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One Nation under Trump: More Power to Him?

Jessica Hernandez*

This note examines the following question: to what extent has the Trump administration heralded an expansion of presidential trade powers with respect to Section 232 of the Trade Expansion Act of 1962? It proceeds by first providing an overview of the Trade Expansion Act of 1962. It then looks at the Section 232 investigations which (a) preceded Trump's assumption of office and (b) resulted in presidential trade action. After reviewing the aforementioned investigations, this note examines the Section 232 investigations initiated under the Trump administration. Attention is paid to how the Trump administration has defined 'national security' more broadly. The implications of adopting an expanded understanding of 'national security' are examined at various points throughout this note, and the note advances the notion that the president's authority under Section 232 warrants curtailment via congressional oversight. Alternatives to Section 232 duties which the United States might consider in the future are also briefly examined. This note ultimately concludes that although the Trump administration is not heralding an expansion of presidential trade powers with respect to Section 232 of the Trade Expansion Act of 1962, the broad definition of 'national security' adopted by it has resulted in the premature imposition of Section 232 duties. Such misuse heightens the risk that the international community will perceive the United States' actions under Section 232 as having roots in protectionism as opposed to in national security concerns.

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I. WHAT IS THE TRADE EXPANSION ACT OF 1962?

In the midst of the Cold War, President John F. Kennedy signed into law the Trade Expansion Act of 1962. The act was intended to facilitate the use of trade agreements as a means to stimulate the United States’ economic growth, strengthen foreign relations, and prevent the spread of communism.¹ Kennedy’s remarks upon signing the bill encapsulated these goals:

This 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. Increased economic activity resulting from increased trade will provide more job opportunities for our workers. . . . The results can

¹ Trade Expansion Act of 1962, Pub. L. No. 87-794, § 102, 76 Stat. 872, 872 (1962).

bring a dynamic new era of growth. . . . A vital expanding economy in the free world is a strong counter to the threat of the world Communist movement. This act is, therefore, an important new weapon to advance the cause of freedom.²

Although the Trade Expansion Act of 1962 granted the president temporary authority to make substantial tariff cuts, it also granted the chief of state the power to do the exact opposite.³

Section 232 of the Trade Expansion Act of 1962 (“Section 232”) enables the president to enact measures—including, but not limited to, increasing tariffs—to adjust imports of articles deemed a threat to national security.⁴ For the president to take action under Section 232, the Secretary of Commerce must first conduct an investigation into the effect of a given good on national security.⁵ The investigation may be self-initiated; alternatively, an interested party or the head of a department or agency may request an investigation.⁶ The Secretary of Commerce has 270 days after the date on which the investigation commences to submit a report to the president on the findings.⁷ Only if the Secretary of Commerce concludes that an imported good threatens national security may the president act under Section 232. The Trade Expansion Act of 1962 grants the president ninety days to decide upon a course of action⁸—and an additional fifteen days to implement it.⁹

Since Donald Trump assumed the presidency, the Secretary of Commerce has initiated four Section 232 investigations.¹⁰ Although Trump is far from the first American president to impose Section 232 duties, there are concerns that he wields tariffs in a “much more forceful and much more coordinated fashion” than any of his predecessors, blurring the lines separating trade policy from foreign policy in the

² *Legislative Summary: International*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/archives/other-resources/legislative-summary/international> (last visited Jan. 5, 2019).

³ *See* 19 U.S.C. § 1862(c) (2012).

⁴ *See id.*

⁵ *See id.* § 1862(b).

⁶ *Id.* § 1862(b)(1)(A).

⁷ *Id.* § 1862(b)(3)(A).

⁸ *Id.* § 1862(c)(1)(A).

⁹ *Id.* § 1862(c)(1)(B).

¹⁰ *See* CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 4 (2019).

process.¹¹ Thus, questions remain as to whether the Trump administration is heralding an expansion of presidential trade powers—as they relate to Section 232. Securing a definitive answer, however, is complicated by the fact that it is difficult to assess whether an administration is exceeding its bounds when limits are not clearly delineated; Section 232 does not define ‘national security,’ and the legislative history is bereft of “any meaningful discussion of the standard.”¹²

Despite the lack of a clear definition or standard for national security, the text of Section 232 does present a number of factors to consider in appraising national security, and most of them fit into one of two classes: (1) variables pertaining to national defense and (2) variables connected to economic welfare. Assessing national security through the national defense lens requires that one look at factors such as:

. . . domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. . . .¹³

By contrast, evaluating national security through the economic welfare lens necessitates looking at an entirely different set of variables, including “the impact of foreign competition on the economic welfare

¹¹ Adam Taylor, *No President Has Used Sanctions and Tariffs Quite Like Trump*, WASH. POST (Aug. 29, 2018), https://www.washingtonpost.com/world/2018/08/29/no-president-has-used-sanctions-tariffs-quite-like-trump/?utm_term=.3f3ac7163535.

¹² David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. OF INT’L L. 926, 935 (1990).

¹³ 19 U.S.C. § 1862(d) (2012).

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 of any domestic products by excessive imports.”¹⁴

The relative importance of factors relating to national defense and those touching upon economic welfare is not addressed in Section 232. Nor does Section 232 state how many variables the Secretary of Commerce must identify as having been adversely affected by foreign imports before soundly opining that a national security threat exists. Additionally, the considerations presented in Section 232 are not comprehensive; the statute makes clear—via language such as “without excluding other relevant factors”—that the lists therein are merely illustrative.¹⁵ These gaps aid one in concluding that, notwithstanding Trump’s improper use of Section 232 from a historical perspective, Trump is technically acting within the letter of the law from a legal perspective. It is this argument which this note seeks to advance: first by detailing the actions of pre-Trump administrations, and then by looking at the Section 232 investigations initiated under the current chief of state.

II. THE PRE-TRUMP ERA

Twenty-six Section 232 investigations were conducted during the various pre-Trump administrations.¹⁶ Nine of them resulted in affirmative findings by the Department of Commerce.¹⁷ In only six did the acting president “impose[] a trade action.”¹⁸ Those six cases will be discussed in the succeeding paragraphs.

A. *The Petroleum Investigation of 1973*

In 1959, President Dwight Eisenhower implemented the Mandatory Oil Import Program (MOIP).¹⁹ This program created a quota system which disallowed the importation of oil in excess of nine percent of

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See CONG. RESEARCH SERV., *supra* note 10, at 38–40.

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *Oil Dependence and U.S. Foreign Policy: 1850–2017*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/oil-dependence-and-us-foreign-policy> (last visited Oct. 25, 2018).

domestic consumption.²⁰ MOIP essentially constituted a response to concerning findings by the Department of Commerce regarding the fact that “although domestic demand [for oil] grew by 216.8% from 1954 to 1958, domestic crude oil production rose only 5.8%.”²¹ Essentially, an excess supply of petroleum at the international level—coupled with low prices therein—had resulted in an increase in imports, and such an increase “threatened the capability of the domestic suppliers to meet the requirements of an expanding economy”²² by denying, or at the very least severely restricting, the ability of domestic producers to grow. The worry was that, in the event of an emergency, the United States “would be confronted with all of the liabilities inherent in a static . . . mobilization base, including the delays, waste and inefficiency that accompany efforts to [strengthen] any part of the mobilization base on a ‘crash’ basis.”²³ It was against the backdrop of MOIP’s eventual failure to correct for the “imbalance” between domestic production and petroleum imports²⁴ that President Richard Nixon decided to initiate a Section 232 investigation and subsequently move away from the existing quota system in favor of a license fee system.²⁵

B. *The Petroleum Investigation of 1975*

In 1973, Nixon lent his support to Israel during the Yom Kippur War.²⁶ Angered by Nixon’s actions, OPEC’s Arab member states responded by enacting an embargo on petroleum exports against the United States and its allies, heralding the OPEC Crisis.²⁷ At the time of the embargo, the United States’ economy relied on oil imports to meet thirty-seven percent of its domestic consumption needs.²⁸ The embargo denied the United States approximately thirty-eight percent of its imports.²⁹ In 1975, in the wake of the OPEC crisis, President Gerald Ford

²⁰ *Id.*

²¹ 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 BUS. L. 235, 244 (1990).

