

**THE TARIFFS THAT STARTED THE TRADE WAR:
SECURITY, PROTECTIONISM AND AMERICA'S
CHANCE OF SUCCESS**

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TABLE OF ABBREVIATIONS

1995 General Agreement on Trade in Services (“GATS 1995”)

Ad Valorem (“AV”)

Appellate Body (“AB”)

Department of Defense (“DoD”)

Dispute Settlement Body (“DSB”)

Dispute Settlement Panel (“DSP”)

European Communities (“EC”)

General Agreement on Tariffs and Trade 1994 (“GATT 1994”)

Harmonized Tariff Schedule (“HTS”)

Least Developing Countries (“LDCs”)

Members of the European Union (the “EU”)

Most-Favored Nation (“MFN”)

United States (“U.S.”)

U.S. Harmonized Tariff Schedule (“HTSUS”)

World Trade Organization (“WTO”)

WTO Rules and Procedures Governing The Settlement of Disputes (“DSU”)

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS	ii
I. INTRODUCTION	1
II. DO THE PRESIDENT’S SECTION 232(b) ALUMINUM AND STEEL TARIFFS VIOLATE THE GATT 1994 ARTICLES I:1 II:1(a) and (b)?	2
A. THE PRESIDENTIAL MEMORANDA ON STEEL AND ALUMINUM	2
1. Steel	2
a. Exemptions	3
b. Exclusions	4
2. Aluminum	4
a. Exemptions	5
b. Exclusions	6
B. PRESIDENTIAL PROCLAMATIONS ON ADJUSTING IMPORTS OF STEEL AND ALUMINUM INTO THE UNITED STATES	6
1. Steel	6
2. Aluminum	6
3. Modifications	7
C. THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994	7
1. Most-Favored Nation: GATT 1994 Article I	7
a. Are the Section 232 Tariffs on Steel and Aluminum Covered by Article I:1?	8
b. Do the Section 232 Steel and Aluminum Measures Afford an Advantage to Some States?	8
c. Are the Products at Issue ‘Like Products’?	9
(i) Covered Steel Under the President’s Steel Tariffs	9
(ii) Covered Aluminum Under the President’s Aluminum Tariffs	9
(d) Are Advantages Accorded ‘Immediately and Unconditionally’ For Like Products, Irrespective of Their Origin?	10
2. GATT Article II:1(a) and (b)	11
III. DOES THE GATT 1994 ARTICLE XXI ESSENTIAL SECURITY EXCEPTION EXEMPT THE U.S. FROM ITS OBLIGATIONS UNDER GATT 1994?	12
A. JURISDICTION	13
B. JUSTICIABILITY	13
1. United States - Trade Measures Affecting Nicaragua	13
2. United States — The Cuban Liberty and Democratic Solidarity Act (DS39)	14
3. Russia – Measures Concerning Traffic in Transit (DS512)	15
4. Impact of Russia – Traffic in Transit on U.S. — Certain Measures on Steel and Aluminium Products	17
C. THE IMPACT OF THE DISPUTE SETTLEMENT CRISIS AT THE WTO	20
D. PROBABLE OUTCOME	20
IV. CONCLUSION	21
REFERENCES	I
ENDNOTES	VI

I. INTRODUCTION

United States (“U.S.”) President Donald Trump (“Trump”) is obsessed with righting America’s trade balance.¹ But there are many trade experts and economists who counsel against this strategy and maintain that trade deficits do not harm the economy in the long run because the currency will always return in some form or another, for example through foreign investment. These experts oppose attempts to ‘win’ trade relationships. They also express serious doubts about whether foreign states cause trade deficits and whether policies can be pursued to reduce them.²

On the flip-side there are those that believe sustained trade deficits are problematic. It is on the advice of these experts that on June 1, 2018 the President imposed a 25% tariff on steel and a 10% tariff on aluminum imports.³ The tariffs were enacted to prevent ‘cheap’ metals from flooding the U.S. market and to spur growth in the domestic steel and aluminum industries.⁴

To justify the steel and aluminum tariffs the President cited ‘national security’. The U.S. asserts that securing the long-term viability of the domestic steel and aluminum industries with protective tariffs is required so those industries can meet America’s defense needs. The U.S. argues that even if the steel and aluminum measures are inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) the matter is not ‘justiciable; and a World Trade Organization (“WTO”) adjudicator (e.g., a WTO Dispute Settlement Panel) cannot examine whether the Section 232 measures violate the GATT 1994 because those measures are necessary for the protection of its ‘essential security interests’ under GATT 94 Article XXI(b)(iii).

On April 5, 2018 the People's Republic of China ("China") challenged Trump's Section 232 measures for violating the WTO agreements and requested consultations with the U.S in *U.S.—Certain Measures on Steel and Aluminum Products* ("U.S. -Measures on Steel"). Canada followed on June 15, 2018.⁵

The first step under the WTO Rules and Procedures Governing The Settlement of Disputes ("DSU") is for Members to negotiate with each other to work out their differences. The negotiation process known as 'consultations' lasts a minimum of 60 days. If consultations fail the complaining member may request the establishment of a Dispute Settlement Panel ("DSP") composed of trade experts to determine whether a State has violated WTO rules.⁶ In October 2018 both Canada and China requested the formation of a DSP.⁷ Other WTO members impacted by the Section 232 measures have also requested consultations, joined existing requests or moved to the panel stage⁸.

