10:41 AM), <https://www.lawfareblog.com/america-trades-down-legal-consequences-president-trumps-tariffs>.

219. GUZMAN ET AL., *supra* note 107, at 183.

nations and the multilateral trading system, the framers provide three exceptions, which allow members to take trade actions that may be inconsistent with the GATT obligations.²²⁰ Article XX permits trade actions that are necessary for the protection of vital domestic interests (public morals, human, animal and plant life, and national treasures of artistic, historical, or archaeological value).²²¹ Article XIX, known as the “safeguard clause,” authorizes temporary restriction on imports when a domestic industry is seriously injured or threatened with a serious injury caused by an unforeseen surge in imports.²²² Article XXI allows members to escape the GATT obligations for the protection of their essential security interests under specific circumstances.²²³ Since the establishment of the WTO, members rarely invoked Article XXI to implement unilateral trade actions.²²⁴

Article XXI “is not a general national security clause which permits any derogation from the GATT when national security interests are at stake.”²²⁵ The framers of the original Articles XXI noted “a great danger of having too wide an exception” that could encourage members to “put on measures which really have a commercial purpose” under “the guise of security.”²²⁶ As the framers explained:

[W]e thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the

220. See GATT, *supra* note 119, art. XXI.

221. *Id.* art. XX.

222. *Id.* art. XIX; Chad Bown & Meredith Crowley, *Safeguards in the World Trade Organization* 2 (Feb. 2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.603.5817&rep=rep1&type=pdf>.

223. See GATT, *supra* note 119, art. XXI; Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268 (1998).

224. Cf. SYLVIA DE MARS, WORLD TRADE IN 2019: THE US AND THE WTO 20–21, BRIEFING PAPERS NO. 08465, HOUSE OF COMMONS LIBRARY (June 4, 2019), <http://researchbriefings.files.parliament.uk/documents/CBP-8465/CBP-8465.pdf>.

225. Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 384 (2003).

226. ANALYTICAL INDEX OF THE GATT 600, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdf (“We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: ‘by any Member of measures relating to a Member’s security interests,’ because that would permit anything under the sun.”).

adoption of protection for maintaining industries under every conceivable circumstance. . . . [T]here must be some latitude here for security measures. It is really a question of balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, *we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.*²²⁷

To strike a balance, the framers enumerated specific circumstances under which a member could pursue trade actions to protect its essential security interests. Article XXI provides that:

Nothing in this Agreement shall be construed . . . 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; [or] (iii) taken in time of war or other emergency in international relations.²²⁸

As such, when a member invokes Article XXI to protect the economic interest of domestic industries, such interest must at least relate to (i) fissionable materials, (ii) the traffic in goods for supplying a military establishment, or (iii) war or other emergencies in international relations.²²⁹ The language is not necessarily clear with the meaning of “for the purpose of supplying a military establishment” and “other emergency in international relations.”²³⁰ A close examination of the text suggests that Article XXI does not permit the protection of domestic industries, unless such protection relates to a particular military objective or a security threat at the time of

227. *Id.* (emphasis added).

228. See GATT, *supra* note 119, art. XXI.

229. See Lee, *supra* note 117, at 288–91.

230. GATT, *supra* note 119, art. XXI(b)(ii)–(iii).

war or emergency in international relations.

By using the term “for the purpose of supplying a military establishment,” Article XXI(b)(ii) indicates a somewhat confined situation, as opposed to an open-ended relationship with the military.²³¹ The term “for the purpose of” points to a particular objective.²³² As an example, Article XXI(b)(ii) permits export restrictions if there is evidence that such exports would ultimately be used for military purposes by another country.²³³ Moreover, the term “establishment” means “an organized body of men, maintained at the expense of the sovereign or of the state for a specific purpose.”²³⁴ By using the indefinite article “a” for “military establishment,” the framers intended to address supply for specific military equipment, hardware, or facility.²³⁵

Similarly, the use of the phrase “taken in the time of war or other emergency situations in international relations” also indicates a narrow situation.²³⁶ First, the term “taken in time of” describes a chronological concurrence, providing that a member could pursue necessary protection during the time of a war or an emergency in international relations.²³⁷ Second, the term “war” commonly refers to armed conflict.²³⁸ By using the conjunction “or” with the adjective “other” in “war or other emergency in international relations,” this subparagraph indicates that war is one example of the broader category of “emergency in international relations.”²³⁹ This conjunction suggests that the term “other emergency” refers to a situation that is not a war but is comparable to war.²⁴⁰ Third, an “emergency in international relations” should elicit “the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b),” which cover fissionable materials, traffic in arms, ammunition, and implements of war, and traffic in goods and materials to supply a military

231. *Id.* art. XXI(b)(ii); Lee, *supra* note 117, at 291.