²² *Id.*

²³ U.S. DEP’T OF TREAS., OFFICE OF SEC’Y., *Effects of Oil Imports on National Security*, 44 Fed. Reg. 18818, 18819 (Mar. 29, 1979).

²⁴ Bialos, *supra* note 21, at 245 (explaining that “oil imports continued to grow and rose from 1.61 million bbl/d in 1960 to 6.03 million bbl/d in 1973”).

²⁵ CONG. RESEARCH SERV., *supra* note 10, at 38.

²⁶ Bialos, *supra* note 21, at 246.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

initiated a Section 232 investigation.³⁰ The findings of the investigation revealed that the United States' dependence on imported petroleum was increasing, and this reliance "threatened to impair the national security, foreign policy, military predominance, and economic welfare of the United States."³¹ After the Secretary of Treasury determined that there existed a significant risk that another interruption like the OPEC Crisis would occur,³² Ford took action under Section 232.³³ He accelerated increases in Nixon's graduated license fees; introduced a new, supplemental fee to be levied against every barrel of imported oil; and reinstated certain tariffs lifted under Nixon.³⁴

C. *The Petroleum Investigation of 1978*

The petroleum investigation of 1978—which concluded in 1979³⁵ and confirmed the findings of the 1959 and 1975 studies³⁶—prompted President Jimmy Carter to issue two proclamations. In April of 1979, Carter issued Proclamation 4655, temporarily suspending import fees and tariffs;³⁷ a shortage of petroleum in the international arena had driven up prices in the oil market, and the added costs occasioned by previous Section 232 tariffs made import fees "burdensome to the American public."³⁸ Additionally, in April of 1980, Carter issued Proclamation 4744, announcing the Petroleum Import Adjustment Program (PIAP).³⁹ At the time of the program's enactment, the United States was importing more than forty percent of its oil,⁴⁰ and—by 1978—OPEC nations were supplying the country with eighty-three percent of all imported oil.⁴¹ The United States was "import[ing] and us[ing] more oil than all the other Western industrialized nations put together."⁴² When viewed in light of

³⁰ *Id.*

³¹ *Id.* at 246–47.

³² *Id.* at 247.

³³ *Id.* at 248.

³⁴ *Id.*

³⁵ U.S. DEP'T OF TREAS., OFFICE OF SEC'Y., *supra* note 23, at 18818.

³⁶ *See* Proclamation No. 4744, 45 Fed. Reg. 22864 (Apr. 2, 1980).

³⁷ Proclamation No. 4655, 44 Fed. Reg. 21243 (Apr. 6, 1979).

³⁸ *Id.*

³⁹ Proclamation No. 4744, *supra* note 36.

⁴⁰ *Conservation Fee on Oil Imports Remarks and a Question-and-Answer Session with Reporters*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/conservation-fee-oil-imports-remarks-and-question-and-answer-session-with-reporters> (last visited Oct. 25, 2018).

⁴¹ U.S. DEP'T OF TREAS., OFFICE OF SEC'Y., *supra* note 23, at 18819.

⁴² THE AMERICAN PRESIDENCY PROJECT, *supra* note 40.

the Section 232 findings discussed above, this excessive reliance on foreign suppliers of oil was deemed a national security threat. Interestingly, in June of 1980, Carter rescinded Proclamation 4744 after Congress terminated the PIAP.⁴³ PIAP's fatal flaw was its imposition of fees on domestic and imported petroleum alike; thus, it "could not [possibly] act as a disincentive to reduce imports."⁴⁴

D. The Iranian Petroleum Investigation of 1979

On November 4, 1979, Iranian militants attacked the American Embassy at Tehran, taking approximately sixty Americans hostage.⁴⁵ Within twenty-four hours, several Iranian authorities—including Ayatollah Ruhollah Khomeini (who was acting as the de facto chief of state), "the Foreign Minister, the commander of the Revolutionary Guard, the public prosecutor, and the judiciary"—expressed their approval of the militants' actions.⁴⁶ The hostage situation prompted Carter to issue Proclamation 4702 on November 12, 1979, implementing an embargo on Iranian oil.⁴⁷ The proclamation came on the heels of a memorandum from the Secretary of Treasury, in which the United States' reliance on Iran for oil was deemed to constitute a threat to national security.⁴⁸

The 1979 oil embargo presents a case wherein the connection between imports and a threat to national security is clear: had the United States continued to import oil from Iran in the midst of the hostage crisis, it would have funded a government which had taken—and which persisted in taking—hostile action against it. Providing Iran with a stream of income via petroleum imports was inherently incompatible with the goal of sending a message—both to Iran and to the international community—that threatening the safety and wellbeing of the United States' citizens was unacceptable.

E. The Libyan Petroleum Investigation of 1982

In March of 1982, President Ronald Reagan issued Proclamation 4907, announcing the enactment of an embargo on petroleum from

⁴³ Proclamation No. 4766, 45 Fed. Reg. 41899 (June 19, 1980).

⁴⁴ *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 617 (D.C. Cir. 1980).

⁴⁵ Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 418, 427 (1980).

⁴⁶ *Id.*

⁴⁷ Proclamation No. 4702, 44 Fed. Reg. 65581 (Nov. 12, 1979).

⁴⁸ *Id.*

Libya.⁴⁹ In his proclamation, Reagan explicitly stated that the “policy and action supported by revenues from the sale of oil imported into the United States [from Libya were] inimical to . . . national security.”⁵⁰ The actions and policies referred to by Reagan likely included Libya’s overt support of terrorism,⁵¹ its alignment with Palestine in the territorial dispute between Israelis and Palestinians,⁵² and its tendency to render aid to governments or movements black-listed by Washington.⁵³

The relationship between petroleum imports and national security in this case is similar to that in the case of Iran: the president may have concluded that the United States would indirectly fund activities adverse to itself, its people, or its allies absent an embargo. Given that Libya was “widely perceived as the world’s strongest supporter of terrorism” during the 1980’s, that conclusion was not without merit.⁵⁴

F. The Metal-Cutting and Metal-Forming Machine Tools Investigation of 1983

In 1983, representatives from the ferroalloy industry, the metal fastener industry, and the machine tool industry sought the implementation of favorable protective measures under Section 232; they claimed that the existence of their industries was integral to national security.⁵⁵ The subsequent investigation revealed that the aforementioned industries indeed faced problems domestically.⁵⁶ For instance, with respect to the metal fastener industry, the United States imported nearly “two-thirds of the nuts, bolts, and large screws needed to hold together virtually all types of military equipment” by 1982.⁵⁷ Despite the foregoing, the Department of Commerce opined that such a situation did not indicate the presence of a national security threat.⁵⁸ Rather, it argued that the following factors warranted examination: (i) whether the exporting countries were politically reliable, (ii) whether any shipping

⁴⁹ Proclamation No. 4907, 47 Fed. Reg. 10507 (Mar. 10, 1982).

⁵⁰ *Id.*

⁵¹ See Lisa Anderson, *Rogue Libya’s Long Road*, 241 MIDDLE E. REP. 42, 43 (2006).

⁵² Yahia H. Zoubir, *Libya in US Foreign Policy: From Rogue State to Good Fellow?*, 23 THIRD WORLD Q. 31, 32 (2002).

⁵³ *Id.*

⁵⁴ Jonathan B. Schwartz, *Dealing with a “Rogue State”: The Libya Precedent*, 101 AM. J. INT’L L. 553, 553 (2007).

⁵⁵ Aaron L. Friedberg, *The Strategic Implications of Relative Economic Decline*, 104 POL. SCI. Q. 401, 418 (1989).

⁵⁶ See *id.* at 419.