II. DO THE PRESIDENT'S SECTION 232(b) ALUMINUM AND STEEL TARIFFS VIOLATE THE GATT 1994 ARTICLES I:1 II:1(A) AND (B)?

A. THE PRESIDENTIAL MEMORANDA ON STEEL AND ALUMINUM

1. STEEL

On April 20, 2017 the Office of the Press Secretary ("Press Secretary") of the U.S. issued a memorandum from the President directing the U.S. Secretary of Commerce ("Commerce Secretary" or "the Secretary") to initiate an investigation under section 232(b)(1)(A) of the Trade Expansion Act of 1962 ("Section 232")¹⁰ "to determine the effects on national security of steel imports"("the steel memo").¹¹ After an investigation into the matter, on January 11, 2018, the Commerce Secretary responded with a "Report on The Effect Of Imports Of Steel On The Na-

tional Security.”¹² At the time of the report the Secretary concluded that the “quantities and circumstance” of steel imports were “weakening our internal economy” and threatened to impede national security¹³ as defined in Section 232. In order to remove the threat the Commerce Secretary proposed reducing imports to a level that in combination with good management would allow U.S. steel mills to operate at 80 percent of production capacity.¹⁴

In order to accomplish this import reduction and increase production capacity the Secretary recommended alternatives to the President. The first alternative suggested imposing *either* a global quota or a tariff. For a global quota the Secretary proposed limiting imported steel products to a specified percent of 2017 import levels applied on a country and steel product basis.¹⁵ For a global tariff the Secretary advised that in addition to collecting antidumping or countervailing duties the U.S. could impose higher tariff rates on all imported steel products.¹⁶ The second alternative proposed increasing tariff rates on steel products from Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica as well as collecting antidumping or countervailing duties from those States.¹⁷ Under this plan other countries were limited to their 2017 import level.¹⁸

a. Exemptions

Both plans permitted the President to exempt select countries based on overriding security or economic interests. An exemption had to be made at inception so a proportional adjustment to a final quota or tariff could be imposed on non-exempt States. Adjusting in such a way ensured that steel imports remained at the requisite level, which allowed the domestic steel industry to operate at 80 percent utilization.¹⁹ An important qualification limited each exempt State to 100% of its 2017 imports.²⁰

b. Exclusions

In order to shield U.S. consumers and consuming industries from any potential negative effects from the Section 232 tariffs, the Commerce Secretary implemented a Section 232 product exclusion process in March 2018.²¹ The exclusions provided limited relief where products were not “produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality.”²² Those seeking exclusions were initially required to file a separate application for each and every product, but the Commerce Department has since tried to streamline the process. An exclusion is generally valid for one year from the date it is granted; and retroactive to the date the application was posted on the Commerce Department website.²³

2. ALUMINUM

On April 27, 2017 the Press Secretary issued a second Section 232²⁴ memorandum from the President directing the Commerce Secretary to consider “the effects on national security of aluminum imports” (“the aluminum memo”).²⁵ After the investigation concluded on January 17, 2018 the Commerce Secretary prepared a report on “The Effect Of Imports Of Aluminum On The National Security.”²⁶ The Secretary determined that the Department of Defense (“DoD”) and critical domestic industry's dependence on large quantities of aluminum imports weakened the U.S. economy and threatened to impede national security.²⁷ This dependence on foreign aluminum, according to the Secretary, placed the U.S. at risk of becoming totally reliant on imported high-purity aluminum, which is crucial for military and commercial systems; leaving open the possibility that the domestic industry would be unable to meet national security needs or respond to a national security emergency. As a method of removing this threat to national security the Secretary determined that aluminum imports must be reduced to a level that permitted U.S. pro-

ducers to restart idled capacity and stabilize production.²⁸ In order to accomplish this the Commerce Secretary proposed either import quotas or tariffs on: (i) unwrought aluminum; (ii) aluminum castings and forgings; (iii) aluminum plate, sheet, strip, and foil; (iv) aluminum wire; (v) aluminum bars, rods and profiles; and (vi) aluminum tubes and pipes; and (vii) aluminum tube and pipe fittings.²⁹

In the first alternative the Commerce Secretary proposed a worldwide quota of 86.7 percent on aluminum imports that would allow U.S. primary producers to increase production to 80 percent of U.S. production capacity in order to meet national security needs.³⁰ The tariff version of the plan proposed a 7.7 percent tariff to create the same effect as an 86.7 percent quota in addition to charges for antidumping or countervailing duties.³¹ The second alternative proposed a 23.6 tariff rate on aluminum imports from China, Hong Kong, Russia, Venezuela and Vietnam to enable U.S. aluminum producers to operate at 80 percent capacity in addition to charges for antidumping or countervailing duties.³² Under the second alternative other States were limited to their 2017 import level.³³

a. Exemptions

The Secretary's plan offered the President the option to exempt States from the proposed quotas based on overriding security or economic interests including their willingness to address excess global aluminum capacity and other industry challenges.³⁴ As with steel any exemption for aluminum had to be made at inception so a proportional adjustment to a final quota or tariff could be imposed on non-exempt States. Adjusting in such a way ensured that aluminum imports remained at or below the level needed for the domestic industry to return to 2012 production and import penetration levels.³⁵

b. Exclusions

Exclusions provided for aluminum follow the same procedure as steel.