232. *See* GATT, *supra* note 119, art. XXI(b)(ii); Lee, *supra* note 117, at 291.

233. *See* WORLD TRADE ORG., *supra* note 226, at 602.

234. Lee, *supra* note 117, at 293.

235. *Id.*; GATT, *supra* note 119, art. XXI(b)(ii).

236. *Id.* art. XXI(b)(iii).

237. Panel Report, *Russia — Measures Concerning Traffic in Transit*, ¶7.70, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia Transit Restriction Panel Report*].

238. *Id.* ¶ 7.72.

239. *Id.*

240. *See id.*

establishment.²⁴¹

B. FROM SWEDISH SHOE QUOTAS TO UKRAINE CRISIS: THE APPLICATION OF THE NATIONAL SECURITY EXCEPTION

An economic injury to a domestic industry certainly entails political consequences that may affect the welfare of a country and its population, but it does not give a WTO member the right to neglect the purpose of Article XXI to rationalize its trade actions in the name of national security.²⁴² To understand the ongoing dispute regarding Section 232 Tariffs, this Section reviews legal precedents in which the WTO members cited the national security exception to defend their trade actions.

1. Swedish Import Restrictions on Footwear

In November 1975, Sweden invoked Article XXI to establish a global import quota to protect its footwear industry (“*Swedish Shoe Quotas*”).²⁴³ At that time, Swedish domestic production only accounted for twenty-five percent of the total footwear supply.²⁴⁴ This quota applied to a wide class of products (leather shoes, plastic shoes, and rubber boots).²⁴⁵ Sweden declared that its action “was taken in conformity with the spirit of Article XXI,”²⁴⁶ stating that:

The continued decrease in domestic [shoe] production has become a critical threat to the emergency planning of Sweden’s economic defense as an integral part of the country’s security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in

241. *Id.* ¶ 7.74.

242. See Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT’L L., 558, 580–81 (1990) (“It would be flawed reasoning to apply article XXI to those emergency situations already covered by other provisions and thereby neglect the distinct purpose the security exception is supposed to serve.”).

243. Council of the Representatives, *Draft Report on Work since the Thirtieth Section Addendum*, GATT Doc. C/W/264/Add.1 (Nov. 7, 1975).

244. *Id.*

245. Report of the Panel Notification of Global Import Quota, *Sweden — Import Restrictions on Certain Footwear*, GATT Doc. L/4250 (Nov. 17, 1975).

246. *Id.*

order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.²⁴⁷

However, Sweden provided little evidence that its protective measures related to a particular military objective or a security threat during a war or an emergency in international relations.²⁴⁸ *Swedish Shoe Quotas* was widely considered an example of abuse of national security rationale.²⁴⁹ On July 1, 1977, Sweden voluntarily ended its unilateral quota before any formal, legal proceedings had begun.²⁵⁰

2. Russian Restrictions on Traffic in Transit

On April 5, 2019, a WTO panel issued a decision on *Russia—Measures Concerning Traffic in Transit* (“*Russian Transit Restrictions*”).²⁵¹ The decision is of major significance as *Russian Transit Restrictions* is the first and only dispute in which a WTO panel interpreted Article XXI.²⁵² Between 2014 and 2018, Russia restricted Ukraine from using transit routes across Russia for traffic destined for Kazakhstan and the Kyrgyz Republic.²⁵³ Ukraine alleged that Russian restrictions were inconsistent with Russia’s obligations under the GATT relating to the freedom of transit and the requirement to publish trade regulations.²⁵⁴ Russia responded by invoking Article XXI, claiming that its measures were necessary for the protection of its essential security interests in respect of the emergency in international