⁵⁷ *Id.*

⁵⁸ *Id.*

losses incurred would prove minimal, and (iii) whether, if the suppliers were unable to access necessary raw materials, said suppliers would be able to “obtain sufficient quantities of suitable-grade steel from the United States.”⁵⁹ Answering these inquiries in the negative did not create a *per se* presumption of a national threat; rather, it indicated that there was a *possibility* that delays and shortages could ensue.⁶⁰ Ultimately, after conducting its investigation, the Department of Commerce elected not to recommend that the president act pursuant to the powers granted under Section 232.⁶¹ Instead, Reagan utilized avenues unrelated to Section 232 to offer aid where proper. For instance, the Department of Commerce’s reports led to “a decision in 1984 to increase stockpiles of some ferroalloys.”⁶² Additionally—with regard to the machine tools industry—the Reagan administration sought Voluntary Restraint Agreements (beginning in 1986) with various suppliers.⁶³

III. KEY POINTS FROM PRE-TRUMP ADMINISTRATION INVESTIGATIONS

Taking action under Section 232 has often been regarded as “the nuclear option in trade law.”⁶⁴ Thus, this note proposes that the following factors deserve thoughtful consideration before resorting to Section 232 tariffs: (a) whether there is a significantly contentious relationship with an exporting state, (b) whether, under a hypothetical deterioration in the working relationship between the importer and a given exporter, the former’s ability to securely procure the imported good elsewhere (including internally) would be significantly compromised, and (c) whether the circumstances are such that in the event of a national emergency, the state would not be able to adequately meet the needs of the Defense Department. Applying the proffered framework can enhance

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 419 n.66.

⁶⁴ Noah Glazier, *Legal Framework and Economic Critique: Trump's Trade Authority and Policy. A Look at the Legality, Practicality, Probability, and Rationality of President Trump's Proposed Trade-Related Action*, 14 S.C. J. INT'L L. & BUS. 27, 42 (2017) (quoting Doug Palmer & Matthew Nussbaum, *Trump puts aluminum imports in 'national security' crosshairs*, POLITICO (Apr. 26, 2017, 9:25 PM), <https://www.politico.com/story/2017/04/26/trump-aluminum-imports-trade-237665>).

one's understanding of why prior administrations imposed Section 232 duties in the petroleum cases but not in the 1983 case.

In the 1983 case, the main exporting countries included Japan, Taiwan, and India—none of which the United States had a significantly contentious relationship with at the time.⁶⁵ Moreover, states like Iran and Libya differed from Japan, Taiwan, and India in a fundamental way. Unlike the latter, the former had taken actions diametrically opposed to significant interests of the United States shortly before the imposition of duties, and they formed part of an organization that controlled a substantial amount of the international oil supply.⁶⁶ Concerns that one OPEC member's decision to stop supplying the United States could set off a domino effect were likely far from non-issues, and given the inability of the United States' domestic industries to compensate for supply disruptions, the threat of a domino effect would have qualified as a compelling one. By contrast, during the 1983 Section 232 investigation, the United States presumably determined either that its domestic industries would successfully mobilize and make up for any supply disruptions or that other suppliers could reliably fulfill this objective.

IV. THE TRUMP ADMINISTRATION

Having examined several Section 232 investigations initiated during pre-Trump administrations, one should next consider investigations commenced under the Trump administration.

⁶⁵ See Lou Cannon, *Reagan, Nakasone Discuss Trade in Tokyo*, WASH. POST (Nov. 10, 1983), <https://www.washingtonpost.com/archive/politics/1983/11/10/reagan-nakasone-discuss-trade-in-tokyo/5ea4a87f-a634-4f99-991c-2edbd7cdf80/> (making reference to the “friendly relations between Japan and the United States”); WHITE HOUSE, OFF. PRESS SECRETARY, *Joint Communique of the United States of America and The Peoples Republic of China*, CENT. INTELLIGENCE AGENCY (Aug. 17, 1982), <https://www.cia.gov/library/readingroom/docs/CIA-RDP83B00551R000200010003-4.pdf> (highlighting the United States' commitment to maintaining “cultural, commercial, and other unofficial relations with the people of Taiwan,” and acknowledging that the United States had sold arms to Taiwan and would continue to do so); *U.S.-India Relations 1947–2019*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/us-india-relations> (last visited Dec. 13, 2019) (identifying the year 1982 as a watershed in U.S.-Indian relations, for President Ronald Reagan and Prime Minister Indira Gandhi agreed to “increase cooperation and resolve a dispute over nuclear power”).

⁶⁶ John Tagliabue, *OPEC Talks Expected to Focus on Production*, N.Y. TIMES (Jan. 21, 1983), <https://www.nytimes.com/1983/01/21/business/opec-talks-expected-to-focus-on-production.html> (identifying Iran and Libya as OPEC members in 1983).

A. *The Steel Investigation of 2017*

In March of 2018, President Donald Trump issued Proclamation 9705, announcing the imposition of a “25 percent ad valorem tariff on steel articles . . . imported from all countries except Canada and Mexico.”⁶⁷ Trump’s decision to take action against steel imports under Section 232 is significant. It marked the first time in nearly thirty-five years that presidential action (in the form of imposing a tariff, duty, or fee) was taken under Section 232.⁶⁸ Also, the decision marked the first time that action was taken under Section 232 against an import other than petroleum.⁶⁹ As per Trump, the duties were enacted in response to a national security threat occasioned by a weakening of the country’s internal economy (precipitated, in turn, by “global excess capacity for producing steel”) and a “shrinking of [the United States’] ability to meet national security production requirements in a national emergency.”⁷⁰ Thus, put more concisely, Trump credited national defense needs and the country’s economic wellbeing with motivating his decision to impose duties under Section 232.

Viewed in the context of the six Section 232 investigations discussed in the preceding sections, though, how appropriate is it to maintain that steel imports pose a national security threat? In answering this question, it is helpful to employ the three-pronged test proposed earlier; said test synthesizes multiple salient factors explicitly and implicitly considered by previous administrations.

The first factor to consider is whether there exists a significantly contentious relationship with an exporting state. In descending order, the top twenty countries from which the United States imports steel are Canada, Brazil, South Korea, Mexico, Russia, Turkey, Japan, Germany, Taiwan, India, China, Vietnam, the Netherlands, Italy, Thailand, Spain, the United Kingdom, South Africa, Sweden, and the United Arab Emirates.⁷¹ None of these countries recently engaged in openly hostile action—comparable in gravity, for instance, to Iran taking American

⁶⁷ Proclamation No. 9705, 83 Fed. Reg. 11625, 11626 (Mar. 8, 2018).

⁶⁸ See CONG. RESEARCH SERV., *supra* note 10, at 39–40.

⁶⁹ See *id.* at 38–40.

⁷⁰ Proclamation No. 9705, *supra* note 67.

⁷¹ *The Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended*, BUREAU OF INDUS. AND SEC. OFF. OF TECH. EVALUATION, U.S. DEP’T OF COM. (Jan. 11, 2018), at 28, <https://agoa.info/images/documents/15373/theeffectofimportsofsteelonthenationalsecurity-withredactions-20180111.pdf>.

hostages in 1979 or to Libya's government openly sponsoring terrorism in the 1980s—against the interests of the United States.

Second, one must determine whether the deterioration in the working relationship between the United States and a given exporter would significantly compromise the former's ability to securely procure the imported good elsewhere (including internally). Because the United States imports steel from such a long list of countries, and because the lower eighteen of these countries collectively supply approximately two-thirds of the United States' total steel imports (with no state individually supplying more than ten percent of said total),⁷² it is unlikely that a breakdown in one working relationship will significantly compromise other relationships—especially given the fact that steel-producing states are not members to an organization akin to OPEC, wherein the threat of a domino effect looms heavily.

Lastly, it is necessary to assess whether circumstances are such that, in the event of a national emergency requiring mobilization of the military, the United States would not be able to adequately meet the needs of the Defense Department. Domestic production more than adequately meets the steel requirements of the United States military.⁷³ Such steel requirements “represent about three percent of U.S. production,”⁷⁴ meaning that the United States produces enough steel to meet the military's needs thirty times over. Furthermore, the United States has reciprocal defense arrangements—which afford it protection both in the event of an attack abroad and in the event of an attack on its own soil—with four of its top ten suppliers: Canada (via the North Atlantic Treaty), Brazil (via the Rio Treaty), Turkey (via the North Atlantic Treaty), and Germany (via the North Atlantic Treaty).⁷⁵ Collectively, these four states provide the United States with thirty-nine percent of its imported steel.⁷⁶ Thus, if—in an emergency occasioned by an attack—the United States required a continued supply of steel to meet

⁷² *See id.*

⁷³ *See* John Brinkley, *Trump's National Security Tariffs Have Nothing To Do With National Security*, FORBES (Mar. 12, 2018, 11:41 A.M.), <https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/#3d585902706c>.