B. PRESIDENTIAL PROCLAMATIONS ON ADJUSTING IMPORTS OF STEEL AND ALUMINUM INTO THE UNITED STATES

1. STEEL

On March 8, 2018 the President issued a proclamation under his Section 232 authorities adjusting imports based on the Commerce Secretary's findings in the Steel Report that "steel articles 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."³⁶ The President imposed a 25 percent ad valorem ("AV")³⁷ tariff on steel articles and began negotiating exemptions.³⁸ In order to enact the increased duty rate on steel the President modified subchapter III of chapter 99 of the U.S. Harmonized Tariff Schedule ("HTSUS").³⁹ The modification entered effect on March 23, 2018.⁴⁰

2. ALUMINUM

Also on March 8, 2018 the President issued a proclamation under his Section 232 authorities adjusting aluminum imports based on the Commerce Secretary's finding that aluminum imports combined with global excess capacity for producing aluminum were weakening the U.S. economy leaving it "almost totally reliant on foreign producers of primary aluminum" and putting the U.S. "at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems."⁴¹ As a result the President imposed a 10 percent AV tariff on imported aluminum articles while negotiating exemptions.⁴² In order to enact the increased duty rate on imported aluminum articles the President ordered the

modification of subchapter III of chapter 99 of the HTSUS.⁴³ The modification entered into effect on March 23, 2018.⁴⁴

3. MODIFICATIONS

The day before the Section 232 tariffs on steel and aluminum entered into force the President issued exemptions for Argentina, Australia, Brazil, Canada, Mexico, South Korea and the European Union (the “EU”). Canada, Mexico and the E.U received 30 day exemptions. Brazil and South Korea were only exempt from steel; and Argentina and Australia received permanent exemptions.⁴⁵

C. THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

1. MOST-FAVORED NATION: GATT 1994 ARTICLE I

GATT 1994 obliges WTO Members to abide by the overriding principle of trade without discrimination under the 'most-favored nation' (“MFN”) provision of Article I.⁴⁶ Within the WTO MFN is an economic status where a State enjoys the best trade terms given by its trading partners so that trade concessions provided to one partner shall be granted to other WTO Members.⁴⁷ This fundamental non-discrimination obligation of GATT 1994 set forth in Article I:1 has been described as 'pervasive', a 'cornerstone of the GATT', and 'one of the pillars of the WTO trading system'."⁴⁸ The U.S. appeared to violate its MFN obligation when exempting some States but not others from the Section 232 tariffs.

The principal purpose of the MFN treatment obligation of Article I:1 is to ensure all WTO Members equality of opportunity to import from or export to other WTO Members (or any other State).⁴⁹ To determine whether a measure is consistent with a Member’s MFN treatment obligation under Article I:1, four questions must be answered: (i) whether a measure is covered

by Article I:1; (ii) whether that measure accords an ‘advantage’; (iii) whether the products at issue are ‘like products’; and (iv) whether the advantage at issue is accorded ‘immediately and unconditionally’ to all like products concerned, irrespective of their origin or destination.⁵⁰

a. Are the Section 232 Tariffs on Steel and Aluminum Covered by Article I:1?

The U.S. Section 232 measures imposed a 25 percent AV tariff on steel articles and a 10 percent AV tariff on aluminum products imported from non-exempt States.⁵¹ Since the measures subjected steel and aluminum articles imported from non-exempt States to charges upon importation they are controlled by GATT 1994 Article I:1.

b. Do the Section 232 Steel and Aluminum Measures Afford an Advantage to Some States?

Article I:1 of the GATT 1994 refers to ‘*any* advantage, favour, privilege or immunity granted by any [Member]’.⁵² The word ‘any’ is interpreted to afford broad meaning to the term ‘advantage’.⁵³ In considering the word ‘advantage’ within the meaning of Article I:1, the AB in *EC – Bananas III* (1997)⁵⁴ determined that a measure provided an ‘advantage’ when it created ‘more favourable competitive opportunities’ or affected the commercial relationship between products of different origins.⁵⁵ Further clarifying this position, the AB in *Canada – Autos* (2000)⁵⁶ ruled:

The words of Article I:1 refer not to some advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘any advantage’; not to some products, but to ‘any product’; and not to like products from some other Members, but to like products originating in or destined for ‘all other’ Members.⁵⁷

‘Advantage’ in Article I:1 pertains to any advantage granted by a Member for a like product from or for another State.⁵⁸ With respect to the Section 232 tariffs on aluminum and steel the measures offered an advantage to States exempt from the 25 percent AV tariff on steel articles

and 10 percent AV tariff on aluminum articles.⁵⁹ As a result when selectively imposing the Section 232 tariffs the U.S. failed to satisfy the second element needed to fulfill its MFN obligation.

c. Are the Products at Issue ‘Like Products’?

The MFN treatment obligation extends to like products and prohibits discrimination within the meaning of Article I:1 of the GATT 1994. For present purposes Article I:1 concerns products originating in another State and necessitates that any advantage provided for those products be afforded to ‘like products’ originating in the territory of all other Members.

(i) Covered Steel Under the President’s Steel Tariffs

The Presidential steel tariffs cover a wide variety of steel products classified under the Harmonized Tariff Schedule (“HTS”) 6 digit levels 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90.⁶⁰

(ii) Covered Aluminum Under the President’s Aluminum Tariffs

The Presidential aluminum tariffs include aluminum products under HTS headings for (i) unwrought aluminum (HTS 7601); (ii) aluminum bars, rods, and profiles (HTS 7604); (iii) aluminum wire (HTS 7605); (iv) aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (v) aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (vi) aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70).⁶¹

It is apparent from the HTS classifications laid out the Presidential Proclamations and subsequent adjustments that the Section 232 tariffs discriminate between like products based only on country of origin. These enactments, therefore, prevent the U.S. from fulfilling this element of the MFN obligation under GATT 1994 Article I:1.

(d) Are Advantages Accorded ‘Immediately and Unconditionally’ For Like Products, Irrespective of Their Origin?

Article I:1 requires that any advantage granted by a Member for imports from or exports to another State must be provided ‘immediately and unconditionally’ to all other WTO Members. In this context, ‘immediately’ means ‘without delay, at once, instantly’. No time should lapse between when a State provides the advantage to one Member and when that advantage is bestowed on others (for like products).⁶² So when the President issued his March 22, 2018 proclamation exempting Argentina, Australia, Brazil, Canada, Mexico, the E.U., and South Korea the same advantages were not immediately and unconditionally provided to all other Members. Once the Section 232 steel and aluminum tariffs entered into force the U.S. had one set of steel and aluminum tariffs for most Member States and another set of lower tariffs for exempt States. By imposing separate tariffs for like products based on country of origin the U.S. did not satisfy the final element of its MFN obligation under GATT 1994 Article I:1.