247. *Id.*

248. *See id.*

249. Compare Hahn, *supra* note 242, at 578, with Alexandroff & Sharma, *supra* note 101, at 1574.

250. Hahn, *supra* note 242.

251. Charlene Barshefsky et al., *WTO Issues Groundbreaking Decision on GATT National Security Exception*, WILMERHALE (Apr. 9, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190409-wto-issues-groundbreaking-decision-on-gatt-national-security-exception>; Dylan Gereats, *WTO Issues Ruling in Russia-Traffic in Transit: Measures Justified on National Security Grounds Are Justiciable*, MAYER BROWN (Apr. 8, 2019), <https://www.mayerbrown.com/en/perspectives-events/publications/2019/04/wto-issues-ruling-in-russia-traffic-in-transit-measures-justified-on-national-security-grounds-are-justiciable>;

252. Barshefsky et al., *supra* note 251.

253. *Id.*

254. *See* Russia Transit Restriction Panel Report, *supra* note 237, ¶ 7.1.

relations since 2014.²⁵⁵ Russia argued that the national security exception is “totally self-judging”—namely, the invoking member retains the authority to determine what it considers necessary to the protection of its essential security interests.²⁵⁶

However, the WTO Panel held that Article XXI is not entirely self-judging as Russia alleged.²⁵⁷ The Panel stressed that “[i]t would be entirely contrary to the security and predictability of the multilateral trading system established” to allow member nations to decide the merits of a national security claim for themselves.²⁵⁸ Had Article XXI granted absolute discretion to members, there would have been no reason to distinguish between different types of essential security interests.²⁵⁹ The Panel concluded that it has jurisdiction to review whether a member’s action satisfies the requirements of Article XXI.²⁶⁰

The Panel utilized a two-step analysis framework to determine whether Russia met the requirements for invoking Article XXI. The Panel began its analysis with an assessment of whether the Russian restrictions objectively fell within the circumstances enumerated under Article XXI(b).²⁶¹ The circumstances enumerated under the Article should be amenable to objective determination.²⁶² As the Panel pointed out:

[T]he existence of a war, as one characteristic example of a larger category of “emergency in international relations,” is clearly capable of objective determination. Although the confines of an “emergency in international relations” are less clear than those of the matters addressed in subparagraphs (i) and (ii), and of “war” under subparagraph (iii), it is clear that an “emergency in international relations” can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective

255. *Id.* ¶ 7.4.

256. *Id.* ¶ 7.57.

257. *Id.* ¶ 7.102.

258. *Id.* ¶ 7.79.

259. *See id.* ¶ 7.33.

260. *See id.* ¶ 7.101.

261. *Id.* ¶ 7.25.

262. *Id.* ¶ 7.71.

determination.²⁶³

If a specific circumstance exists, the Panel then assesses whether the invoking member has applied Article XXI(b) in good faith.²⁶⁴ The discretion to designate particular interest as “essential security interests” should be limited by the member’s obligation to interpret and apply Article XXI in good faith.²⁶⁵ Put most simply, the good faith obligation prohibits the invoking members using the national security exception as a means to circumvent their obligations under the GATT.²⁶⁶ As the Panel illustrated, a “glaring example” of circumvention would be a situation in which a member sought to release itself from the multilateral trading system “simply by re-labelling trade interests” as “essential security interests.”²⁶⁷ Subsumed within the notion of good faith is that a member’s trade action must meet “a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are not implausible as measures protective of these interests.”²⁶⁸

Using this two-step analysis framework, the Panel ultimately held that Russia met the requirements for invoking the national security exception.²⁶⁹ The Ukraine and Russia conflict constituted an emergency in international relations, and thus the restrictions adopted between November 2014 and July 2016 were obviously “taken in the time of” that emergency.²⁷⁰ The Panel interpreted that an “emergency in international relations,” enumerated under Article XXI(b)(iii), refers to a “situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”²⁷¹ Between 2014 and 2018, Ukrainian soldiers and Russian-backed separatists engaged in a military conflict in eastern Ukraine, which resulted in more than ten thousand reported deaths.²⁷² The United Nations General

263. *Id.*

264. *Id.* ¶7.132.

265. *Id.*

266. *Id.* ¶7.133.

267. *Id.*

268. *Id.* ¶ 7.138.

269. *Id.* ¶ 7.149.

