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SECTION 232 AND REFORM OF U.S. TRADE LAW

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EXECUTIVE SUMMARY

Section 232 of the Trade Expansion Act of 1962 authorizes the president to adjust imports on the basis of national security in a way that runs counter to the principles of limited government and the role of Congress in international trade. The law places no limits on the president in determining what may constitute a threat to national security, the metrics examined to demonstrate such a threat and the action that could be taken after such a threat to national security is determined to exist. Given the most recent unsuccessful constitutional challenge to section 232 based on the law's overly broad delegation of legislative power to the executive branch, Congressional action is needed to establish limits on the president to prevent the type of unbridled actions that have taken place during the Trump administration.

Among the findings of the analysis:

- The broad definition of national security as contemplated by the statute affords the president unlimited autonomy in determining whether or not the target product of a section 232 investigation threatens to impair national security. Further, section 232 allows the president to take virtually any action he chooses to adjust imports of the target product if imports of that product are found to be a threat to national security.
- The national security provision of the General Agreement on Tariffs and Trade (GATT) has rarely been used in the nearly 75 years since the GATT was signed. Further, this provision was not intended to give member states unlimited power. The language of Article XXI was purposefully written so that this exception would be used only in extraordinary, limited circumstances.
- Following the U.S. claim of national security in imposing tariffs on steel and aluminum it is not surprising that numerous countries, including China, Russia, Canada, Mexico, and the European Union, retaliated against the United States, imposing their own tariffs on a variety of traded goods, focusing heavily on agricultural products. After decades of only rare invocation of the national security exception, the president of the United States appears to have invoked it for precisely the purpose the drafters of the exception hoped it would not be used.
- Rather than boosting the economy, the actions taken during the Trump administration under section 232 with respect to steel and aluminum products contributed to a recession in the manufacturing sector that preceded the Covid-19 pandemic and contributed significantly to the devastation of U.S. agricultural exports.

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- The imposition of tariffs on imports of steel and aluminum products benefitted only a small segment of U.S. manufacturing (i.e., steel producers). The current administration's use of section 232 has been harmful not only in terms of its impact on international relations, but also in its impact on the U.S. economy. U.S. Federal Reserve data released in early 2020 demonstrated that the U.S. manufacturing sector was in a recession during 2019, prior to any potential impact arising from the Covid-19 pandemic. In December 2019, manufacturing jobs declined by 12,000, with the steepest loss occurring in the making of fabricated metal products. A major contributor to this trend is that jobs in U.S. industries that use steel inputs outnumber jobs in U.S. industries that produce steel by approximately 80 to 1.
- The adverse effects of the section 232 tariffs on steel and aluminum do not stop at the manufacturing sector, and in fact they trickle down to consumers of finished steel products. The Peterson Institute for International Economics, a non-partisan, non-profit think tank, calculated that every steel job saved by the Trump administration's tariffs costs U.S. consumers over \$900,000—more than 13 times the typical salary of a steelworker—caused by the 10 percent increase in steel prices that U.S. companies have paid since the tariffs went into effect. The same study estimates the total additional cost to the economy to be \$11.5 billion per year.
- Another group that has been hard-hit by the Trump administration's section 232 tariffs are U.S. farmers. Retaliatory tariffs placed on U.S. agricultural products by China (as well as other countries such as Canada and Mexico) significantly reduced the volume of U.S. agricultural exports. According to the Congressional Research Service, China was the top destination for U.S. agricultural exports for 2010 to 2016, but by mid-2019, the Chinese market for U.S. agricultural goods shrunk to only fourth largest. In terms of actual value, U.S. agricultural exports to China declined by 53 percent between 2017 and 2018, from \$19 billion to \$9 billion. This decline occurred in the wake of China's imposition of retaliatory tariffs ranging from 15 to 25 percent on various imports from the United States, including 94 agricultural products.
- Based on the sheer number of investigations initiated and actions taken, the types of products being targeted, and the widespread retaliation by international trading partners, it is evident that the Trump administration has come to view section 232 as an instrument to be used not necessarily for national security, but rather as a convenient tool for managing trade without the inconvenience or necessity of proving that imports are "unfair" or that they are the cause of material or serious injury, as would be the case with countervailing duties, antidumping duties or safeguards.
- A court case brought by the American Institute for International Steel ("AIIS") and initially filed before the U.S. Court of International Trade ("CIT"), argued that section 232 was unconstitutional because it constituted an improper delegation of authority, which violated Article 1, Section 1 of the U.S. Constitution

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and the doctrine of separation of powers.¹ In March 2019, a three-judge panel at the CIT rejected this challenge, citing the U.S. Supreme Court's decision in *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548 (1976) ("*Algonquin*"), wherein the Supreme Court rejected a challenge to section 232 also based on the issue of non-delegation. However, although the CIT ultimately decided against AIIS, citing the necessity of relying on the *Algonquin* decision, Judge Katzmman (one of the three judges on the CIT panel) expressed "grave doubts" about the constitutionality of section 232 absent *Algonquin*, stating that "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the president in violation of the separation of powers."