⁷⁴ *Id.*

⁷⁵ *See U.S. Collective Defense Agreements*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/s/l/treaty/collectivedefense/> [<https://web.archive.org/web/20190805151941/https://2009-2017.state.gov/s/l/treaty/collectivedefense/>] (last visited Aug. 24, 2019).

⁷⁶ *See* OFF. OF TECH. EVALUATION, BUREAU OF INDUSTRY AND SECURITY, U.S. DEP'T OF COM., *supra* note 71.

actual threats, the United States might be able to utilize its agreements with these countries to its advantage.

The foregoing analysis suggests that—despite claims to the contrary—the circumstances do not warrant a finding that steel imports threaten national security by infringing on the United States’ ability to meet national defense needs. The next question to address is whether steel imports threaten national security by adversely affecting the United States’ economic wellbeing.

Interestingly, some facts highlighted in the Department of Commerce’s investigative report include the following: in the international arena, no country imports more steel than the United States; the United States imports almost four times as much steel as it exports; since 1998, there has been a thirty-five percent decrease in domestic employment in the steel industry; since 2009, the domestic steel industry has operated on a negative net income; since 2010, the United States has charged more for hot-rolled steel coil—a common type of steel that often has its price regarded as a “benchmark price indicator”—than other states have; since 2000, four electric arc furnace facilities shuttered up, while more than twenty-five percent of the United States’ basic oxygen furnace facilities have been lost; and American steel producers have found that they are unable to compete with foreign producers.⁷⁷

Although it has been gradually increasing, the import penetration of steel is at a mere 33.8%—meaning that the United States produces nearly seventy percent of the steel it consumes.⁷⁸ How is one to reconcile the assertion that importing 33.8% of consumed steel threatens the internal economy with the 1983 finding that importing nearly twice as many “nuts, bolts, and large screws needed to hold together virtually all types of military equipment” does not?⁷⁹ Moreover, a substantial increase in jobs is unlikely to result from the imposed tariffs. One major reason why jobs in domestic steel production have declined is attributable to advances in productivity.⁸⁰ Whereas it took 10.1 hours to produce a single ton of steel in 1980, it required 2.0 hours to accomplish the same feat in 2016.⁸¹

⁷⁷ *Id.* at 31.

⁷⁸ *Id.* at 7.

⁷⁹ Friedberg, *supra* note 55.

⁸⁰ See Tori K. Whiting, *President Should Reject Flawed Commerce Report on Steel Tariffs*, THE HERITAGE FOUNDATION (Feb. 27, 2018), at 4, <https://www.westshorebank.com/custom/fi/westshorebank/fb/disclosure/Heritage-Think-Tank-Steel-Tariffs.pdf>.

⁸¹ *Id.*

Admittedly, it is concerning that the domestic steel industry is operating on a negative net income; this challenges its very viability.⁸² Exacerbating such troubles is the fact that—reflecting “higher taxes, healthcare, environmental standards, and other regulatory measures,” as well as state-subsidization of steel production in other countries—the United States charges more for steel than other states do,⁸³ and its steel producers continue to lose bids on domestic projects.⁸⁴ Although resorting to Section 232 measures may seem like an ideal way to level the playing field and allow the United States’ steel industry to become competitive, Section 232 duties come with a hefty price tag.

Overall, Section 232 of the Trade Expansion Act of 1962 is consistent with international obligations. In relevant part, Article XXI of the General Agreement on Tariffs and Trade (GATT) reads as follows:

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; (iii) taken in time of war or other emergency in international relations . . .⁸⁵

Notwithstanding the foregoing, the Trade Expansion Act provides fertile grounds for retaliation. For instance, a number of countries have responded to the United States’ Section 232 duties under Trump by increasing tariffs on American goods. Canada is doing so with steel and aluminum—among other products⁸⁶—and the European Union has elected to place extra duties on goods to immediately rebalance €2.8 billion worth of exports, with an additional €3.6 billion worth of exports

⁸² See OFF. OF TECH. EVALUATION, BUREAU OF INDUSTRY AND SECURITY, U.S. DEP’T OF COM., *supra* note 71, at 37.

⁸³ See *id.* at 31–32 (explaining that in 2016 China’s prices for hot-rolled coil were fourteen percent lower, those in ASEAN states were thirty-three percent lower, and those in North Europe were twenty-one percent lower).

⁸⁴ See *id.* at 36–37.

⁸⁵ General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 4 U.S.T. 639, 55 U.N.T.S. 194.

⁸⁶ John Brew ET AL., *Latest U.S. Trade Actions/Tariffs and Other Countries Retaliatory Measures*, CROWELL MORING (October 30, 2018), <https://www.cmtradelaw.com/2018/10/latest-u-s-trade-actions-tariffs-and-other-countries-retaliatory-measures/> (last updated Aug. 23, 2019).

set to be rebalanced over the next few years.⁸⁷ Other countries which have retaliated with increased tariffs include Mexico, China, India, Japan, Russia, and Turkey.⁸⁸ Their targeted products range from bourbon whiskey and powdered cheese⁸⁹ to golf cars and motorcycles.⁹⁰

Interestingly, the current trade war is reminiscent of one which unfolded during the 1960s. After the Second World War, the United States transitioned to factory farming, enabling it to supply mass quantities of poultry not only to domestic consumers but abroad as well.⁹¹ Countries like France and Germany responded by placing tariffs on chicken imported from the United States.⁹² While this had the intended effect of reducing the amount of American chicken exports, it also led President Lyndon Johnson to respond with tariffs of his own: Johnson imposed duties at a rate of twenty-five percent on potato starch, dextrin, brandy, and light trucks—all of which the United States imported from Europe in large numbers.⁹³ Thereafter, “Volkswagen AG’s pickup and van business collapsed in the United States, and demand for French brandy began to dry up.”⁹⁴

That the consequences of the Section 232 duties on steel will mirror those of the chicken tax—albeit in reverse, with the United States’ businesses crumbling abroad—is quite possible. Equally possible is the

⁸⁷ European Commission Press Release IP/18/4220, EU Adopts Rebalancing Measures in Reaction to U.S. Steel and Aluminium Tariffs (June 20, 2018).

⁸⁸ Brew ET AL., *supra* note 86.

⁸⁹ *Retaliatory Measures on Goods Originating in the U.S.*, CROWELL MORING, <https://www.crowell.com/files/Mexican-Retaliatory-measures-on-goods-originating-in-the-US.pdf>, (last visited Jan. 4, 2019).

⁹⁰ *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, India*, WORLD TRADE ORGANIZATION (May 18, 2018), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=245263,245266,245272,245249,245254,244331,244332,244335,244292,244291&CurrentCatalogueIdIndex=4&FullTextHash=-1264605332&HasEnglishRecord=True&HasFrenchRecord=False&H.

⁹¹ Bryce Hoffman, *If You Aren’t Worried About a Trade War, You Don’t Know About the Chicken Tax*, FORBES (Mar. 3, 2018), <https://www.forbes.com/sites/brycehoffman/2018/03/03/if-you-arent-worried-about-a-trade-war-you-dont-know-about-the-chicken-tax/#9333dfb5455b>.

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Id.*

chance that trading partners will imitate Trump and attempt to block the United States' market access by pointing to national security concerns.⁹⁵

The effects of Trump's Section 232 duties will likely be felt domestically, too. Industries which use steel in manufacturing will have to contend with the increased prices. Executives in impacted industries will undoubtedly elect to pass these additional costs to consumers, who may then respond by lowering their demand for affected products.

B. The Aluminum Investigation of 2017

In March of 2018, Trump issued Proclamation 9704, introducing "a 10 percent ad valorem tariff on aluminum articles . . . imported from all countries except Canada and Mexico."⁹⁶ Trump indicated that aluminum imports threatened national security by negatively impacting national defense and the state's economic wellbeing.⁹⁷

Viewed against the backdrop of pre-Trump Section 232 investigations, can it be argued that aluminum imports pose a national security threat, as far as national defense is concerned? Again, it is appropriate to look to the three-pronged test proposed earlier.

To begin with, there is no significantly contentious relationship with an exporting state. In descending order, the top sixteen states from which the United States imports aluminum are Canada, Russia, United Arab Emirates, China, Bahrain, Argentina, South Africa, India, Qatar, Venezuela, Indonesia, Mexico, Germany, Saudi Arabia, and Brazil.⁹⁸ None of these countries have recently engaged in openly hostile action such that the United States would be rendering itself vulnerable—from a security standpoint—if it persisted in trading with them.