Based on the above analysis the President’s Section 232 trade measures are inconsistent with the U.S.’ MFN treatment obligation under Article I:1. The measures afford some U.S.’ trading partners advantages over other Members with respect to like products; and those advantages are not immediately and unconditionally provided to all other Members.

The Appellate Body *EC – Seal Products* (2014), stated:

as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members...it prohibits ... conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member.⁶³

The President’s proclamations did not protect expectations of equal competitive opportunities. They caused non-exempt Members ⁶⁴ to experience detrimental effects from lost competi-

tive opportunities to excluded Members.⁶⁵ By exempting some States the President's proclamation created more favorable competitive opportunities for exempt Members and was inconsistent with the U.S.' MFN treatment obligation of Article I:1 of the GATT 1994.⁶⁶ As alleged in *U.S. - Measures on Steel* creating one set of tariffs for some Members while lowering tariffs for other trading partners violates the most-favored nation principle.⁶⁷

2. GATT ARTICLE II:1(A) AND (B)⁶⁸

Article II reflects a central purpose of the GATT 1994: 'to preserve the value of tariff concessions negotiated by a Member with its trading partners and bound in that Member's Schedule.'⁶⁹ Members agree under GATT Article II no ordinary customs duties shall be imposed "on the importation" of products over bound tariff rates⁷⁰. Article II exempts products from other duties and charges "imposed on or in connection with importation".⁷¹ These empowering provisions make Article II "the basic market-access provision that determines the maximum price of... entry" for access to a Member country.⁷²

A three-step analysis for determining the consistency of tariff treatments, like the Section 232 measures, with Article II:1(a) and Article II:1(b) was laid out by the DSP in *EC – Chicken Cuts*.⁷³ In deciding whether tariff treatments of frozen boneless salted chicken cuts imported into the European Communities ("EC") were consistent with Article II:1(a) and Article II:1(b), the DSP stated:⁷⁴

[W]e will need to ascertain: (a) the treatment accorded to the products at issue under the EC Schedule; (b) the treatment accorded to the products at issue under the measures at issue; and (c) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule.⁷⁵

As alleged in the Requests for Consultations the U.S. imposed import duties on steel and aluminum in excess of those set forth in the U.S.' Schedule of Concessions and Commitments annexed to the GATT 1994 ("Schedule of Concessions").⁷⁶ After that non-exempt States paid tariff rates 10% (aluminum) and 25% (steel) higher than the Schedule of Concessions provided. According to the analysis in *EC -Chicken Cuts* since the President's Section 232 tariffs apply ordinary customs duties in excess of those recorded in the U.S.' Schedule of Concessions the measures are inconsistent with GATT Article II:1(a) and Article II:1(b), unless they are subject to an exception.

III. DOES THE GATT 1994 ARTICLE XXI ESSENTIAL SECURITY EXCEPTION EX-EMPT THE U.S. FROM ITS OBLIGATIONS UNDER GATT 1994?

Article XXI, the essential security exception allows States to impose protective trade measures without violating their WTO obligations.⁷⁷ But the question of whether a WTO DSP has jurisdiction over the exception has never been definitively resolved.

GATT Article XXI provides, in relevant part:

Nothing in this Agreement shall be construed

- (b) to prevent any [member country] 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;⁷⁸

A. JURISDICTION

The issue of jurisdiction over the essential security exception has remained in dispute in part because the DSU does not specify when a DSP or the AB may exercise jurisdiction. Without that clarification a Member must look to WTO jurisprudence for guidance in determining a tribunal's jurisdiction over claims.⁷⁹

In general a DSP's terms of reference establish jurisdiction, which means a DSP may not adjudicate claims not included in a request to establish a panel.⁸⁰ Similarly a DSP only has jurisdiction to determine the parties' rights and obligations under the list of covered agreements.⁸¹

B. JUSTICIABILITY

Justiciability is a concept the U.S. distinguishes from jurisdiction. The distinction is rooted in U.S. constitutional law and known as the 'political question' doctrine.⁸² The crux of the political question doctrine is that some legal claims should not be decided by an adjudicating body due to their political nature. Courts must dismiss these types of claims for lack of jurisdiction, rather than deciding them on the merits.⁸³ The longstanding U.S. position has been that the essential security exception is 'non-justiciable'.⁸⁴ As discussed below both Presidents Ronald Reagan ("Reagan") and William J. Clinton ("Clinton") put forth the justiciability argument to prevent hearings on trade measures enacted on national security grounds.

1. UNITED STATES - TRADE MEASURES AFFECTING NICARAGUA

On May 1, 1985 Reagan issued an Executive Order prohibiting all trade with Nicaragua and transactions relating to air and sea transportation between Nicaragua and the U.S. effective May 7, 1985.⁸⁵ Reagan issued his order upon a finding that "an unusual and extraordinary threat to national security and foreign policy existed."⁸⁶ In response Nicaragua called a special meeting

of the GATT Council seeking a panel finding that Reagan's trade embargo nullified or impaired Nicaragua's benefits under the General Agreement. The U.S. replied that "[i]t was not for GATT to approve or disapprove the judgment made by the United States as to what was necessary to protect its national security interests. GATT was a trade organization, and had no competence to judge such matters."⁸⁷ The Panel determined that within its terms of reference, it could examine the measures at issue "solely in the light of the relevant GATT provisions, concerning itself with only the trade issues under dispute".⁸⁸ Meaning, it could not rule on the justiciability of the essential security exception.