270. *Id.* ¶ 8.1.

271. *Id.* ¶ 7.76.

272. Kimberly Amadeo, *Ukraine Crisis, Summary and Explanation*, BALANCE (Oct. 21, 2019), <https://www.thebalance.com/ukraine-crisis-summary-and-explanation-3970462>.

Assembly and the international community recognized the situation between Ukraine and Russia as involving armed conflict.²⁷³

With respect to the good faith obligation, the Panel found that there was nothing to suggest that Russia invoked the security exception as a means to circumvent its GATT obligations.²⁷⁴ Instead, there was a clear correlation between Ukraine's decision to pursue the EU–Ukraine Association Agreement in March 2014 and the deterioration in Ukraine's relations with Russia.²⁷⁵ Russia took several actions in response to the emergency, including the adoption of trade actions at issue.²⁷⁶ Given the character of the conflict between Ukraine and Russia, the Panel concluded that Russia's articulation of its essential security interests and trade actions met the requirements under Article XXI(b)(iii).²⁷⁷ Ukraine did not appeal this ruling.²⁷⁸ On April 26, 2019, the Dispute Settlement Body adopted the Panel's report.²⁷⁹

3. The Fundamental Tension Between Section 232 Tariffs and Article XXI

Unlike *Russian Transit Restrictions*, President Trump's Section 232 Tariffs may not fall within the scope of the three circumstances enumerated under Article XXI(b). It would be even more challenging to show “good faith” as the Trump administration explicitly expanded the scope of Section 232 protection to cover “the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements.”²⁸⁰ Even if a WTO panel rules in favor of the United States, however, it could hardly be called a victory. Such a ruling may spur a race to the bottom among the WTO members to legitimize their protectionist policy by citing national security

273. Russia Transit Restriction Panel Report, *supra* note 237, ¶7.122.

274. *Id.* ¶ 7.137.

275. *Id.* ¶ 7.142.

276. *Id.*

277. *Id.* ¶ 7.149.

278. *DS512: Russia — Measures Concerning Traffic in Transit*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm (last visited May 6, 2019).

279. *Id.*

280. 2018 STEEL INVESTIGATION REPORT, *supra* note 48, at 1; *see FERER ET AL.*, *supra* note 35.

concerns.²⁸¹ International trade order may once again subject to the vagaries of domestic lobbying and international power relations rather than the rule of law.²⁸² If a panel rules against the United States, the country would be expected to remove the tariffs.²⁸³ A failure to comply may lead to compensatory payments to the complaining members or a trade sanction.²⁸⁴ Given the current political rhetoric,²⁸⁵ an unfavorable outcome may prompt President Trump to ignore the WTO's ruling and use it to make a case for pulling the United States out of the WTO.²⁸⁶ In either scenario, the legitimacy of the multilateral rules-based trading system would be seriously undermined.²⁸⁷

C. PROPOSED SOLUTIONS: RECONSIDERING AND RECONSTRUCTING SECTION 232

As illustrated above, the current state of Section 232 is

281. See Ben Dooley, *Japan Cites 'National Security' in Free Trade Crackdown. Sound Familiar?*, N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/business/japan-south-korea-trade-war-semiconductors.html> ("Mr. Abe [the Prime Minister of Japan] became the latest world leader to strike a blow against free trade, when he moved to limit South Korea's access to Japanese chemicals that are essential to its vast electronics industry, citing vague and unspecified concerns about national security. In doing so, Japan joined the United States, Russia and other countries that have used national security concerns as a justification for cutting off trade South Korean officials suspect a different motive: retaliation over an escalating political dispute between the two countries concerning reparations for Japan's World War II-era conduct. To some, Mr. Abe's move seemed to take a page from Mr. Trump's playbook, turning trade into a cudgel."); *A Trade Dispute Between Japan and South Korea has Trumpian Echoes*, ECONOMIST (July 18, 2019), <https://www.economist.com/leaders/2019/07/18/a-trade-dispute-between-japan-and-south-korea-has-trumpian-echoes>; Keith Johnson, *Why Are Japan and South Korea at Each Other's Throats?*, FOREIGN POL'Y (July 15, 2019, 3:36 PM), <https://foreignpolicy.com/2019/07/15/why-are-japan-and-south-korea-in-a-trade-fight-moon-abe-chips-wwii/>; ential to its vast electronics industry, citing vague and unspecified concerns about national security. In doing so, Japan