Moreover, the deterioration in the working relationship between the United States and a given exporter would not significantly compromise the former's ability to securely procure the imported good elsewhere. With the exception of Canada, no country provides the United States

⁹⁵ CONG. RESEARCH SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (Version 14, 2019).

⁹⁶ Proclamation No. 9704, 83 Fed. Reg. 11619, 11620 (Mar. 8, 2018).

⁹⁷ *See id.*

⁹⁸ *See The Effect of Imports of Aluminum on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, OFF. OF TECH. EVALUATION, BUREAU OF INDUSTRY AND SECURITY, U.S. DEP'T OF COM. (Jan. 17, 2018), at 66, https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf.

with more than eleven percent of its total aluminum imports.⁹⁹ Hence, it is unlikely that the severing of ties with any one state will significantly jeopardize the United States' access to aluminum.

Finally, present circumstances are such that in the event of a national emergency, the United States would be able to adequately meet the needs of the Defense Department. The import penetration of aluminum is ninety-one percent¹⁰⁰—meaning that the United States only produces nine percent of the aluminum it consumes. However, as was true with steel, the United States' military requirements necessitate an allocation of merely three percent of total domestic aluminum production to defense.¹⁰¹ Additionally, the United States has reciprocal defense agreements with Canada and Germany via the North Atlantic Treaty, and with Argentina, Brazil, and Venezuela via the Rio Treaty.¹⁰² Combined, these states provide nearly fifty percent of the United States' total imported aluminum.¹⁰³ In the event of a crisis induced by an attack, the United States could conceivably exploit these agreements to address material aluminum shortages.

The preceding paragraphs suggest that, had the current state of affairs been subjected to a purely pre-Trump-administration analysis, the government would not have concluded that aluminum imports threaten national defense. Communications at the federal level support this assertion. For instance, in a memorandum authored by Secretary of Defense James Mattis for Secretary of Commerce Wilbur Ross, Mattis explained that the United States' production capabilities adequately satisfied military requirements.¹⁰⁴ The fact that Mattis nonetheless used his memorandum to declare that unfair trade practices involving steel and aluminum could threaten national security necessitates discussing the extent to which aluminum imports adversely affect the United States' economic wellbeing.

At first blush, the most compelling finding that aluminum imports threaten the country's economic wellbeing concerns employment. Between 2013 and 2016, fifty-eight percent of jobs in the primary aluminum sector were lost “as several smelters were either permanently

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 6.

¹⁰¹ *See* Brinkley, *supra* note 73.

¹⁰² U.S. DEP'T OF STATE, *supra* note 75.

¹⁰³ *See* OFF. OF TECH. EVALUATION, BUREAU OF INDUSTRY AND SECURITY, U.S. DEP'T OF COM., *supra* note 98.

¹⁰⁴ Brinkley, *supra* note 73.

shut down or temporarily idled.”¹⁰⁵ Disconcerting though this finding may seem, the described decline represents a loss of only 7,408 jobs, and several other aluminum sectors—including secondary production/alloying, sheet/plate/foil/extrusion/coatings, foundries, forgings, and metal service centers—seemingly made up for this diminution by making available thousands of new jobs, thereby resulting in an overall employment increase of three percent in the aluminum industry as a whole.¹⁰⁶ Thus, contribution to the unemployment rate cannot, in and of itself, be cited as the reason that the loss of certain aluminum manufacturing jobs creates a national security threat. Rather, as Trump explained in Proclamation 9704, there is growing concern that the continued closure of aluminum production facilities will cause the United States to rely entirely on foreign powers to (a) meet existing needs and (b) respond to emergencies wherein an increase in the production of aluminum is required.¹⁰⁷ Trump’s chosen remedy—Section 232 duties—raises a number of issues. First, as was true of the Section 232 duties imposed on steel, increasing tariffs on aluminum introduces the risk of retaliation by the United States’ trading partners. For reasons previously discussed in the context of the chicken tax, this might essentially culminate in the sacrificing of multiple industries to save merely one. Moreover, the Section 232 duties are unnecessary. As per Jeff Bialos—former Deputy Under Secretary of Defense for Industrial Affairs—the idea that the United States would suddenly need to increase metal production to replace damaged tanks (and the like) is antiquated thinking.¹⁰⁸ Although such concerns were valid during the times of the Second World War, today’s wars center on “qualitative superiority, not quantitative superiority.”¹⁰⁹ Concurring that the need to increase steel and aluminum production during wartime is a nonissue, Andrew Hunter—former chief of staff to Ash Carter, who served as Secretary of Defense from 2015 to 2017—explains that because the market for steel and aluminum is so robust, the Department of Defense’s supply of these goods is not vulnerable to disruptions.¹¹⁰

¹⁰⁵ OFF. OF TECH. EVALUATION, BUREAU OF INDUSTRY AND SECURITY, U.S. DEP’T OF COM., *supra* note 98, at 89.

¹⁰⁶ *See id.* at 90.

¹⁰⁷ *See* Proclamation No. 9704, *supra* note 96.

¹⁰⁸ Peter Coy, *National Security Is a Good Reason for Protection. But Not of Steel and Aluminum*, BLOOMBERG (Mar. 2, 2018, 4:00 A.M.), <https://www.bloomberg.com/news/articles/2018-03-02/national-security-is-a-good-reason-for-protection-but-not-of-steel-and-aluminum>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

C. The Vehicle and Automobile Parts Investigation of 2018

In May of 2018, the Secretary of Commerce—acting under the direction of the Trump administration—launched a Section 232 investigation into the effects of the importation of automobiles and automotive parts on national security.¹¹¹

According to the Congressional Research Service, the Trump administration initiated the vehicle and automobile parts investigation as part of its plan to institute changes not only in the auto industry but also in the domain of international trade.¹¹² Namely, the administration aimed to accomplish the following: “(1) expand[] domestic auto manufacturing and domestic content in autos; (2) address[] bilateral trade deficits; and (3) reduc[e] disparities in U.S. and trading partner tariff rates.”¹¹³ Likely motivating the first of these goals was the fact that between 1992 and 2018, the number of foreign-owned auto manufacturing plants located in the United States grew from seven to seventeen.¹¹⁴ Moreover, the number of imported vehicles—as a percentage of total sales in the United States—increased from forty-one percent in 2010 to forty-eight percent in 2017.¹¹⁵

Furthermore, as far as the second goal of the Trump administration is concerned, some speculated that the threat of Section 232 duties was being used “to create U.S. leverage for ongoing and future negotiations” unrelated to automotive imports.¹¹⁶ For instance, in conjunction with talks concerning the proposed trade agreement between the United States, Mexico, and Canada, the Trump administration issued letters to Mexico and Canada wherein it expressed that both states would benefit from exemptions to any Section 232 duties relating to automobiles and automotive parts.¹¹⁷ Similarly, after the United States and Japan agreed to enter into trade negotiations, the Trump administration announced (in September of 2018) that it would not impose Section 232 duties on

¹¹¹ 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 Truck, and Automotive Parts, 83 Fed. Reg. 24735–01 (May 30, 2018).

¹¹² See CONG. RESEARCH SERV., IF10971, SECTION 232 AUTO INVESTIGATION (Version 6, 2019).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Japan.¹¹⁸ The United States made a comparable promise to the European Union as the two parties conducted trade negotiations.¹¹⁹

Undoubtedly influencing the third of the administration's goals was the understanding that—with respect to at least some vehicles—the United States imposes tariffs which are significantly lower than those of its trading partners.¹²⁰ For instance, whereas the United States has a 2.5% tariff on passenger automobiles, the European Union has tariffs of ten percent.¹²¹ Overall, Trump wanted to address this incongruity by raising tariffs on all imported automobiles and automobile parts to twenty-five percent.¹²²

On May 17, 2019, Trump issued Proclamation 9888.¹²³ In it, he stated that the Secretary of Commerce had concluded that (i) “automobiles and certain automobile parts [were] being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States,” (ii) imports [were] “weakening our internal economy,” and (iii) “[the] contraction of the American-owned automotive industry, if continued, [would] significantly impede the United States’ ability to develop technologically advanced products that are essential to our ability to maintain technological superiority to meet defense requirements and cost effective global power projection.”¹²⁴ Rather than impose tariffs, however, Trump elected to direct the United States Trade Representative, Robert E. Lighthizer, to pursue agreements with the European Union, Japan, “and any other country the Trade Representative deem[ed] appropriate” to “address the threatened impairment of national security.”¹²⁵ Lighthizer had to report back within 180 days.¹²⁶ If the United States had not entered into an agreement within 180 days of Proclamation 9888’s issuance—or if it entered into an agreement which proved ineffective or

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Peter Buxbaum, *Section 232 Hearing on Automobile and Automotive Parts Imports Opened Yesterday*, GLOBAL TRADE, July 21, 2018, <http://www.globaltrademag.com/global-trade-daily/section-232-hearing-on-automobile-and-automotive-parts-imports-opened-yesterday>.