2. UNITED STATES — THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT (DS39)

On May 3, 1996 the EC acting on its own behalf and on behalf of its Member States requested consultations with the U.S. pursuant to Article 4 of the DSU, GATT 1994 Articles XXIII:1 and the 1995 General Agreement on Trade in Services ("GATS 1995") Articles XXIII:1 concerning the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD ACT), widely known as the Helms-Burton Act.⁸⁹ Consultations were held on June 4 and July 2, 1996 but proved unsuccessful.⁹⁰ The EC then requested a DSP find the Helms-Burton Act inconsistent with the U.S.'s obligations under GATT 1994 and GATS 1995.⁹¹ The WTO delayed naming arbitrators until February 20, 1997 in hopes "that the dispute could be worked out bilaterally."⁹² The U.S. immediately responded to the appointment of a DSP by announcing it would not participate in the proceedings since the Helms-Burton Act 'was not fundamentally a trade matter' or within the scope of the application of WTO law and, as such, not within the jurisdiction of the DSP.⁹³ Eventually the parties resolved their differences outside the dispute forum, with the U.S. arguably fearful of the consequences of adjudicating Article XXI before a WTO Panel.⁹⁴ This

meant for a second time there would be no ruling on the U.S. position that Article XXI was not justiciable. That remained the case until 2019.

3. RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT (DS512)

On April 5, 2019 a WTO Panel decided for the first time in *Russia – Measures Concerning Traffic in Transit* (“*Russia – Traffic in Transit*”) the issue of jurisdiction in a dispute where a party claimed its measures were justified on national security grounds.⁹⁵

Russia – Traffic in Transit concerned assorted measures imposed by Russia on transit by road and rail through Russian territory as well as the ‘publication and administration of those measures.’⁹⁶ Russia asserted that the 2014 annexation of Crimea was an international emergency that continued to exist and presented threats to Russia's essential security interests.⁹⁷ Russia argued that “under Article XXI(b)(iii) both the determination of a Member's essential security interests and the determination of whether any action is necessary for the protection of a Member's essential security interests [we]re at the sole discretion” of the invoking Member.⁹⁸ Russia took the interpretive position that “the explicit wording of Article XXI” permits the invoking Member “to determine the necessity, form, design, and structure of the measures taken pursuant to Article XXI.”⁹⁹ Because of this discretion Russia argued that the DSP lacked jurisdiction over the Russian measures.¹⁰⁰ Ukraine responded that Members invoking the essential security exception did not have “total discretion”; and a DSP’s “objective assessment must include an examination of whether a Member invoking Article XXI has done so in good faith”.¹⁰¹ Ukraine further asserted that a unilateral determination of the applicability of GATT Article XXI would be contrary to Article 23.1 of the DSU.¹⁰²

In assessing the parties' arguments the DSP dissected the text of Article XXI.¹⁰³ The Panel reasoned that the reference in the essential security exception to what an invoking Member "considers," may be interpreted as leaving one, two, or all three of the following questions for an invoking Member's to decide:

- (i) whether actions are necessary for the protection of essential security interests; and/or
- (ii) what the member's essential security interests are; and/or
- (iii) whether its essential security interests relate to "fissionable materials or the materials from which they are derived;" "the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;" or are "taken in time of war or other emergency in international relations."¹⁰⁴

The Panel decided based on the text, context, and negotiating history of Article XXI, that the first question [(i) *the necessity for protecting essential security interests*] was to be left to a Member invoking Article XXI.¹⁰⁵ The last two questions were subject to objective review (to some extent) by a DSP.¹⁰⁶

The Panel's conclusion that Article XXI(b) vests DSPs with the power to review whether the requirements of sub-paragraphs (i)-(iii) are met rather than leaving the determination to an invoking Member means that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging".¹⁰⁷ And because a Member's invocation of Article XXI(b)(iii) is not within the sole discretion of the invoking member the DSP can take jurisdiction over the invocation.

The DSP, at the same time, rebuffed the U.S. argument that Russia's invocation of Article XXI(b)(iii) was 'non-justiciable'.¹⁰⁸

4. IMPACT OF *RUSSIA – TRAFFIC IN TRANSIT* ON *U.S. — CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS*

In *Russia – Traffic in Transit* the U.S. and Russian delegations stood side by side arguing that Article XXI(b) was “non-justiciable” and WTO tribunals lacked jurisdiction to review a Member’s invocation of the clause. But the DSP’s finding of justiciability puts Trump’s invocation of the essential security exception in jeopardy in *U.S. -Measures on Steel*.¹⁰⁹

The Panel Report in *Russia – Traffic in Transit* was not all bad news for Russia, however. The DSP determined that an emergency in international relations existed within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.¹¹⁰ The DSP noted that by March 2014 and continuing through the end of 2016 “relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community.”¹¹¹ By December 2016 the situation advanced to armed conflict.¹¹² The DSP also pointed to various international sanctions imposed against Russia as further evidence of “the gravity of the situation”.¹¹³

Compare that conflict to the ‘national emergency’ that led Trump to institute Section 232 steel tariffs. Trump’s steel tariffs are based on “the level of global excess capacity, the level of imports, the reduction in basic oxygen furnace facilities since 2001, and the potential impact of further plant closures on capacity needed in a national emergency.” The President determined that reducing imports to a level at which U.S. steel mills operated at 80% or more production capacity was the only effective way to remove essential security threats.¹¹⁴