- Several members of Congress have put forth proposed legislation in an attempt to address the actions taken by President Trump under section 232. While some of the proposed legislation involves providing assistance to U.S. companies already harmed by section 232, others of the proposed bills are more forward-looking, seeking to limit the power of the president under section 232 in the future.
- The bills differ in scope but they share a common theme: The need for Congressional approval before action is taken pursuant to section 232. These proposed bills implicitly recognize the issue that AIIS brought before the CIT, CAFC, and Supreme Court: Section 232 affords the president far too much power with no limitations on its use. While the powers afforded to the president under section 232 have existed for decades, President Trump's use of section 232 is unprecedented, both in terms of frequency and scope, as well as in the broad definition of what constitutes a threat to national security. Requiring Congressional approval would effectively limit future presidents from abusing section 232 in the same way and would restore a balance, reducing the overly-broad power the president is currently afforded under section 232 to those situations where the issue actually is "national security" rather than a convenient means of managing trade.

¹ Donald B. Cameron of Morris, Manning & Martin, LLP was one of several attorneys representing AIIS in this constitutional challenge.

BACKGROUND

Section 232 of the Trade Expansion Act of 1962, *as amended*, authorizes the president to adjust imports on the basis of national security.² As described below, the broad definition of national security as contemplated by the statute affords the president unlimited autonomy in determining whether or not the target product of a section 232 investigation threatens to impair national security. Further, section 232 allows the president to take virtually any action he chooses to adjust imports of the target product if imports of that product are found to be a threat to national security.

Section 232 provides for certain procedural rules and deadlines in conducting an investigation, although much of the language of the statute resembles general guidelines more than actual instructions. Section 232(b) directs the Secretary of Commerce (the “Secretary”), upon request of the head of any department or agency, application of an interested party, or his own motion, to initiate an investigation to determine the effects of imports of a particular article on national security.³ During the course of such an investigation, the Secretary shall consult with the Secretary of Defense, seek information and advice from appropriate officers of the United States, and hold public hearings or otherwise afford interested parties an opportunity to present relevant information “if it is appropriate and after reasonable notice.”⁴ In other words, hearings are not a mandatory part of this process. Additionally, it is important to note that the advice of the Secretary of Defense need not be followed, only sought. No later than 270 days after initiation, the Secretary shall submit a report to the president on the findings of such investigation with respect to the effect of imports of the target product on national security as well as the Secretary’s recommendations for “action or inaction” under section 232.⁵

Section 232(c) provides for the actions that the president takes after receiving the Secretary’s report. Specifically, section 232(c) directs the president to determine within 90 days of receiving the aforementioned report whether to concur with the findings of the Secretary, and if he concurs, to “determine the nature and duration of the action that, in the judgment of the president, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”⁶ Notably, section 232(c) places no limits on what type of “action” the president is permitted to take. The statute indicates that the president may use his “judgment”⁷ and that the president may take “other actions as the president deems necessary.”⁸

² 19 U.S.C. § 1862.

³ *Id.* § 1862(b)(1)(A).

⁴ *Id.* § 1862(b)(2)(A)(i)-(iii).

⁵ *Id.* § 1862(b)(3)(A).

⁶ *Id.* § 1862(c)(1)(A)(ii).

⁷ *Id.*

⁸ *Id.* § 1862(c)(3)(ii)(II).

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Section 232(d) describes the types of indicia the Secretary and the president shall examine, while noting that these indicia should be considered “without excluding other relevant factors.”⁹ Specifically, section 232(d) requires the Secretary and the president to

give consideration to 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.¹⁰

Further, section 232(d) is expansive in its definition of national security, explaining that the Secretary and the president

shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, *without excluding other factors*, in determining whether such weakening of our internal economy may impair the national security.¹¹

In short, subsections 232(c) and (d) place no limits on the president in determining what may constitute a threat to national security, what metrics could be examined to demonstrate such a threat, and what action could be taken after such a threat to national security is determined to exist.

THE HISTORY OF SECTION 232

Between 1962 and June 2020, the U.S. Department of Commerce (“Commerce”) (or the Department of the Treasury before it) initiated 34 section 232 investigations.¹² In fourteen of those cases, Commerce determined that the targeted imports threatened to impair national security.¹³ In eleven instances, the president took action.¹⁴ As of writing, three investigations are currently ongoing.¹⁵ See **Table 1**, below.

⁹ *Id.* § 1862(d).

