

# THE TRUMP EFFECT: SECTION 232 AND CHALLENGES TO THE DISPUTE SETTLEMENT BODY AT THE WORLD TRADE ORGANIZATION

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## I. INTRODUCTION

Since 1995, the World Trade Organization (WTO) has served as a forum for Members to resolve international trade disputes. In recent years, it has faced growing pressures as increasingly complex trade disputes test its limits. Those pressures have intensified under the Trump Administration, which has imposed a number of restrictive trade measures that other Members have challenged at the WTO. In particular, the Trump Administration's recent import restrictions under Section 232 of the Trade Expansion Act of 1962 (Section 232) raise concerns that may force the WTO to issue decisions that could lead the United States or other Members to abandon the forum.

## II. OVERVIEW OF SECTION 232

Section 232 authorizes the Bureau of Industry and Security (BIS) within the U.S. Department of Commerce to conduct investigations and determine whether imported goods “threaten to impair the national security.”<sup>1</sup> If BIS finds that there is a threat to national security, and the President concurs, then the President may “take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten or impair the national security.”<sup>2</sup>

Until recently, this provision was rarely used. From the establishment of the WTO in 1995 until 2017, there were only two Section 232 investigations: (1) crude oil in 1999, where BIS found that petroleum imports threatened to impair national security but no

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1. 19 U.S.C. § 1862 (2018).
2. § 1862(c)(3)(A)(ii).

measures were imposed<sup>3</sup> and (2) iron ore and semi-finished steel in 2001, where no threat to national security was found.<sup>4</sup>

Since 2017, the Trump Administration has initiated five investigations under Section 232: (1) steel<sup>5</sup>; (2) aluminum<sup>6</sup>; (3) automobiles, including SUVs, vans and light trucks, and automotive parts (autos)<sup>7</sup>; (4) uranium<sup>8</sup>; and (5) titanium sponge.<sup>9</sup> As a result of these investigations, the president imposed import restrictions on steel<sup>10</sup> and aluminum.<sup>11</sup> Those measures were later modified as a result of negotiations, although they remain in place for virtually all countries, including NATO allies. On May 19, 2019, the Administration removed steel and aluminum tariffs against Canada and Mexico after the U.S.-Mexico-Canada Agreement (USMCA) trade agreement was signed.<sup>12</sup> On July 12, 2019, the President issued a memorandum disagreeing with the Secretary of Commerce's finding that imports of uranium threaten to impair national security.<sup>13</sup> The determination on autos is due out in late 2019.<sup>14</sup>

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3. See Summary of Secretarial Report Under Section 232 of the Trade Expansion Act of 1962, As Amended, on the Effect of Imports of Crude Oil on the National Security, 65 Fed. Reg. 46,427 (July 28, 2000).

4. See Report on the Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, 67 Fed. Reg. 1958 (Jan. 15, 2002).

5. See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Apr. 26, 2017).

6. See Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, 82 Fed. Reg. 21,509 (May 9, 2017).

7. See Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, 83 Fed. Reg. 24,735 (May 30, 2018).

8. See Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Uranium, 83 Fed. Reg. 35,204 (July 25, 2018).

9. See Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Titanium Sponge, 84 Fed. Reg. 8503 (March 8, 2019).

10. See, e.g., Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018). Since imposing the Section 232 measures on steel, the administration has amended them as part of negotiations with other countries.

11. See, e.g., Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 8, 2018). Section 232 measures on aluminum have also been amended as part of negotiations with other countries.

12. Proclamation 9893, 84 Fed. Reg. 23,983 (May 23, 2019); Proclamation 9894, 84 Fed. Reg. 23,987 (May 23, 2019). The parties reached a side agreement regarding Section 232 measures for autos.

13. Presidential Memorandum, White House, Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group (July 12, 2019), <https://www.whitehouse.gov/presidential-actions/memorandum-effect-uranium-imports-national-security-establishment-united-states-nuclear-fuel-working-group/> [https://perma.cc/QN2S-FJZX].