For three reasons the above justifications for steel tariffs can be interpreted as economic excuses for protective trade measures. First they have their heaviest impact on our allies. Canada,

a close ally, and Brazil (exempt) are the top U.S. suppliers of imported steel. Russia and China, place fifth and eleventh, with 9% and 2% of imports, respectively.¹¹⁵ Second, the U.S. is not at risk of going to war with many of the countries that import significant amounts of steel. The U.S. has defense treaties with five of the 12 countries chosen for increased tariffs. And third the DoD is not concerned about the production capacity of domestic steel producers. The DoD requires only 3% of US steel (and aluminum) production.¹¹⁶

With respect to aluminum the President relied on three factors to justify his ‘national emergency’: (i) ‘displacement of domestic aluminum by excessive imports’; (ii) the adverse impact (caused by excessive imports) on the economic welfare of the domestic aluminum industry’; and (iii) the global excess capacity in aluminum (primarily Chinese) that weakens the U.S. economy and threatens to impair the national security.¹¹⁷ But as with steel our close ally Canada is the largest source of U.S. aluminum imports.

In 2017 Canadian aluminum imports accounted for 36 percent of total U.S. aluminum imports by value.¹¹⁸ And while there have been 935 requests for exclusions for our longstanding ally only 3 have been approved as of December. Those exclusions amounted to less than 5,000 tonnes. China on the other hand has fared considerably better.¹¹⁹ The U.S. has approved exclusion for 550,000 tonnes. Compare that with actual Chinese imports of 641,000 tonnes in 2017 and China has hardly been affected by the aluminum tariffs.¹²⁰ This disparity in impact on our ally versus our adversary runs contrary to the President’s national security goals. Moreover it is China that distorts global supply as well as demand balances for aluminum. Not Canada. China’s subsidies for its aluminum makers are pulling more metal production into its orbit and fueling excess plant capacity.¹²¹ Under these circumstances it would make more sense for the U.S. to in-

stitute tariffs that had the opposite impact on the two States in order to meet Trump's stated goals.

For these reasons it difficult to see how U.S. security is threatened by dependence on imported aluminum and steel. Relying on a strong ally for non-military metal production does not seem to rise to an emergency in international relations. As stated in *Russia -Traffic in Transit*:

An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.¹²²

In what looked like a sneak-peek for *U.S. -Measures on Steel*, the DSP criticized "protectionism under the guise of security." The Russia Panel highlighted that on a vast majority of occasions where Members invoked Article XXI(b)(iii) the situation involved an "armed conflict and acute international crisis, where heightened tensions could lead to armed conflict".¹²³ By elaborating on the background of Article XXI(b)(iii), the DSP in *Russia -Traffic in Transit* accentuated Members' past history of exercising restraint when invoking Article XXI(b)(iii), and their endeavors to "separate military and serious security-related conflicts from economic and trade disputes."¹²⁴ The DSP did not assign any legal significance to this *obiter dicta*.¹²⁵ But the Panel's analysis should give the U.S. reason to pause and examine further efforts to pursue Section 232 measures if it cannot meet the heightened security standards laid out in *Russia -Traffic in Transit*. This holds true even though the Panel Report in *Russia -Traffic in Transit* (which is not final as both Russia and Ukraine may appeal the decision)¹²⁶ is not binding on the U.S.¹²⁷ The U.S. will have its own chance to present its arguments before a DSP in *U.S. -Measures on Steel*.

C. THE IMPACT OF THE DISPUTE SETTLEMENT CRISIS AT THE WTO

What may ultimately impact the outcome of the dispute over the President's Section 232 tariffs is the dispute settlement crisis at the WTO. Members have failed to update WTO rules, which has led the AB to base its decisions on vague and inadequate directives. The resulting interpretations have led the U.S., along with other members, to allege that binding AB decisions have bypassed Members' rights to amend the WTO rulebook and thus impaired their national sovereignty.¹²⁸ As a result U.S. officials have been blocking appointments of AB members in an effort to force negotiations for new rules.¹²⁹

The blocking of appointments has left the AB with three instead of seven members.¹³⁰ Three is the minimum number of AB members needed to hear a matter on appeal. Terms of service for two of the three remaining AB members expire on December 10, 2019;¹³¹ the WTO will cease to function without a rules update by that date.¹³² This means that the DSP in *U.S. -Measures Against Steel* will need to issue a report and have appeals decided¹³³ by December 10, 2019.¹³⁴ If that does not occur then the parties are not obliged to comply with any adverse report as long as they give notice of plans to appeal.¹³⁵

D. PROBABLE OUTCOME

Based on the Russia Panel's decision to take jurisdiction over *Russia -Traffic in Transit*, it seems likely that a DSP will also find Trump's tariffs justiciable and that decision will be supported by an AB if an appeal is taken. This is because, even though the *Russia -Traffic in Transit* decision is not binding on other tribunals, the Russia Panel took great care to dissect Article XXI(b) clause by clause, discuss the meaning behind the essential security exception, and detail the negotiating history of Article XXI. The DSP provided the AB with a thorough record to sup-

port a decision that the essential security exception is justiciable. And, because there are only three remaining AB members, that same division¹³⁶ will hear any timely appeals taken by the parties in *U.S. -Measures on Steel*. With the same arguments before it logic dictates the AB will rule the same way in both matters.

For these reasons it is likely that a DSP will take jurisdiction over *U.S. -Measures Against Steel*, find the President's invocation of Article XXI(b)(iii) justiciable and determine that the Section 232 tariffs are protectionist measures rather than justified essential security exceptions to GATT 1994.