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² See U.S. Congressional Research Service, *Section 232 of the Trade Expansion Act of 1962* (CRS In Focus IF10667 June 3, 2020) (“CRS June 2020 Section 232 Memo”) at Figure 2; U.S. Congressional Research Service, *Section 232 Investigations: Overview and Issues for Congress* (CRS Report R45249 Apr. 7, 2020) (“CRS April 2020 Section 232 Report”) at 3 (citing 31 section 232 investigations initiated between 1962 and 2019).

¹³ CRS June 2020 Section 232 Memo at Figure 2.

¹⁴ *Id.*

¹⁵ *Id.*

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Table 1 – Section 232 Investigations, 1962-2020¹⁶

Targeted Imports	Initiation Year	Targeted Imports	Initiation Year
Manganese and chromium ferroalloys	1963	Antifriction bearings	1987
Tungsten mill products	1964	Petroleum	1987
Antifriction bearings	1964	Plastic injection molding machinery	1988
Watches, watch movements and parts	1965	Uranium	1989
Manganese, silicon and chromium ferroalloys and refined metals	1968	Gears and gearing products	1991
Miniature and instrument precision ball bearings	1969	Ceramic Semiconductor Packaging	1992
Extra high voltage power circuit breakers, transformers, and reactors	1972	Crude Oil and Petroleum Products	1994
Petroleum	1973	Crude Oil	1999
Petroleum	1975	Iron ore and finished steel	2001
Iron and steel nuts, bolts, large screws	1978	Steel	2017
Petroleum	1978	Aluminum	2017
Petroleum from Iran	1979	Automobiles, including SUVs, vans and light trucks, and automotive parts	2018
Glass-lined chemical processing equipment	1981	Uranium ore and products	2018
Manganese, silicon and chromium ferroalloys and related metals	1981	Titanium Sponge	2019
Iron and steel nuts, bolts, large screws	1982	Grain-Oriented Electrical Steel	2020
Petroleum from Libya	1982	Mobile Cranes	2020
Metal-cutting and Metal Forming Machine Tools	1983	Vanadium	2020

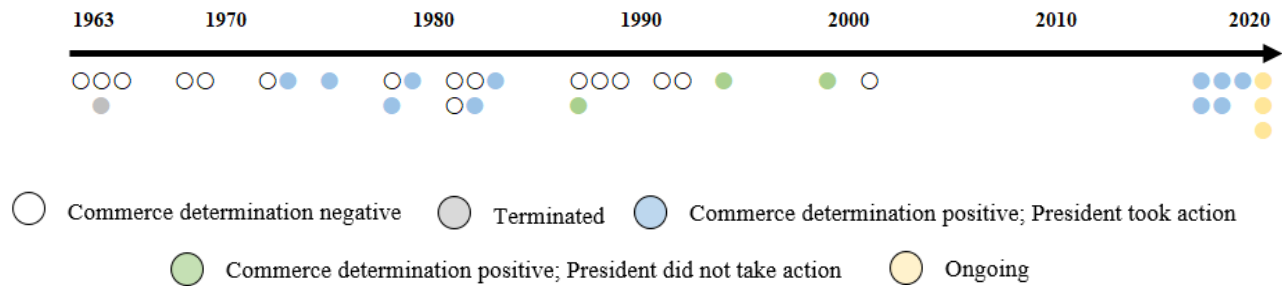
- Commerce determination negative
- Terminated
- Commerce determination positive; President took action
- Commerce determination positive; President did not take action
- Ongoing

¹⁶ See CRS April 2020 Section 232 Report at Table B-1; CRS June 2020 Section 232 Memo at 2. While President Trump took action after the Automobiles and Automotive Parts, Uranium Ore, and Titanium Sponge investigations, these actions involved directing the U.S. Trade Representative (“USTR”) to negotiate to resolve national security threats in the case of Automobiles and Automotive Parts, and establishing working groups in the case of Uranium Ore and Titanium Sponge. These actions did not involve restricting imports, as in the case of steel and aluminum products.

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As shown above in Table 1, of the 34 investigations that have occurred in the 58 years during which action under section 232 was available, eight of them, i.e., 24 percent, took place under the Trump administration.¹⁷ In other words, a highly disproportionate number (nearly a quarter) of the investigations initiated under section 232 took place in fewer than four years, under a single administration. See the timeline below.

Figure 1 – Section 232 Investigation Timeline¹⁸



The Trump administration sits in stark contrast to previous administrations. As shown above, the Trump administration has initiated eight investigations under section 232, and Commerce made affirmative determinations in each of the five completed investigations. As demonstrated by **Table 1** and **Figure 1**, above, there has never been a period of time with a comparable number of initiations and accompanying positive determinations.