¹²³ Proclamation No. 9888, 84 Fed. Reg. 23433 (May 17, 2019).

¹²⁴ *Id.* at 23434.

¹²⁵ *Id.* at 23434–35.

¹²⁶ *Id.*

was not carried out—the President could take other actions to adjust imports, including the imposition of tariffs.¹²⁷

On November 14, 2019, the 180-day period came to an end.¹²⁸ Because Trump had not imposed Section 232 tariffs by then, his ability to do so prospectively is now severely circumscribed.¹²⁹ Had Trump elected to resort to sanctions, he would have faced an interesting predicament. To implement Section 232 duties without running afoul of international obligations, Trump would have had to show that the increasing of tariffs constituted an action which the United States opined necessary “for the protection of its essential security interests . . . relating to the traffic in . . . implements of war” or “for the purpose of supplying a military establishment”; the other exceptions outlined in the GATT did not apply.¹³⁰ Proclamation 9888, however, does not intimate that vehicle and automobile parts imports have had an adverse effect on the traffic of implements of war, nor did it suggest that they have interfered with the United States’ ability to supply its military. Rather, Proclamation 9888 primarily focuses on the effects of such imports on research and development of key automotive technologies.

D. The Uranium Ore and Products Investigation of 2018

In January of 2018, Ur-Energy USA Inc. (“Ur-Energy”) and Energy Fuel Resources (USA) Inc. (“Energy Fuel Resources”)—two of five uranium miners in the United States—filed a petition requesting the initiation of a Section 232 investigation into the effects of uranium imports on national security.¹³¹ Petitioners sought to have twenty-five percent of the domestic market for uranium reserved for American companies.¹³² They framed their request as necessary for national

¹²⁷ See 19 U.S.C. § 1862(c)(3)(A) (2012).

¹²⁸ David Lawder, *Trump Can No Longer Impose ‘Section 232’ Auto Tariffs After Missing Deadline: Experts*, REUTERS (Nov. 19, 2019, 2:39 A.M.), <https://www.reuters.com/article/us-usa-trade-autos/trump-can-no-longer-impose-section-232-auto-tariffs-after-missing-deadline-experts-idUSKBN1XT0TK>.

¹²⁹ See *id.*

¹³⁰ General Agreement on Tariffs and Trade, *supra* note 85.

¹³¹ *Petition for Relief Under Section 232 of the Trade Expansion Act of 1962 from Imports of Uranium Products that Threaten National Security*, Before the United States Department of Commerce (Jan. 16, 2018), at 9, 17, <http://www.energyfuels.com/wp-content/uploads/2018/01/2017.01.16-Signed-Petition.pdf>.

¹³² Steven Mufson, *Trump Officials Weigh Limits on Uranium, Invoking National Security*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/business/2018/07/18/trump-officials-weigh-limits-uranium-invoking-national-security/?noredirect=on&utm_term=.96e3eba5a0c8.

defense purposes—and thus, national security purposes—claiming that the United States’ military requires uranium to build nuclear weapons, to fuel nuclear reactors, and to produce tritium.¹³³ Petitioners further alleged that international treaties prevent the United States from procuring uranium from foreign parties for any of the aforementioned purposes.¹³⁴ Thus, the United States needs to maintain a degree of self-sufficiency where uranium production is concerned.

Although petitioners refer to the Treaty on the Non-Proliferation of Nuclear Weapons, they seemingly fail to acknowledge the differences between the obligations imposed on nuclear-weapon states (“NWS”) and non-nuclear-weapon states (“NNWS”). With regard to NWS, the treaty provides as follows:

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.¹³⁵

Importantly, this article does not bar a NWS from transferring *materials* for use in nuclear weapons or devices. There is evidence in the remainder of the treaty’s text to suggest that this omission was made purposely. Had the authors of the treaty wanted to restrict NWS from trading in materials, they would have explicitly stated so, just as they did when addressing NNWS:

Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards . . . for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable

¹³³ *Petition for Relief Under Section 232 of the Trade Expansion Act of 1962 from Imports of Uranium Products that Threaten National Security*, *supra* note 131, at 76–78.

¹³⁴ *Id.* at 77.

¹³⁵ Treaty on the Non-Proliferation of Nuclear Weapons, art. I, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

material The safeguards required by this article shall be applied to all source or special fissionable *material* in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.¹³⁶

Because uranium is neither a weapon nor a device, NWSs are not precluded from transferring it. According to the International Atomic Energy Agency, NWSs are those states which “manufactured and exploded a nuclear weapon or other nuclear explosive device before 1 January 1967.”¹³⁷ Only five countries fall into this category: the United States, the United Kingdom, the Soviet Union (now the Russian Federation), France, and China.¹³⁸ Thus—contrary to claims made by Ur-Energy and Energy Fuel Resources—the United States is not limited to solely using domestically-produced uranium to meet its military needs. It can import uranium for military use from any NWS.

Additionally, nuclear experts have determined that the United States’ military could rely on uranium stockpiles in the event of an emergency.¹³⁹ The United States also has enough uranium to fuel its naval reactors through the year 2060, and—although the state previously predicted that it would exhaust the uranium set aside for tritium production by 2027—the Department of Energy has now identified actions which will enable tritium production to use existing reserves until sometime between 2038 and 2041 (or possibly later).¹⁴⁰ As for the construction of nuclear weapons, because the United States is presently laboring towards reducing the number of nuclear warheads available globally, “there is little need for uranium imports for U.S. nuclear weapons.”¹⁴¹

¹³⁶ *Id.* at art. III (emphasis added).

¹³⁷ *Non-Proliferation Treaty*, INT’L ATOMIC ENERGY AGENCY, <https://www.iaea.org/topics/non-proliferation-treaty> (last visited Jan. 2, 2018).

¹³⁸ *Fact Sheet: Nuclear Proliferation Treaty (NPT)*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION (Apr. 14, 2017), <https://armscontrolcenter.org/fact-sheet-nuclear-non-proliferation-treaty-npt/>.

¹³⁹ See Mufson, *supra* note 132 (explaining that “[t]he United States has 574.5 metric tons of highly enriched uranium, according to the International Panel on Fissile Materials”).

¹⁴⁰ *Tritium and Enriched Uranium Management Plan Through 2060*, U.S. DEPARTMENT OF ENERGY (Oct. 2015), at iv, 27, <http://fissilematerials.org/library/doe15b.pdf>.

¹⁴¹ Mufson, *supra* note 132.

In their petition, Ur-Energy and Energy Fuel Resources further argue that the domestic uranium mining industry must be properly maintained to ensure (a) that the United States does not become vulnerable to manipulation by states like Russia, which has a state-funded uranium mining industry and uses its nuclear capabilities to influence foreign policy, (b) that the United States preserves a sense of energy security and independence, and (c) that the United States sustains its research and development programs.¹⁴² Ultimately, the United States can rely on NNWSs to meet most—if not all—of its non-military needs. The United States currently obtains slightly over half of its total imported uranium from Australia and Canada.¹⁴³ Although it cannot use this uranium to fuel nuclear reactors or build nuclear weapons, it can use such uranium to meet the fuel needs of its space fuel reactors, isotope production reactors, and research reactors.

For the United States to retain the ability to satisfy its military needs without relying wholly on other NWS's after it exhausts current reserves, it must ensure not only the continued existence of its uranium mining industry, but also that said industry remains in good health. Petitioners imply that the actions of other state actors are making this difficult. Because some countries—a number of which subsidize their uranium mining industries—are able to sell uranium at lower prices than the United States, the American uranium mining industry is becoming increasingly less competitive.¹⁴⁴ Whether this amounts to a national security, however, is debatable.