14. See Proclamation No. 9888, 84 Fed. Reg. 23,433 (May 17, 2019).

### III. CHALLENGES TO SECTION 232 ACTIONS

#### A. Challenges in U.S. Courts

The Trump Administration's Section 232 measures have been challenged at the U.S. Court of International Trade (CIT). In one case, the American Institute for International Steel (AIIS) argued that Section 232 is an unconstitutional delegation of Congress's tariff powers under Article I, Section 8 of the U.S. Constitution.<sup>15</sup> The CIT found that Section 232 did not present an improper delegation of authority.<sup>16</sup> The plaintiffs filed an appeal, which is now pending before the U.S. Court of Appeals for the Federal Circuit.<sup>17</sup> Although Congress has indicated it may move to limit the President's authority under Section 232, particularly with respect to autos, it is unclear if there is sufficient support to override a Presidential veto.<sup>18</sup>

#### B. Challenges to Section 232 at WTO

In addition to challenges in U.S. courts, several countries have challenged the Section 232 import restrictions at the WTO.<sup>19</sup> These and other disputes raise national security and trade claims that will test the WTO dispute settlement system in new ways. In particular, the Panel Report for *Russia – Measures Concerning Traffic in Transit*, issued on April 5, 2019, sets the stage for a collision

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15. Complaint at 1, *Am. Inst. for Int'l Steel, Inc. v. United States*, No. 18-00152 (Ct. Int'l Trade June 27, 2018). Art. I, Section 8 of the Constitution provides, *inter alia*, that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8.

16. *Am. Inst. for Int'l Steel v. United States*, No. 18-00152, slip op. at 6. One member of the three-judge panel wrote separately agreeing that the court was bound by Supreme Court precedent, but noting that it may be time to revisit the determination. *Id.* at 28 (Katzmann, J., *dubitante*).

17. See *Am. Inst. For Int'l Steel v. United States*, No. 19-1727 (Fed. Cir. filed March 25, 2019). The plaintiffs' petition for a writ of certiorari before judgment was denied by the U.S. Supreme Court on June 24, 2019. 588 U.S. \_\_\_, 139 S. Ct. 2748 (2019).

18. The Bicameral Congressional Trade Authority Act, introduced in both houses of Congress on Jan. 31, would limit the president's authority to restrict imports on national security grounds under Section 232 of the Trade Expansion Act of 1962. See Bicameral Congressional Trade Authority Act of 2019, H.R. 940/S. 287, 116th Cong. § 2 (2019).

19. Challenges have been brought by China, India, the European Union, Norway, Russia, Switzerland, and Turkey. Several other countries have joined these disputes as Third Parties. See *Panels Established to Review US Steel and Aluminum Tariffs, Countermeasures on US Imports*, WORLD TRADE ORG. (Nov. 21, 2018), [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_19nov18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm) [<https://perma.cc/N4XX-LVDF>].

course between the United States and the WTO.<sup>20</sup> During the proceedings, Russia raised Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) as a defense.<sup>21</sup> The United States is also relying on Article XXI as a defense in the Section 232 disputes.<sup>22</sup>

Article XXI of the GATT 1994 is often characterized as the “third rail” of WTO dispute settlement.<sup>23</sup> This provision allows a Member to take actions “it considers necessary for the protection of its essential security interests.”<sup>24</sup> The Panel Report for *Russia – Traffic in Transit* is the first WTO decision interpreting Article XXI of the GATT 1994.<sup>25</sup>

The United States submitted its views as a Third Party in the *Russia – Traffic in Transit* dispute and argued that Article XXI is “self-judging,” meaning that once a country decides it is acting in its national security interests, it does not have to justify its actions.<sup>26</sup> The United States explained that “the dispute is non-justiciable in

20. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter *Russia – Traffic in Transit*] (the dispute concerns Russian measures on traffic in transit from Ukraine through Russia to third countries).

21. *Id.* ¶ 7.28.