282. Beattie, *supra* note 104.

283. FERER ET AL., *supra* note 35, at 24.

284. *Id.*

285. John Micklethwait, Margaret Talev & Jennifer Jacobs, *Trump Threatens to Pull U.S. Out of WTO If It Doesn't 'Shape Up'*, BLOOMBERG (Aug. 30, 2018, 2:52 AM), <https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up>; Tae Kim, *Trump Reportedly Wants the US to Withdraw from World Trade Organization*, CNBC (June 29, 2018, 7:10 AM), <https://www.cnbc.com/2018/06/29/trump-reportedly-wants-us-to-withdraw-from-world-trade-organization.html>.

286. Beattie, *supra* note 104.

287. See Chow, *supra* note 108, at 29.

untenable. Multiple pieces of legislations have been introduced in Congress to limit the executive branch's Section 232 authority.²⁸⁸ These legislative proposals range from strengthening congressional oversight,²⁸⁹ to transferring investigatory authority to the Defense Department,²⁹⁰ to stalling the ongoing Section 232 investigation on the automobile industry,²⁹¹ to simply exempting allies from Section 232 Tariffs.²⁹² However, these stand-alone proposals are inadequate on their own. Building on these well-conceived proposals, this Note strives to explore a comprehensive solution, urging Congress to restore congressional oversight, reconsider the boundary of Section 232 authority, and restructure procedural and substantive constraints to prevent abuses of power.

1. Restore Congressional Oversight

The Constitution exclusively vests in Congress the power to “lay and collects taxes, duties, imposts and excises” and “regulate commerce with foreign nations.”²⁹³ Unlike war powers where the President shares constitutional authority with Congress,²⁹⁴ in the area of international commerce, the President's authority is almost entirely statutory.²⁹⁵ By completely delegating Section 232 authority to the executive branch, Congress ceded a critical authority to regulate foreign

288. William Reinsch & Jack Caporal, *Steel and Aluminum Tariffs: A Push and Pull between the President and Congress*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 7, 2018), <https://www.csis.org/analysis/steel-and-aluminum-tariffs-push-and-pull-between-president-and-congress>.

289. Global Trade Accountability Act of 2019, H.R. 723, 116th Cong. (2019).

290. Bicameral Congressional Trade Authority Act of 2019, H.R. 940, 116th Cong. (2019).

291. Automotive Jobs Act of 2019, S. 121, 116th Cong. (2019).

292. H.R.J. Res. 810, 115th Cong. (2018) (reaffirming the trade and investment partnership between the United States and the European Union is critical to the economic and national security of the United States).

293. U.S. CONST. art. I, §8, cl.1; *Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. at 1346.

294. Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1190–91 (2018) (“The Constitution of the United States divides the war powers of the federal government between the Legislative and Executive Branches: Article I provides Congress with the power to declare war and to raise and support the armed forces, while Article II establishes the President as Commander in Chief of the armed forces and directs the President with the Take Care Clause.”).

295. See Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 1, 6 (2019).

commerce.²⁹⁶ Simply put, under the current Section 232, the executive branch plays both investigator and judge with the power to “self-initiate” an investigation—acting without receiving petitions from domestic industries.²⁹⁷ This creates an enormous potential for abuse.

Members of Congress have introduced several bills designed to restore congressional oversight.²⁹⁸ Senator Mike Lee proposed the Global Trade Accountability Act, which requires the President to secure a joint resolution approved by Congress before any unilateral trade action can take effect.²⁹⁹ He believed that “Congress has already given the Executive Branch far too much power to raise tariffs without congressional approval” and “Congress . . . should be involved in any decision that would increase barriers to trade.”³⁰⁰ Another bill aims to reclaim congressional control over Section 232 power by requiring congressional approval for all trade actions in the name of national security.³⁰¹ Former Senator Bob Corker said that: “[m]aking claims regarding national security to justify what is inherently an economic question not only harms the very people we all want to help and impairs relations with our allies but also could invite our competitors to retaliate.”³⁰² As he pointed out, “[i]f the president truly believes invoking Section 232 is necessary to protect the United States from a genuine threat, he should make the case to Congress and to the American people and do the hard work necessary to secure congressional approval.”³⁰³

However, merely strengthening congressional oversight

296. *See id.* at 1345–47; Bown, *supra* note 25.