SECTION 232 UNDER THE CURRENT ADMINISTRATION

The current administration is unique not only in the number of section 232 investigations initiated and affirmative determinations made, but also in the products that have been targeted. Prior to the current Administration, there were nine investigations in which Commerce determined that the targeted imports threatened to impair national security.¹⁹ Eight of those investigations pertained to crude oil or petroleum products.²⁰ However, the current administration’s affirmative determinations have significantly expanded the scope of products found to be a threat to national security.

The actions taken as a result of these affirmative determinations, particularly in the case of the actions on steel and aluminum products, are arguably being used by the Trump administration in the pursuit of the managed trade policies President Trump appears to favor. While the administration has touted the broad discretion granted to the president under section 232, other member nations of the World Trade Organization (“WTO”) disagree, arguing that the United States has violated its obligations under WTO agreements, including the WTO Safeguards Agreement

¹⁷ CRS June 2020 Section 232 Memo at 2.

¹⁸ See CRS April 2020 Section 232 Report at Table B-1; CRS June 2020 Section 232 Memo at 2.

¹⁹ See CRS April 2020 Section 232 Report at Table B-1.

²⁰ *Id.*

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and the General Agreement on Tariffs and Trade (“GATT”) 1994.²¹ The United States has invoked Article XXI of the GATT 1994, known as the national security exception. Specifically, Article XXI(b) stipulates that nothing in the GATT shall be construed

to prevent any contracting party from taking any action which it considers necessary 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...²²

This provision has rarely been used in the nearly 75 years since GATT was signed.²³ Further, this provision was not intended to give member states unlimited power. Rather, the language of Article XXI was purposefully written so that this exception would be used only in extraordinary, limited circumstances. As stated in the Preparatory Committee of the United Nations Conference on Trade and Employment, “{w}e cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.”²⁴

It is thus not surprising that numerous countries, including China, Russia, Canada, Mexico,²⁵ and the European Union, retaliated against the United States, imposing their own tariffs on a variety of traded goods, focusing heavily on agricultural products. After decades of only rare invocation of the national security exception, the president of the United States appears to have invoked it for precisely the purpose the drafters of the exception hoped it would not be used.

²¹ World Trade Organization Dispute Settlement, *United States – Certain Measures on Steel and Aluminum Products* (DS544), available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm.

²² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

²³ See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 Utah L. Rev. 697 (2011), available at: https://scholarship.law.nd.edu/law_faculty_scholarship/330.

²⁴ United Nations, Econ. & Soc. Council, Preparatory Committee of the U.N. Conference on Trade & Employment, Thirty-Third Meeting of Commission A, at 21, U.N. Doc. E/PC/T/A/PV/33 (1947) (Mr. Leddy on behalf of the United States), available at: <https://docs.wto.org/gattdocs/g/UN/EPCT/APV-33.PDF>.

²⁵ Canada and Mexico withdrew their retaliation after the United States withdrew 232 duties against Canada and Mexico as a condition to concluding the U.S. Mexico Canada Agreement. See USTR Press Release, “United States Announces Deal with Canada and Mexico to Lift Retaliatory Tariffs,” (May 17, 2019), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and#:~:text=Washington%2C%20DC%20%E2%80%93%20Today%20the,American%20goods%20by%20those%20countries>.

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However, the imposition of tariffs on imports of steel and aluminum products, while benefitting a small segment of U.S. manufacturing (i.e., steel producers), has not been altogether successful for the United States. In fact, the current administration's use of section 232 has been harmful not only in terms of its impact on international relations, but also in its impact on the U.S. economy. U.S. Federal Reserve data released in early 2020 demonstrated that the U.S. manufacturing sector was in a recession during 2019,²⁶ prior to any potential impact arising from the Covid-19 pandemic. The Institute for Supply Management's Purchasing Manager Index ("PMI")—a widely-used metric of the health of U.S. manufacturing—registered 47.2 in December 2019, signaling a contraction in manufacturing and showing its lowest reading since June 2009, during the Great Recession.²⁷ Also in December 2019, manufacturing jobs declined by 12,000, with the steepest loss occurring in the making of fabricated metal products.²⁸ A major contributor to this trend is that jobs in U.S. industries that use steel inputs outnumber jobs in U.S. industries that produce steel by approximately 80 to 1.²⁹

On August 6, 2020, President Trump re-imposed section 232 tariffs on a subset of aluminum imports (non-alloyed unwrought aluminum) from Canada.³⁰ Shortly thereafter, Canada announced its intention to impose retaliatory tariffs on U.S. goods.³¹

The adverse effects of the section 232 tariffs do not stop at the manufacturing sector, and in fact they trickle down to consumers of finished steel products. The Peterson Institute for International Economics, a non-partisan, non-profit think tank, calculated that every steel job saved by the Trump administration's tariffs costs U.S. consumers over \$900,000—more than 13 times the typical salary of a steelworker—caused by the 10 percent increase in steel prices that U.S. companies have paid since the tariffs went into effect.³² The same study estimates the total additional cost to the economy to be \$11.5 billion per year.³³

²⁶ Federal Reserve Statistical Release (Jan. 17, 2020), available at: <https://www.federalreserve.gov/releases/g17/20200117/g17.pdf>. The data show a 1.3 percent decline in manufacturing industrial production in 2019 as compared to 2018.