On April 14, 2019, the Secretary of Commerce transmitted to Trump his report on the investigation into the effects of uranium ore and products on the United States' national security. The Secretary opined that “uranium is being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States as defined under section 232 of the Act.”¹⁴⁵ However, Trump did not concur; he explained that although “the

¹⁴² See *Petition for Relief Under Section 232 of the Trade Expansion Act of 1962 from Imports of Uranium Products that Threaten National Security*, *supra* note 131, at 80–85.

¹⁴³ See U.S. ENERGY INFO. ADMIN., 2017 URANIUM MARKETING ANNUAL REPORT (2018), at 21, <https://www.eia.gov/uranium/marketing/pdf/umar2017.pdf>.

¹⁴⁴ See *Petition for Relief Under Section 232 of the Trade Expansion Act of 1962 from Imports of Uranium Products that Threaten National Security*, *supra* note 131, at 68–69.

¹⁴⁵ *Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group*, THE WHITE HOUSE (July 12, 2019), <https://www.whitehouse.gov/presidential-actions/memorandum-effect-uranium-imports-national-security-establishment-united-states-nuclear-fuel-working-group/>.

Secretary's findings raise significant concerns regarding the impact of uranium imports on the national security with respect to domestic mining . . . a fuller analysis of national security considerations with respect to the entire nuclear fuel supply chain is necessary at this time."¹⁴⁶ Thus, Trump elected not to impose Section 232 tariffs on uranium ore and products.

V. PREVIOUS ADMINISTRATIONS VERSUS THE TRUMP ADMINISTRATION

The Trade Expansion Act of 1962 recognizes that national security is tied to both national defense and economic welfare. Nonetheless, in the Section 232 investigations that resulted in the undertaking of presidential trade action, pre-Trump administrations generally focused on matters pertaining to national defense in determining whether given imports posed a national security threat. They did not place economic considerations at the forefront of their discussions. The Trump administration, by contrast, seemingly places economic welfare on equal footing with national defense. Although doing so does not violate the Trade Expansion Act of 1962, it constitutes a shift away from the "very narrow, technical" reading of 'national security' which characterized previous Section 232 investigations.¹⁴⁷ The succeeding considers whether such broadening poses a separation-of-powers problem.

As was mentioned earlier, Section 232 duties are regarded as the nuclear option in the trade world.¹⁴⁸ Comparing Section 232 tariffs to a nuclear weapon underscores the notion that implementing them is best left as a course of last resort. The manner in which the Trump administration broadly construes threats to national security, however, has seemingly resulted in the premature use of Section 232 duties. Because of the significant consequences attached to such tariffs, misuse is not to be taken lightly. Misuse raises concerns that the nation's interests might be better served by placing limits on the president's unilateral trade powers. Curtailment of this sort is not unprecedented.

¹⁴⁶ *Id.*

¹⁴⁷ See David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. OF INT'L L. 926, 947 (1990).

¹⁴⁸ Noah Glazier, *Legal Framework and Economic Critique: Trump's Trade Authority and Policy. A Look at the Legality, Practicality, Probability, and Rationality of President Trump's Proposed Trade-Related Action*, 14 S.C. J. INT'L L. & BUS. 27, 42 (2017).

During the 1970s, the Nixon and Ford administrations initiated a system of price controls on petroleum in response to a sudden increase in fuel prices precipitated by OPEC.¹⁴⁹ Although the controls kept the price of oil low in the United States and saved consumers between five and twelve billion dollars a year, they accomplished this at a great cost.¹⁵⁰ Because gas stations could not raise prices, global increases in oil prices led to reductions in the amount of foreign oil purchased by American companies.¹⁵¹ This caused a shortage of an estimated 1.4 million barrels of oil per day.¹⁵² Gas stations which previously remained perpetually open began closing mere hours after opening; a few hours was all that they needed to sell out of gas.¹⁵³ The oil scarcity caused a panic and forced consumers to sit for hours in lines to ensure that they secured gas.¹⁵⁴

When the Iranian oil crisis unfolded in 1979, global oil prices skyrocketed, worsening the energy situation in the United States.¹⁵⁵ Fistfights broke out at gas stations shortly thereafter.¹⁵⁶ Recognizing their unsustainable nature, Carter elected to phase out price controls between 1979 and 1981.¹⁵⁷ Opining that the significant increases in the price of oil (resulting from the ability of American companies to charge market prices) constituted “an appropriate object of taxation,”¹⁵⁸ Congress passed the Crude Oil Windfall Profit Tax Act in 1980.

Section 402 of the Crude Oil Windfall Profit Tax Act (“Section 402”) amended the Tax Expansion Act of 1962 by allowing Congress—via a joint resolution—to render void any presidential action taken under Section 232 “to adjust imports of petroleum or petroleum products.”¹⁵⁹ Although the president may veto the resolution, a two-thirds vote by Congress can override the veto.¹⁶⁰ A report authored by the staff of the Joint Committee on Taxation elucidates the possible rationale underlying

¹⁴⁹ *How Gas Price Controls Sparked '70s Shortage*, WASH. TIMES (May 15, 2006), <https://www.washingtontimes.com/news/2006/may/15/20060515-122820-6110r/>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ S. REP. NO. 96–394, at 6 (1979).

¹⁵⁸ *Id.*

¹⁵⁹ Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, § 402, 94 Stat. 301 (1980).

¹⁶⁰ H.R. REP. No. 96–3919, at 5 (1981).

Section 402's inclusion in the Crude Oil Windfall Profit Act. The report explains that, "[o]wing to the importance of all forms of energy to our economy, Congress believed that an orderly and specific procedure should be established for reviewing Presidential actions taken to adjust oil imports."¹⁶¹ Additionally, Congress may have harbored concerns that subjecting domestic industries to excessive taxation could have adversely affected the economic welfare of the nation. If, for instance, owners of American gas stations had to contend not only with taxes attributable to the Crude Oil Windfall Profit Tax Act but also with tariffs imposed on the foreign oil they imported, it is quite feasible that gas station owners would have responded by simply raising their prices until "domestic [oil] prices [rose] even higher than the world price."¹⁶²

Interestingly, the Crude Oil Windfall Profit Tax Act includes a phaseout provision.¹⁶³ The Act stipulates the removal of the imposed taxes during a thirty-three month period beginning no later than December of 1990.¹⁶⁴ Section 402, however, does not have an expiration date.¹⁶⁵ It is still in effect. Bearing in mind that presidents imposed Section 232 duties exclusively on petroleum imports prior to the Trump administration—and assuming that Congress believed that presidents yet to come would continue to use Section 232 duties to adjust petroleum imports—to what extent can it be argued that a desire to restore its Article I powers motivated Congress to make Section 402 outlive the Crude Oil Windfall Profit Act? The Constitution grants Congress the authority to "regulate Commerce with foreign Nations," and the Trade Expansion Act undeniably infringes upon that right. Thus, it is conceivable that—in part—Congress intended to use Section 402 to curtail the president's ability to act unilaterally in a domain wherein it typically received starring credit. Nevertheless, regardless of Congress' aim, the effects of Section 402 are the same: the provision breathed congressional oversight into Section 232, and it aided in partly restoring the balance of powers contemplated by the Constitution. With the Trump administration heralding the first-ever use of Section 232 duties to adjust imports of goods other than petroleum, perhaps the time has come to amend the Trade Expansion Act of 1962 yet again to extend congressional oversight to Section 232 duties levied against non-petroleum goods.

¹⁶¹ *Id.* at 119.

¹⁶² S. REP. No. 96-394, at 27 (1979).

¹⁶³ *See* 26 U.S.C. § 4990(b)-(c) (2012).

¹⁶⁴ *Id.*

¹⁶⁵ *See* Crude Oil Windfall Profit Tax Act of 1980, *supra* note 159.