22. First Written Submission of the United States, *Certain Measures on Steel and Aluminum Products*, ¶ 20, WT/DS564 (June 12, 2019), <https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS564%29.fin.%28public%29.pdf> [<https://perma.cc/LT56-VXDQ>].

23. See Alex Lawson, *Trump May Be Tipping His Hand In Security Trade Probes*, LAW360 (May 2, 2017), <https://www.law360.com/articles/1087412/high-stakes-wto-security-case-set-for-decision-next-year> [<https://perma.cc/TBY6-U84L>].

24. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Art. XXI provides the following:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) 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;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

*Id.* at art. XXI. This provision was wholly incorporated into GATT 1994. See General Agreement on Tariffs and Trade 1994 art. 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190.

25. *Russia – Traffic in Transit*, *supra* note 20, ¶ 7.20.

26. Third-Party Oral Statement of the United States, *Russia – Measures Concerning Traffic in Transit*, WT/DS512, at 4 (Jan. 25, 2018), <https://ustr.gov/sites/default/files/enforce->

the sense that the Panel cannot make findings on Russia's invocation, other than to conclude that Article XXI has been invoked."<sup>27</sup> In a meeting of the Dispute Settlement Body (DSB) in October 2018, the United States made the following statements regarding Section 232 and Article XXI:

It is simply not the WTO's role, nor its competence, to review a sovereign nation's judgment of its essential security interests.

The United States has explained that it considers the Section 232 measures necessary for the protection of its essential security interests, and they are therefore justified under Article XXI of the GATT 1994 . . . .

The clear and unequivocal position, for over 70 years, is that issues of national security are not matters appropriate for adjudication in the WTO dispute settlement system . . . .

It is not the WTO's function, nor within its authority, to second guess a sovereign's national security determination. WTO Members did not abdicate their responsibilities to their citizens to protect their essential security interests when they formed the WTO.

Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised . . . Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. We therefore do not see any reason for this matter to proceed further . . . .

The United States wishes to be clear: if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO's dispute settlement system and even the viability of the WTO as a whole.<sup>28</sup>

The United States' position that Article XXI is self-judging is not new. This has long been the position of the United States and several other WTO Members, although opinions differ as to the degree it is self-judging.<sup>29</sup>

However, the Panel in *Russia – Traffic in Transit* rejected the United States' arguments that Article XXI is self-judging and non-

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ment/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf [https://perma.cc/2FTU-7YHG].

27. Third-Party Executive Summary of the United States, *Russia – Measures Concerning Traffic in Transit*, WT/DS512, at 2 (Feb. 27, 2018), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Exec.Summ.fin.%28public%29.pdf> [https://perma.cc/B8WB-3UXP].

28. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 31–34 (Oct. 29, 2018), [https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB\\_Stmt\\_as-delivered.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_Stmt_as-delivered.fin_public.pdf) [https://perma.cc/F4YJ-AE72].

29. See generally Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (describing the general consensus that the security exception in Article XXI is beyond WTO review).

justiciable.<sup>30</sup> In doing so, the Panel relied on a textual and contextual interpretation of Article XXI.<sup>31</sup> It also reviewed the negotiating history of Article XXI, and cited several statements by the United States to confirm its interpretation that Article XXI is justiciable.<sup>32</sup> Although the Panel found that the Russian transit measures at issue fell within the Article XXI exceptions, it also warned that a Member's discretion to designate a concern as an "essential security interest" is limited by its obligation to interpret and apply the Article XXI exceptions in good faith.<sup>33</sup>

For decades, Members have avoided invoking Article XXI as a defense by limiting trade restrictive measures imposed for national security reasons or resolving disagreements regarding national security outside of the WTO dispute settlement forum. That time has come to an end. The Panel's decision opens the door for scrutiny of measures that Members claim fall under the Article XXI, and notably, whether such measures were imposed in good faith.