IV. CONCLUSION

Even though Trump may not prevail on the merits in *U.S. -Measures Against Steel*, a loss at the WTO is not necessarily going to prevent the Administration from achieving its Section 232 goals. Trump's stated aims in his 2018 steel and aluminum proclamations were to "reduce imports to a level that the Secretary assessed would enable domestic steel (and aluminum) producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production."¹³⁷

In the year 2018, when the tariffs went into effect, imports of steel and aluminum, from non-exempt States, decreased quantitatively by more than 10%, although both experienced slight increases in value. Annual domestic U.S. steel production jumped by 6% from 2017 to 2018 while primary U.S. aluminum production increased 18% (January-November, latest data available).¹³⁸

Based on these numbers the Section 232 tariffs helped reach the 80% barrier by raising import duties to spark production capacity.¹³⁹ Domestic primary aluminum producers in Decem-

ber 2018 reached 78% production capacity, up from 43%, in December 2017.¹⁴⁰ For steel, the adjusted year-to-date production through mid-March 16 was 20.3 million net tons, up 6.7% compared with the same period in 2018. This equalled a capacity rate of 81.4%. For the same period in 2018, mills produced 19.0 million tons at a capacity utilization rate of 76.6%. Meaning, in the short term, the Section 232 tariffs accomplished the President's goal of reducing imports to a level that enabled domestic steel and aluminum producers to use approximately 80 percent of existing domestic production capacity.¹⁴¹ What remains to be seen is (i) whether the current reductions will result in long-term viability for the steel and aluminum industries; (ii) the impact of retaliatory tariffs on other domestic industries; (iii) whether the deadweight loss/welfare effect will negatively impact the domestic economy; and (iv) if the Section 232 tariffs are able to address industry fairness and provide U.S. producers with a more level playing field, such that those benefits outweigh any adverse economic results from the Section 232 tariffs. It is only after these questions are answered and *U.S. -Measures on Steel* matter concluded that it can be determined if the tariffs succeeded.

REFERENCES

International Treaties

GENERAL AGREEMENT ON TARIFFS AND TRADE 1994, Apr. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES art 3.2, April 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Annex 2, 1869 U.N.T.S. 401.

International Law -WTO Actions

Canada – Certain Measures Affecting The Automotive Industry, Appellate Body Report, WTO Doc. WT/DS139/AB/R WT/DS142/AB/R (May 31, 2000).

European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products, Appellate Body Report, WTO Doc. WT/DS400/AB/R WT/DS401/AB/R, para. 5.86 (May 22, 2014).

European Communities - Regime for the Importation, Sale and Distribution of Bananas, Panel Report, para. 7.239, WTO Doc. (May 22, 1997).

Russia – Measures Concerning Traffic in Transit, Report of the Panel, WTO Doc. WT/DS512/R (April 5, 2019).

Russia – Measures Concerning Traffic in Transit (DS512), Responses of the United States of America to Questions from the Panel and Russia to Third Parties' (n 20).

U.S.—Certain Measures on Steel and Aluminum Products, Request for Consultations, WTO Doc. WT/DS/544/1 (April 9, 2018).

United States - The Cuban Liberty And Democratic Solidarity Act, Request for the Establishment of a Panel by the European Communities, WTO Doc. WT/DS38/2 (October 8, 1996).

U.S. -Measures on Steel, Request for the Establishment of a Panel by China, WTO DOC. WT/DS544/8 (October 19, 2018).

United States - Trade Measures Affecting Nicaragua, Report of the Panel, Doc. No. L/6053, para. 1.1 (October 13, 1986).

U.S. Law

NATIONAL TECHNOLOGY AND INDUSTRIAL BASE: PERIODIC DEFENSE CAPABILITY ASSESSMENTS, 10 U.S. Code § 2505(1994).

SAFEGUARDING NATIONAL SECURITY, 19 U.S.C. 1862(b)(1)(A) (October 11, 1962).

U.S. Government Reports

Department of Commerce, Bureau of Industry and Security, The Effect of Imports of Steel on the National Security, p. 7(January 11, 2018) https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf [“Steel Report”].

DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, *Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum into the United States*, 83 Federal Register 12106 (March 19, 2018).

Section 232 Investigations: Overview and Issues for Congress, CSR Report R45249, p. 18 (Updated April 2, 2019) <https://fas.org/sgp/crs/misc/R45249.pdf>.

U.S. Customs and Border Protection, Section 232 Tariffs on Aluminum and Steel, UPDATE: Additional Duty on Imports of Steel and Aluminum Articles under Section 232, <https://www.cbp.gov/trade/remedies/232-tariffs-aluminum-and-steel>.

Peter Van den Bossche, *Law and Policy of the World Trade Organization*, 1,161 (Werner Zdouc ed. 4th ed. 2017).

Presidential Proclamations

Presidential Proclamation 9704 of March 8, 2018, *Adjusting Imports of Aluminum into the United States*, 83 Federal Register 11619, March 15, 2018 [“Aluminum Proclamation”].

Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel Into the United States*, 83 Federal Register 11625, para. 5 (March 15, 2018) [“Steel Proclamation”].

Secondary Sources

Kimberly Amadeo, *Most Favored Nation Status*, [thebalance.com](https://www.thebalance.com) (November 4, 2018) <https://www.thebalance.com/most-favored-nation-status-3305840> (last visited April 21, 2019).

Iryna Bogdanova, Adjudication of the GATT security clause: to be or not to be, this is the question, WTI Working Paper No. 01/2019 1,8, https://www.wti.org/media/filer_public/20/83/208397bd-e043-4182-8ba9-8288deaf5a81/adjudication_of_the_gatt_security_clause_iryana_bogdanova.pdf.

Rene Brown, Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton, 86 Geo. L.J. 405, 407-408 (November 1997).

Adam Hayes, *Trade Deficit: Advantages and Disadvantages*, investopedia.com (May 1, 2019) <https://www.investopedia.com/articles/investing/051515/pros-cons-trade-deficit.asp>.