During 2018, lawmakers introduced a number of bills to “take back” from the executive branch the power to regulate foreign commerce.¹⁶⁶ Senator Bob Corker notably proposed predicating the president’s ability to impose Section 232 duties on congressional approval.¹⁶⁷ Overall, Corker’s bill has garnered the greatest support,¹⁶⁸ and were it to pass, it would circumscribe the president’s trade powers more so than does Section 402; Corker’s bill would function as a complete prohibition absent an expressed green light from Congress.¹⁶⁹ Because of the severe restrictions inherent in such a proposal, it is possible that the bill will fail to gain presidential favor—and given that Section 232 functions as a means of enhancing the country’s safety, executive disapproval of Corker’s bill would not come as a surprise.

One might posit that increasing the likelihood of obtaining the president’s stamp of approval on legislation limiting the Trade Expansion Act of 1962 requires crafting a bill modeled after Section 402, which succeeded in passing muster with the legislative and executive branches—albeit under a different administration. Such a bill, however, would create the presumption that the imposition of Section 232 duties is valid unless Congress says otherwise. Bearing in mind the oftentimes adverse consequences associated with increasing duties, is it not preferable to have a statute which creates the opposite presumption: that the invocation of Section 232 duties is temporary unless Congress decides otherwise? A statute requiring *approval* of the president’s trade actions under Section 232 (within a given number of days of their undertaking, as opposed to prior to implementation as Corker suggests) would accomplish just that. More importantly, it would reinforce the constitutionally endowed hegemony of the legislative branch where regulating commerce with foreign nations is concerned.

Ultimately, because the legality of Section 232 duties would lapse only if Congress failed to agree with the president’s trade actions, the hypothetical bill considered in this note would afford the president a considerable degree of latitude in taking swift action to address threats to national security. Hence, it might be perceived as a relatively fair means of reconciling Congress’ constitutional powers with the authority vested in the president by the legislature—similar to how the War Powers

¹⁶⁶ Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, LAWFARE (Aug. 5, 2018, 11:00 A.M.), <https://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

Resolution of 1973 aided in reconciling Congress' power to declare war with the president's status as commander-in-chief.¹⁷⁰

VI. SECTION 232 DUTIES: "PLAN Z"

Misusing or resorting to Section 232 duties prematurely can heighten the risk that the international community will perceive a given administration's actions as having roots in protectionism as opposed to national security. This, in turn, might increase the likelihood that other countries will challenge the United States' conduct in an international forum, or that the United States' trading partners will retaliate. Hence, it is imperative that—whenever possible—administrations first attempt to remedy damages stemming from foreign imports by availing themselves of alternatives to Section 232 duties.

One existing avenue is the World Trade Organization's ("WTO") dispute settlement mechanism. Amongst possible claims it could bring, the United States might benefit from alleging that certain WTO member states have violated Article VI of the GATT (which prohibits dumping) and Article 3 of the Agreement on Subsidies and Countervailing Measures (which disallows subsidies). The United States has made ample use of the WTO's dispute resolution mechanism in the past. Of the more than 577 disputes brought to the WTO since 1995,¹⁷¹ the United States has initiated 131 complaints.¹⁷² Admittedly, there is the possibility that challenging a state's WTO compliance will occasionally prove fruitless. For instance, in 2017, the Obama administration requested to enter into consultations with China, claiming that the Chinese government provided subsidies to aluminum producers.¹⁷³ One year later—merely two months before Trump announced the imposition of Section 232 duties on aluminum—consultations still had not occurred.¹⁷⁴

¹⁷⁰ See 50 U.S.C. § 1544 (2012).

¹⁷¹ *Dispute Settlement Activity – Some Figures*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm#more_numbers (last visited Jan. 7, 2019).

¹⁷² See *Disputes by Member*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Jan. 7, 2019).

¹⁷³ *China – Subsidies to Producers of Primary Aluminum*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds519_e.htm (last visited Jan. 7, 2019).

¹⁷⁴ *2017 Report to Congress On China's WTO Compliance*, U.S. TRADE REP. (Jan. 2018),

It is thus not surprising why some think Trump is justified in taking action against aluminum imports under Section 232. Curiously, however, the United States did not request consultations with China to resolve the government's alleged unfair trade practices as they relate to steel.¹⁷⁵ This omission is relevant given that the Secretary of Commerce specifically identified China as one of the countries responsible for adversely affecting the United States' steel industry.¹⁷⁶ The fact that consultations to address the subsidization of Chinese aluminum failed to take place does not excuse the Trump administration for this lapse; to hold otherwise is to overlook the scores of times that the WTO's dispute settlement mechanism successfully resulted in or facilitated conflict resolution. Consequently, the United States' decision to forego requesting consultations with China to challenge its trade practices concerning steel represents but one example of the Trump administration underutilizing the WTO's dispute resolution mechanism.¹⁷⁷

Instead of, or in addition to, pursuing existing alternatives to Section 232 duties, the United States might consider reforming the international system. Specifically, the United States should push the WTO to adopt an anti-circumvention agreement; such an agreement would consist of rules prohibiting members from taking deliberate measures to illegally get around, or circumvent, antidumping and countervailing duties.

Presently, the United States has "extensive antidumping and countervailing duties" on steel imported from China.¹⁷⁸ However, in a number of cases, China has succeeded in avoiding these tariffs by building plants abroad.¹⁷⁹ Although the United States has anti-

<https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

¹⁷⁵ See WORLD TRADE ORGANIZATION, *supra* note 173.

¹⁷⁶ See OFF. OF TECH. EVALUATION, BUREAU OF INDUSTRY AND SECURITY, U.S. DEP'T OF COM., *supra* note 71, at 51–53.

¹⁷⁷ The last time that the United States employed the WTO's dispute resolution mechanism to address China's trade practices as they relate to steel was in 2010, when the United States sought the removal of countervailing duties and anti-dumping duties imposed by the Chinese government against American grain oriented flat-rolled electrical steel. See WORLD TRADE ORGANIZATION, *supra* note 173; *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds414_e.htm.

¹⁷⁸ CONG. RESEARCH SERV., *supra* note 10.

¹⁷⁹ See Matthew Dalton & Lingling Wei, *How China Skirts America's Antidumping Tariffs on Steel*, WALL ST. J. (June 4, 2018, 3:03 P.M.), <https://www.wsj.com/articles/how-china-skirts-americas-antidumping-tariffs-on-steel-1528124339>.

circumvention legislation, China's actions do not fall within its scope.¹⁸⁰ To make an international agreement on anti-circumvention palatable to as many states as possible, its terms should be restricted to the most egregious instances of circumvention, such as when a state opens up shop abroad, or when goods are shipped to another country and sold from there without first undergoing substantial transformation in the second country. Overall, an international anti-circumvention agreement is desirable because there are circumstances under which not even Section 232 duties provide a sufficient remedy after a target state succeeds in avoiding anti-dumping and countervailing duties. The inadequacy of Section 232 tariffs in such instances is attributable to the fact that they are sometimes lower than the avoided anti-dumping and countervailing duties; for instance, whereas Trump has imposed a twenty-five percent duty on steel imported into the United States, the anti-dumping tariffs specific to China "often exceeded 200%."¹⁸¹

VII. CONCLUSION

While pre-Trump administrations assessed national security under Section 232 primarily by looking at how given imports affected national defense, the Trump administration has elected to measure national security under Section 232 by gauging the impact of imports on both national defense and economic welfare. Notwithstanding this divergence, it is inaccurate to state that Trump's decision to increase tariffs on steel and aluminum necessarily represents an expansion of presidential trade powers with respect to the Trade Expansion Act of 1962; Section 232 allows for consideration of variables relating to both national defense *and* economic welfare in appraising national security. The broadening of how national security is conceptualized is thus problematic not because it risks violating domestic law, but because of how the international community might perceive unilateral trade actions taken in the name of eliminating that encompassed by a broader definition of 'impairments to national security.' When a president claims that he is increasing duties for purposes of addressing threats to the nation's economic welfare, doubts arise as to whether national security or protectionism is the true motivator; arguably, it is considerably more difficult to differentiate between protectionism and a state's genuine efforts to eliminate threats to economic welfare than it is to distinguish between protectionism and a

¹⁸⁰ See 19 U.S.C. § 1677j (2012).

¹⁸¹ See Dalton & Wei, *supra* note 179.

country's sincere attempts to remove impediments to effective national defense.

Overall, because of the great costs associated with the use of Section 232 duties—namely in the form of retaliation—it is imperative that administrations treat these tariffs not as their Plan A but as their Plan Z.