²⁷ Institute for Supply Management, December 2019 Manufacturing ISM Report on Business (Jan. 3, 2020), available at: <https://www.instituteforsupplymanagement.org/about/MediaRoom/newsreleasedetail.cfm?ItemNumber=31162&SSO=1>.

²⁸ Irwin, Neil, "Economy in a Nutshell: Manufacturing in Recession. Services Booming.," *The New York Times*, (Jan. 10, 2020), available at: <https://www.nytimes.com/2020/01/10/upshot/economy-in-a-nutshell-manufacturing-in-recession-services-booming.html>.

²⁹ Long, Heather, "Trump's steel tariffs cost U.S. consumers \$900,000 for every job created, experts say," *Washington Post*, (May 7, 2019), available at: <https://www.washingtonpost.com/business/2019/05/07/trumps-steel-tariffs-cost-us-consumers-every-job-created-experts-say/>.

³⁰ See USTR Press Release, "Statement on Presidential Proclamation," (Aug. 6, 2020), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/august/statement-presidential-proclamation>.

³¹ See Ljunggren, David, "Canada to impose retaliatory tariffs on U.S. goods, hopes for resolution," *Reuters* (Aug. 7, 2020), available at: <https://www.reuters.com/article/us-usa-trade-canada/canada-to-impose-retaliatory-tariffs-on-u-s-goods-hopes-for-resolution-idUSKCN2532E4>.

³² *Id.*

³³ *Id.*

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Another group that has been hard-hit by the Trump administration's section 232 tariffs are U.S. farmers. Retaliatory tariffs placed on U.S. agricultural products by China (as well as other countries such as Canada and Mexico) significantly reduced the volume of U.S. agricultural exports. According to the Congressional Research Service, China was the top destination for U.S. agricultural exports for 2010 to 2016, but by mid-2019, the Chinese market for U.S. agricultural goods shrunk to only fourth largest.³⁴ In terms of actual value, U.S. agricultural exports to China declined by 53 percent between 2017 and 2018, from \$19 billion to \$9 billion.³⁵ This decline occurred in the wake of China's imposition of retaliatory tariffs ranging from 15 to 25 percent on various imports from the United States, including 94 agricultural products.³⁶

While the U.S. and China have since come to a trade deal, part of which included a promise from China to expand imports of U.S. agricultural products, many are skeptical that the benefits of the deal will be significant enough, or will happen soon enough. While Chinese imports of U.S. agricultural products increased substantially in the first quarter of 2020 relative to the same period in 2019,³⁷ these imports remained well below target levels.³⁸ Furthermore, much of the damage inflicted on farmers cannot simply be undone. The Farm Bureau reported a 20 percent increase in Chapter 12 family farm bankruptcies in 2019, as compared to the previous year.³⁹ This figure is particularly remarkable in light of the \$28 billion in bailout funds agricultural producers received from the U.S. government in the 2018-2019 period.⁴⁰

Some have pointed to the extension of the steel and aluminum tariffs to certain derivative products, imposed in January 2020,⁴¹ as a tacit admission that the original tariffs on steel and aluminum had unintended consequences, at least on downstream manufacturing. Indeed, the section 232 actions on steel and aluminum failed to take into

³⁴ U.S. Congressional Research Service, *China's Retaliatory Tariffs on U.S. Agriculture: In Brief* (CRS Report R45929 Sept. 24, 2019) at 1.

³⁵ *Id.*

³⁶ *Id.* China imposed tariffs on U.S. products not only in response to the section 232 tariffs imposed by the Trump administration but also in response to the tariffs the administration imposed under Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411), which allows USTR to impose restrictions if it determines that the rights of the United States under any trade agreement are being denied or that the acts, policies, or practices of a foreign country are violating trade agreements or burdening or restricting U.S. commerce.

³⁷ Trading Economics, China Imports of Agricultural Products, available at: <https://tradingeconomics.com/china/imports-of-agricultural-products>.

³⁸ Bown, Chad P., "US-China phase one tracker: China's purchases of US goods," *Peterson Institute for International Economics* (July 2, 2020), available at: <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods>.