297. Bown, *supra* note 25.

298. Stuart Anderson, *Time to Take Away the President's Power to Impose Tariffs*, FORBES (Mar. 5, 2018), <https://www.forbes.com/sites/stuartanderson/2018/03/05/time-to-take-away-the-presidents-power-to-impose-tariffs/#20e5cabb756a>; Revana Sharfuddin, *Bipartisan Reform Bills Aim to Control Trade Taxes*, NAT'L TAXPAYER UNION FOUND. (Dec. 10, 2018), <https://www.ntu.org/library/doclib/2018/12/Bipartisan-Reform-Bills-Aim-to-Control-Trade-Taxes-1.pdf>; Reinsch & Caporal, *supra* note 288.

299. Reinsch & Caporal, *supra* note 288; *see* Global Trade Accountability Act of 2017, S. 177, 115th Cong. § 1 (2017).

300. Mike Lee, *Make Trade Policy Accountable Again*, FORBES (Jan. 19, 2017), <https://www.forbes.com/sites/realspin/2017/01/19/make-trade-policy-accountable-again/#25ef7e43503c>.

301. S. 3013, 115th Cong. § 2 (2018); H.R. 6337, 115th Cong. § 2 (2018); Sharfuddin, *supra* note 298.

302. Gehrke, *supra* note 65.

303. *Id.*

may not be enough. It is equally possible that Congress may apply Section 232 in a similar fashion to protect individual industries. Unlike the President, who generally represents the overall national interest, members of the House and the Senate have constituencies whose opinions about trade are determined mainly by the fate of a few local industries or organizations.³⁰⁴ To prevent the abuse of power, it is more critical to provide some clarity on statutory criteria for invoking Section 232. However, so far, none of these legislative proposals addresses this issue.³⁰⁵

2. Reexamine the Boundary of Section 232

An overbroad interpretation of Section 232 opens the door for the executive branch to depart from the common understanding of national security.³⁰⁶ As a consequence, the executive branch can selectively consider the grievances of individual industries to justify its decision. Therefore, Congress should reconsider and reconstruct the boundary of Section 232 authority to avoid ambiguity.

Admittedly, national security is an inherently broad concept.³⁰⁷ However, Congress can generally align the boundary of Section 232 with the “essential security interest” provided under Article XXI of the GATT.³⁰⁸ In other words, the revised scope of national security under Section 232 should generally be consistent with the enumerated circumstances of Article XXI.³⁰⁹ As illustrated above, such changes would not undermine the United States’ ability to safeguard its national security because the WTO grants wide (but not complete) discretion to countries in defining their “essential security interest” for “the protection of its territory and its population from external threats, and the maintenance of law and public order internally.”³¹⁰

Congress should differentiate threats depending on whether a given import threatens to impair the Defense Department’s ability to meet anticipated military requirements in the event of

304. See GUZMAN ET AL., *supra* note 107, at 57; Reinsch & Caporal, *supra* note 288.

305. See Anderson, *supra* note 298; Sharfuddin, *supra* note 298.

306. See *supra* Part II.A.

307. See Stein, *supra* note 294, at 1197–201.

308. See *supra* Part III.A.

309. GATT, *supra* note 119, art. XXI.

310. Russia Transit Restriction Panel Report, *supra* note 237, at ¶ 7.130; see discussion, *supra* Part III.B.2.

war or emergencies in international relations. Trade action that does not relate to the essential military supplies is inherently suspect for protectionist purposes. Congress should determine whether Section 232 protection is necessary to safeguard national security. As such, the executive branch must demonstrate that the proposed trade action is justified by (1) a real, as opposed to a speculative, threat to national security interest and (2) is narrowly tailored to protect that interest. Some may argue that such scrutiny makes the country vulnerable, especially when it comes to the economic threat to domestic industries. However, there are a number of viable trade measures that the government can take to address unfair trade practices and economic threats to domestic industries, such as anti-dumping duties,³¹¹ countervailing duties,³¹² Section 337 unfair import investigations,³¹³ Section 201 safeguard proceedings,³¹⁴ and Section 301 unfair trade practice proceedings.³¹⁵ Given the availability of these measures to protect economic security, Congress should consider removing economic welfare consideration from Section 232.³¹⁶ At a

311. Antidumping duties are additional tariffs imposed on foreign-made goods imported into the United States that are sold at less than fair value and materially injure or threaten to materially injure a domestic industry. 19 U.S.C. § 1673 (2012).