#### IV. IMPLICATIONS FOR WTO

The Panel Report in *Russia – Traffic in Transit* will test Members' commitments to the DSB and the WTO generally. The United States' position that Article XXI is self-judging raises serious concerns about pending WTO disputes regarding Section 232. In particular, the United States and other Members could use an adverse decision as a reason for withdrawing from the dispute settlement system or even the WTO altogether. Moreover, even if the Trump Administration's Section 232 measures are ultimately found to fall within the Article XXI exceptions, the Administration could find that subjecting those measures to review at the WTO is, in itself, unacceptable.

Other systemic stressors are also expected to test the viability of the Dispute Settlement Body in the coming years.<sup>34</sup> The United States continues to refuse to appoint new members to the Appellate Body (AB) before its concerns regarding the AB are addressed,

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30. *Russia – Traffic in Transit*, *supra* note 20, ¶ 7.103.

31. *Id.* ¶¶ 7.59–7.82.

32. *Id.* ¶¶ 7.84–7.100.

33. *Id.* ¶¶ 7.132–7.138. "The obligation of good faith . . . applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue." *Id.* ¶ 7.138.

34. The Dispute Settlement Body has authority to establish dispute settlement panels, refer matters to arbitration, and adopt panel, AB and arbitration reports. The AB is a standing body of seven persons that hears appeals of panel reports.

which has left the AB with only three sitting members—the minimum number required to hear an appeal.<sup>35</sup> The Trump Administration is blocking these appointments as leverage for achieving reforms at the WTO, but the AB could be rendered effectively inoperative by December 2019 unless WTO Members can agree on the appointment of new members. The shortage of AB members is already exacerbating delays in issuing reports within 90 days of the Notice of Appeal, as required by DSB rules.<sup>36</sup> If appeals are made but unable to proceed because there are not even AB members, the dispute settlement system will face unprecedented uncertainty.

Because of these and other challenges, Members have acknowledged that 2019 is a “crucial year” for the organization.<sup>37</sup> In January, a group of 32 WTO Members agreed that “current trade tensions and challenges should be solved by using increased cooperation and dialogue.”<sup>38</sup> Whether the WTO can continue in its current form as a forum to resolve complex and contentious international trade disputes remains to be seen.

## V. CONCLUSION

The Trump Administration has expressed a willingness to withdraw from international agreements and institutions, including the WTO. The Panel’s decision in *Russia – Traffic in Transit* that Article XXI of the GATT 1994 is not self-judging will test the United States’ commitment to the WTO dispute settlement process. It remains to be seen whether this issue will lead the United States to abandon the idea of an international trade organization altogether

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35. See Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What To Expect? What Choice To Make?*, 1 (July 6, 2019) (Georg. Univ. L. Ctr.) (unpublished working paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3415964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415964) [https://perma.cc/T6W7-72CQ] (“Three ABMs are needed to hear an appeal.”). Some of the U.S.’s complaints are that the AB fails to limit its appellate review to issues “necessary to resolve” the dispute and that the AB often goes beyond its mandate, with judges adding to or diminishing the rights or obligations of Members. See, e.g., Jennifer A. Hillman, *How to Make the Trade War Even Worse*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/opinion/trade-war-china-wto.html> [https://perma.cc/M3JD-6NX6].

36. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.5, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (“In no case shall the proceedings exceed 90 days.”). See also Communication from the Appellate Body, *United States – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, WTO Doc. WT/DS523/7 (Apr. 1, 2019) (informing parties that the panel will be unable to meet the 90-day deadline established by the DSU).

37. World Trade Organization, Informal WTO Ministerial Gathering of 25 January 2019, Personal Concluding Remarks by the Chair, Federal Councillor Guy Parmelin (2019), [https://www.wto.org/english/news\\_e/news19\\_e/chdgra\\_25jan19\\_e.pdf](https://www.wto.org/english/news_e/news19_e/chdgra_25jan19_e.pdf) [https://perma.cc/7Q4H-F3PS].

38. *Id.*

or advocate for more changes to the organization. The WTO system in its current form is not sustainable in the long-term and changes are inevitable. The real test may be whether—and which—Members will find a path forward together and which ones will abandon the forum altogether.