³⁹ "The Verdict Is In: Farm Bankruptcies Up in 2019," Farm Bureau (Jan. 29, 2020), available at: <https://www.fb.org/market-intel/the-verdict-is-in-farm-bankruptcies-up-in-2019>.

⁴⁰ USDA Press Release, "USDA Announces Details of Support Package for Farmers," U.S. Department of Agriculture (July 25, 2019), available at: <https://www.usda.gov/media/press-releases/2019/07/25/usda-announces-details-support-package-farmers>; USDA Press Release, "USA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation," U.S. Department of Agriculture (Aug. 27, 2018), available at: <https://www.usda.gov/media/press-releases/2018/08/27/usda-announces-details-assistance-farmers-impacted-unjustified>.

⁴¹ *Proclamation 9980 of January 24, 2020 Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Jan. 29, 2020).

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account the ripple effects such actions could have—and did have—on other sectors of the U.S. economy, particularly downstream manufacturing. This failure is reflected in the additional section 232 tariffs imposed on downstream, steel-using products such as nails and parts used in cars and tractors. The initial imposition of sweeping tariffs (later, with quota exceptions for certain countries) on the basic, upstream steel and aluminum products contemplated only the narrow interests of the U.S. steel and aluminum producers while ignoring the seemingly obvious effects that this protection would have on other sectors of the U.S. economy.

Aside from the massive bailouts to U.S. farmers noted above, however, President Trump has largely ignored the side-effects of his tariffs and instead has focused on the alleged hollowing out of the steel industry, claiming that globalization and the North American Free Trade Agreement (“NAFTA”) have resulted in job losses and the decline of the U.S. steel industry.⁴² However, while NAFTA went into effect in 1994, steel jobs have actually been declining since the 1980s, largely due to increases in productivity. Joe Innace of S&P Global Platts has explained that in the 1980s, American steelmakers needed 10.1 man-hours to produce a ton of steel, whereas now only 1.5 man-hours are needed.⁴³ Studies have shown that this sharp increase in productivity can be directly linked to the rise of the minimill, which simultaneously displaced vertically-integrated steel production while also driving the remaining vertically-integrated producers to increase productivity in the face of heightened competition.⁴⁴ Clearly, the imposition of tariffs is not the appropriate tool to remedy this “problem,” if it could even be considered one, since imports were not the drivers of the restructuring of the steel industry that occurred decades ago.

However, while there is clearly evidence that the administration’s section 232 actions have been harmful to certain segments of the U.S. economy, whether or not these actions are illegal in the United States is a different debate. As previously discussed, the statutory language of section 232 provides for no limitations on the president’s ability to impose action on imports that are determined to be posing a threat to national security. Namely, there is no requirement as to what degree of specificity should be examined for the targeted product (i.e., the product can be as broadly or as narrowly defined as the party bringing the investigation chooses); no requirement as to whether trading partners should be individually examined or if they must be treated in the same manner; and, importantly, no requirement to quantify or to even assess any potential adverse consequences of an action taken pursuant to section 232. Further, the statute provides no guidelines for consistency in the president’s interpretation of section 232 across different investigations. And, as noted above, while Commerce *may* hold a public hearing or provide

⁴² C-SPAN, “Donald Trump Remarks in Monessen, Pennsylvania,” (June 28, 2016), available at: <https://www.c-span.org/video/?411870-1/donald-trump-delivers-remarks-us-economy>.

⁴³ Wiseman, Paul, “As Trump weighs tariff, U.S. steelmakers enjoy rising profits,” *Associated Press* (Mar. 6, 2018), available at: <https://apnews.com/cae426730cd74e64932e4be7fa5cdebc/As-Trump-weighs-tariff,-US-steelmakers-enjoy-rising-profits#/pg=FGkzCO>.

⁴⁴ Collard-Wexler, Allan, and Jan De Loecker, “Reallocation and Technology: Evidence from the US Steel Industry,” *American Economic Review*, 105 (1): 131-71 (2015).

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an opportunity for public comment, neither is required, leaving the president's authority unbridled in a domestic context.

Nevertheless, based on the sheer number of investigations initiated and actions taken, the types of products being targeted, and the widespread retaliation by international trading partners, it is evident that the Trump administration has come to view section 232 as an instrument to be used not necessarily for national security, but rather as a convenient tool for managing trade without the inconvenience or necessity of proving that imports are "unfair" or that they are the cause of material or serious injury, as would be the case with countervailing duties,⁴⁵ antidumping duties,⁴⁶ or safeguards.⁴⁷ Not coincidentally, actions pursuant to the unfair trade statutes or safeguards provision would not have resulted in retaliation against the agriculture sector, as there would not have been retaliation against trade measures that are legal under WTO agreements.