312. Countervailing duties are additional tariffs imposed on foreign-made goods imported into the United States that benefit from unfair foreign government subsidies and materially injure or threaten to materially injure a domestic industry. 19 U.S.C. § 1671(a) (2012).

313. Domestic companies may file a complaint with the ITC under Section 337 of the Tariff Act of 1930 alleging claims of unfair methods of competition in import trade. The primary remedy available in Section 337 cases is an exclusion order that directs U.S. Customs and Border Protection to bar infringing imports from entering the United States. 19 U.S.C. § 1337 (2012).

314. Section 201 of the Trade Act of 1974 authorizes the President to apply temporary safeguards measures to protect domestic industries that are seriously injured or threatened to be seriously injured by increased imports. Section 201 proceedings are permitted under Article XIX of the GATT, which allows countries to temporarily escape from certain trade concessions to other countries if a surge in imports seriously injures or threatens to seriously injure a domestic industry. 19 U.S.C. § 2251 (2012).

315. Section 301 of the Trade Act of 1974 requires the Office of the United States Trade Representative to take action in certain circumstances and gives it the discretion to act in others if it finds that a foreign government has engaged in an unfair trade practice. 19 U.S.C. § 2411 (2012).

316. The economic welfare consideration provides that “the [Commerce] Secretary and the President . . . shall 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

minimum, Congress should make clear that the mere existence of injury caused by imports to domestic industries does not automatically merit Section 232 protection.

3. Reconsider the International Trade Commission's Role on the Section 232 Investigation

Amid the intense debate concerning the Trump administration's trade policy, lawmakers on Capitol Hill started to question the Commerce Department's role in the Section 232 investigation.³¹⁷ Senator Rob Portman introduced a bill that requires the Defense Department, rather than the Commerce Department, to conduct Section 232 investigations.³¹⁸ However, if the real concern is the abuse of power by the executive branch, transferring investigatory authority to the Defense Department may not be enough. Both departments are directed primarily by political appointees and equally susceptible to political interference.³¹⁹

Congress should restructure the investigation procedure by letting the U.S. International Trade Commission ("ITC") lead the investigation. The ITC is a quasi-judicial federal agency with broad investigative responsibilities on matters of international trade.³²⁰ It has been structured institutionally to be nonpartisan

of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security." 19 U.S.C. § 1862(d).

317. See Rob Portman, *supra* note 24; see also Eliana Johnson & Andrew Restuccia, *Trump Administration Withholds Report Justifying 'Shock' Auto Tariffs*, POLITICO (Mar. 20, 2019), <https://www.politico.com/story/2019/03/20/trump-tariffs-automobiles-commerce-1228344> ("GOP lawmakers suspect the Commerce Department is reverse-engineering its reports to suit the president's policy preferences, finding a national security threat where none exists. They have pointed to the Defense Department's finding that steel and aluminum imports did not pose a national security threat — a finding that broke with the Commerce Department's conclusion granting Trump a green light to crack down on metal imports.").

318. Trade Security Act of 2018, S. 3329, 115th Cong. § 2 (2018); Rob Portman Press Release, *supra* note 24.

319. See Tori Whiting & Riley Walters, *Fixing America's Broken Trade Laws: Section 232 of the Trade Expansion Act of 1962*, HERITAGE FOUND. (May 22, 2019), <https://www.heritage.org/trade/report/fixing-americas-broken-trade-laws-section-232-the-trade-expansion-act-1962>; see also Matthew Yglesias, *Commerce Secretary Wilbur Ross Is Tied up in Major Financial Conflicts of Interest*, VOX (Jun. 20, 2018), <https://www.vox.com/2018/6/20/17479170/wilbur-ross-corruption>.

320. *About the USITC*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/press_room/about_usitc.htm.

and impartial.³²¹ From its inception, the ITC consists of six commissioners and no more than three commissioners could be from the same political party.³²² Its budget is outside the control of the executive branch's Office of Management and Budget.³²³ To further insulate the ITC from political interference, the Trade Act of 1974 extended the commissioner's term from six years to nine years, making an appointed commissioner not beholden to the appointing President.³²⁴ More importantly, the ITC is the most competent federal agency to conduct trade investigations because of its in-depth understanding of the GATT and WTO Agreements.³²⁵ It currently conducts investigations to determine the impact of imports on domestic industries and directs actions against unfair trade practices, such as subsidies, dumping, and patent, trademark, and copyright infringement.³²⁶ For many years, the ITC has facilitated the international trading system and continues to serve as an important "[f]ederal resource where trade data and other trade policy-related information are gathered and analyzed."³²⁷

Ideally, Section 232 should prohibit the executive branch from self-initiating the national security investigation. Upon request of the interested parties (U.S. workers, companies, and industry associations), the ITC must immediately notify the Defense Secretary of the investigation. The ITC should consult with the Defense Department regarding the methodological and policy questions raised in the investigation. The Defense Department shall provide a full demand and supply analysis, determining whether a given import is entering into the country in such quantities that would threaten its ability to meet the anticipated national defense requirements. If the Defense Department identifies a national security threat, the ITC should then consult with the Commerce Department on proper remedies. In the course of the investigation, the ITC should also seek advice from appropriate officers of other federal agencies and afford interested parties an opportunity to present information relevant to such investigation.

321. RHONDA K. SCHMIDTLEIN ET AL., A CENTENNIAL HISTORY OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION, 122 (2017).

322. *Id.* at 137.

323. DOBSON, *supra* note 110, at 125.

324. *Id.* at 126.

325. *See id.* at 125–33.

326. *See* U.S. INT'L TRADE COMM'N., *supra* note 320.

327. *Organization Chart/Staff Directory*, U.S. INT'L TRADE COMM'N., https://www.usitc.gov/press_room/org_chart_staff_directory.htm.

After investigating, the ITC should submit a detailed report to the President addressing, among other things, the following issues: (1) whether the President should take trade actions under Section 232, (2) whether pursuing Section 232 measures is consistent with U.S. obligations under the GATT and the WTO Agreements, and (3) whether there are other appropriate trade measures available without invoking Section 232. After receiving the ITC's report, the President should decide whether to concur with the ITC's recommendations. If the President decides to pursue trade action, then he or she shall submit a plan to Congress for approval. This proposal requires specific findings by different federal agencies and strengthens external checks and balances before the President can act, assuring the presence of rationality and enhancing the legitimacy of both the Presidency and presidential decisions.³²⁸

CONCLUSION

Despite pushback from industry leaders and lawmakers, President Trump dusted off Section 232, a Cold War-era statute, to slap steep tariffs on steel and aluminum imports in the name of national security.³²⁹ To justify this controversial move, the Commerce Department adopted an overbroad interpretation of national security to protect the general welfare of domestic industries.³³⁰ In doing so, the Trump administration alienated key allies that are committed to defending the United States and moved the nation to the brink of a global trade war.³³¹

It remains to be seen how the WTO panel will decide whether Section 232 tariffs on steel and aluminum were a proper invocation of the national security exception under Article XXI of the GATT.³³² Nevertheless, it is evident that using Section 232 as a routine tool to protect domestic industries would lead to an inevitable clash with the international trading system.³³³ No matter how this dispute ends, the legitimacy of the WTO and the success of the global trade liberalization movement are at risk.³³⁴

328. See Stein, *supra* note 294, at 1220–26 (discussing the value of procedural constraints).

329. See *supra* Part I.B.

330. See *supra* Part II.

331. See *supra* Part I.C.

332. See *supra* Part III.B.

333. See *supra* Part III.A&B.

334. See *supra* Part III.B.

Without a rule-based international trading system, the world could be once again dominated by protectionism, creating an atmosphere of mistrust and hostility among countries. Against this backdrop, this Note strives to propose a solution with the hope of sparking further discussion, urging Congress to reconsider the boundary of presidential Section 232 power. It is critical to rebalance the Section 232 authority between Congress and the executive branch by restoring congressional oversight and restructuring procedural and substantive constraints.