CONCLUSION: THE NEED FOR REFORM

In addition to the criticism discussed above, the president's section 232 actions have also faced legal challenges. One of these challenges, brought by the American Institute for International Steel ("AIIS") and initially filed before the U.S. Court of International Trade ("CIT"), argued that section 232 was unconstitutional because it constituted an improper delegation of authority, which violated Article 1, Section 1 of the U.S. Constitution and the doctrine of separation of powers.⁴⁸ In March 2019, a three-judge panel at the CIT rejected this challenge, citing the U.S. Supreme Court's decision in *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548 (1976) ("*Algonquin*"), wherein the Supreme Court rejected a challenge to section 232 also based on the issue of non-delegation.⁴⁹ However, although the CIT ultimately decided against AIIS, citing the necessity of relying on the *Algonquin* decision, Judge Katzmman (one of the three judges on the CIT panel) expressed "grave doubts" about the constitutionality of section 232 absent *Algonquin*, stating that "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the president in violation of the separation of powers."⁵⁰

AIIS appealed the CIT's decision to the Court of Appeals for the Federal Circuit ("CAFC"). The CAFC upheld the CIT's decision, again citing the *Algonquin* decision and explaining that it is "binding precedent."⁵¹ The CAFC's

⁴⁵ 19 U.S.C. § 1671 *et seq.*

⁴⁶ *Id.*

⁴⁷ *Id.* § 2251 *et seq.*

⁴⁸ Complaint, *Am. Inst. for Int'l Steel v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019) (Ct. No. 18-00152) ("*AIIS I*"), *cert. denied*, 139 S. Ct. 2748, *aff'd*, 806 F.App'x 982 (Fed. Cir. 2020) ("*AIIS II*"), *cert. denied*, 2020 WL 3405872.

⁴⁹ *AIIS I*, 376 F. Supp. 3d at 1340.

⁵⁰ *Id.* at 1347, 1352 (Katzmann, J., *dubitante*).

⁵¹ *AIIS II*, 806 F.App'x at 989.

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decision explained that only the Supreme Court has the ability to overrule Supreme Court precedent, thereby precluding the CAFC from deviating from *Algonquin*.⁵²

Shortly after the CAFC's decision, AIIS appealed to the Supreme Court. This was not AIIS' first appeal to the Supreme Court, as AIIS initially sought Supreme Court review after the 2019 CIT decision, bypassing the Federal Circuit. The Supreme Court declined to hear AIIS' case in 2019 and again declined to hear AIIS' case in 2020. While this result was not entirely unsurprising, given that the Supreme Court hears only about one to two percent of the cases put before it each year,⁵³ the decision not to hear the case was nevertheless a setback for AIIS and, arguably, for well-considered, rules-based trade policy.

However, the AIIS appeal does not represent the only avenue for reform. Several members of Congress have put forth proposed legislation in an attempt to address the actions taken by President Trump under section 232. While some of the proposed legislation involves providing assistance to U.S. companies already harmed by section 232,⁵⁴ others of the proposed bills are more forward-looking, seeking to limit the power of the president under section 232 in the future.

One such example is the Promoting Responsible and Free Trade Act of 2019,⁵⁵ sponsored by Representative Joe Cunningham, the Democratic representative of South Carolina's 1st congressional district. The bill proposes requiring congressional approval or disapproval of certain trade remedies, including actions by the USTR and for trade adjustments for national security reasons. Specifically, with respect to section 232, the bill proposes to require the Secretary of Defense, consulting with the Secretary of Commerce, to initiate investigations, prepare an assessment on the national security impact of the article at issue, and submit a report on the findings to the president. If affirmative, under this proposed legislation, the president may direct the Secretary of Commerce to devise recommendations to address the threat, and the Secretary of Commerce (conditioned upon a joint resolution by Congress) would submit a report to the president, who can then decide to take action.

While, as Representative Cunningham has indicated, this proposed legislation "would give Congress the authority to weigh in on tariffs before they are imposed by the president,"⁵⁶ the process presented therein bears substantial similarities to the current procedures under section 232, substituting the Secretary of Defense for the Secretary of

⁵² *Id.* at 989-90.

⁵³ United States Courts, "About the Supreme Court," available at: <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about>

⁵⁴ See, e.g., H.R. 6124 – Assistance for Firms Harmed by Tariffs on Exports Act (116th Congress, House), S. 2551 – Tariff Rebate Act (116th Congress, Senate).

⁵⁵ H.R. 3673 – Promoting Responsible and Free Trade Act of 2019 (116th Congress, House).

⁵⁶ Press Release, "Cunningham Introduces Bill to Give Congress Authority to Review Tariffs," (July 10, 2019), available at: <https://cunningham.house.gov/media/press-releases/cunningham-introduces-bill-give-congress-authority-review-tariffs>.

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Commerce in certain instances. Another similar bill (in that it provides for only limited modifications to the process) is Senator Rob Portman's (D-OH) Trade Security Act of 2019,⁵⁷ which proposed to amend section 232 to require the Secretary of Defense to initiate investigations and to provide for congressional disapproval of certain actions.

Also of a limited nature, the Global Trade Accountability Act of 2019,⁵⁸ introduced by Republican Senator Mike Lee from Utah and co-sponsored by Senators Pat Toomey (R-PA), Jerry Moran (R-KS), Cory Gardner (R-CO), and Roy Blunt (R-MO), seeks to implement congressional review only for what it describes as "unilateral trade actions," which include actions taken under section 232. Under this proposed legislation, both chambers of Congress would be required to affirmatively approve of any such "unilateral trade action," such as increases in tariffs or duties, tightening of tariff-rate quotas or quantitative restrictions on imports, as well as other restrictions or prohibitions on imports.

Other proposed legislation has suggested more comprehensive restructuring to the procedures prescribed under section 232. The Reclaiming Congressional Trade Authority Act of 2019,⁵⁹ sponsored by Representative Stephanie N. Murphy, a Democrat from Florida's 7th district, and co-sponsored by Representative Jim Cooper (D-TN-5) and Representative Joe Cunningham (D-SC-1), proposes to involve the U.S. International Trade Commission ("ITC") in the investigation process.⁶⁰ Specifically, the bill says that the president, after determining national security as the basis for new or additional duties, must submit a proposal to the ITC specifying the details of the product(s) at issue, the proposed duty rate, and the proposed duration of that rate. The ITC would prepare a report assessing the likely impact on the economy, and the Secretary of Defense would prepare a report explaining why the proposal is in the interest of national security. Both reports would be submitted by the president to Congress along with a request for authorization. This legislation would require a joint resolution in Congress for the president to proclaim the duty rates, although the legislation does provide for an exception for urgent action by the president to proclaim a new or additional national security duty for one period of 120 days.

Another example on the more comprehensive side of reform is Senator Pat Toomey's (R-PA) Bicameral Congressional Trade Authority Act of 2019.⁶¹ The bill proposes to amend the Trade Expansion Act of 1962 by

⁵⁷ S. 365 – Trade Security Act of 2019 (116th Congress, Senate), reintroduced from S. 3329 – Trade Security Act of 2018 (115th Congress, Senate).

⁵⁸ S. 1284 – Global Trade Accountability Act of 2019 (116th Congress, Senate). Note that this bill was reintroduced from S. 177 – Global Trade Accountability Act of 2017 (115th Congress, Senate) and is related to H.R. 723 – Global Trade Accountability Act of 2019 (116th Congress, House) re-introduced by Representative Warren Davidson (R-OH-8) after H.R. 5281 – Global Trade Accountability Act of 2018 (115th Congress, House).

⁵⁹ H.R. 3477 – Reclaiming Congressional Trade Authority Act of 2019 (116th Congress, House).

⁶⁰ A related bill was proposed in the Senate by Senator Tim Kaine (D-VA), co-sponsored by Senator Thomas R. Carper (D-DE), Senator Dianne Feinstein (D-CA), and Senator Christopher A. Coons (D-DE). See S. 899 – Reclaiming Congressional Trade Authority Act of 2019 (116th Congress, Senate).

⁶¹ S. 287 – Bicameral Congressional Trade Authority Act of 2019 (116th Congress, Senate). This bill is co-sponsored by ten Senators (four Democrats, one Independent, and four Republicans). Representative Mike Gallagher (R-WI-8) proposed the

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requiring congressional approval for a proposal submitted by the president to Congress. The Bicameral Congressional Trade Authority Act would also require the Department of Defense, rather than Commerce, to investigate. Finally, and most notably, this proposed legislation would retroactively apply to proposed actions made four years prior to enactment of the bill.

Although the above-described bills differ in scope, they share a common thread: The need for Congressional approval before action is taken pursuant to section 232. These proposed bills implicitly recognize the issue that AIIIS brought before the CIT, CAFC, and Supreme Court: Section 232 affords the president far too much power with no limitations on its use. While the powers afforded to the president under section 232 have existed for decades, President Trump's use of section 232 is unprecedented, both in terms of frequency and scope, as well as in the broad definition of what constitutes a threat to national security. Requiring Congressional approval would effectively limit future presidents from abusing section 232 in the same way and would restore a balance, reducing the overly-broad power the president is currently afforded under section 232 to those situations where the issue actually is "national security" rather than a convenient means of managing trade.

related Bicameral Congressional Trade Authority Act of 2019 in the House. See H.R. 940 – Bicameral Congressional Trade Authority Act of 2019 (116th Congress, House). Congressman Gallagher's bill is co-sponsored by 28 other Representatives.

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