Andy Home, *The United States' aluminum tariff wall is crumbling*, [cnn.com](https://www.cnn.com/2019/02/19/reuters-america-column-the-united-states-aluminum-tariff-wall-is-crumbling-andy-home.html) (February 19, 2019) <https://www.cnn.com/2019/02/19/reuters-america-column-the-united-states-aluminum-tariff-wall-is-crumbling-andy-home.html>.

John H. Jackson, *Helms-Burton, the U.S., and the WTO*, asil.org (March 3, 1997) <https://www.asil.org/insights/volume/2/issue/1/helms-burton-us-and-wto>.

Peter Lindsay, *The Ambiguity Of Gatt Article XXI: Subtle Success Or Rampant Failure?*, DUKE L.J. Vol. 52:1277, 1306 (2003).

James McBride and Andrew Chatzky, *The U.S. Trade Deficit: How Much Does It Matter?*, [cfr.org](https://www.cfr.org/backgrounders/us-trade-deficit-how-much-does-it-matter) (March 8, 2019) <https://www.cfr.org/backgrounders/us-trade-deficit-how-much-does-it-matter>.

Office of the Press Secretary, *The White House, Memorandum to the Secretary of Commerce* (April 20, 2017) <https://www.govinfo.gov/content/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf>.

Office of the Press Secretary, *The White House, Memorandum to the Secretary of Commerce* (April 27, 2017) <https://www.commerce.gov/issues/trade-enforcement/section-232-aluminumSX>.

Office of the White House, *President Trump Approves Section 232 Tariff Modifications* (March 22, 2018) <https://www.whitehouse.gov/briefings-statements/president-trump-approves-section-232-tariff-modifications/> ["Section 232 Modifications"].

Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, piie.com, 1-13, 1 (March 2018) <https://piie.com/system/files/documents/pb18-5.pdf> (last visited April 26, 2019).

James Pethokoukis, *Trump's national security excuse for trade protectionism is almost as bad as the economic one*, aei.org, (February 20, 2018) <https://www.aei.org/publication/trumps-national-security-excuse-for-trade-protectionism-is-almost-as-bad-as-the-economic-one/>.

François Rousseau and Luca Caruso, Bain & Company, *Improving Returns in Capital-Intensive Industries*, [industryweek.com](https://www.industryweek.com/finance/improving-returns-capital-intensive-industries) (February 24, 2016) <https://www.industryweek.com/finance/improving-returns-capital-intensive-industries>.

Terence P. Stewart and Shahrzad Noorbaloochi, *The WTO Panel Report on Article XXI and its Impact on Section 232 Actions*, [stewartlaw.com](http://www.stewartlaw.com/Article/ViewArticle/1155#_ftn49) (April 9, 2019) http://www.stewartlaw.com/Article/ViewArticle/1155#_ftn49 (last visited April 25, 2019).

Donald J. Trump, *President Donald J. Trump is Confronting China's Unfair Trade Policies*, Fact Sheets (May 29, 2018) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-confronting-chinas-unfair-trade-policies/>.

Daniel Workman, *U.S. Aluminum Imports By Supplying Country*, www.worldstopexports.com (March 14, 2019) <http://www.worldstopexports.com/us-aluminum-imports-by-supplying-country/>

Appellate Body Members, [wto.org](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm), https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

China's subsidised aluminium 'distorting global supply, demand', [businesstimes.com](https://www.businesstimes.com.sg/energy-commodities/chinas-subsidised-aluminium-distorting-global-supply-demand) (February 7, 2019) <https://www.businesstimes.com.sg/energy-commodities/chinas-subsidised-aluminium-distorting-global-supply-demand> (last visited April 30, 2019).

E.U. Proposes Naming Panel to Handle WTO Complaint Against Helms-Burton, 14 Int'l Trade Rep. (BNA), No. 6, at 230-31 (Feb. 5, 1997).

GATT 1994 – Article II (Jurisprudence), [wto.org](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf.

GATT Council, Minutes of Meeting Held in the Centre William Rappard on May 29, 1985, at 5, C/M/188 (June 28, 1985).

Get tariff data, [wto.org](https://www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm), https://www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm (a tariff rate charged as percentage of the price).

Letter from James N. Mattis, Secretary of Defense, to Wilbur L. Ross Jr., Secretary of Commerce, 2018, https://www.commerce.gov/sites/commerce.gov/files/departments_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf.

Members and Observers, wto.org, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited April 21, 2019).

New Aluminum and Steel Tariffs, www.ajot.com (March 13, 2018) <https://www.ajot.com/news/new-aluminum-and-steel-tariffs> (last visited April 23, 2019).

Steel and Aluminum Tariffs: Thousands of Exclusion Requests from US Firms, www.quantgov.org, <https://quantgov.org/tariff-exclusion/>

ENDNOTES

¹The balance of trade is the difference between a country's exports and imports.

²James McBride and Andrew Chatzky, *The U.S. Trade Deficit: How Much Does It Matter?*, [cfr.org](https://www.cfr.org/backgrounders/us-trade-deficit-how-much-does-it-matter) (March 8, 2019) <https://www.cfr.org/backgrounders/us-trade-deficit-how-much-does-it-matter> (last visited April 28, 2019); Adam Hayes, Trade Deficit: Advantages and Disadvantages, [investopedia.com](https://www.investopedia.com/articles/investing/051515/pros-cons-trade-deficit.asp) (May 1, 2019) <https://www.investopedia.com/articles/investing/051515/pros-cons-trade-deficit.asp> (last visited May 1, 2019).

³U.S. Customs and Border Protection, Section 232 Tariffs on Aluminum and Steel, UPDATE: Additional Duty on Imports of Steel and Aluminum Articles under Section 232, <https://www.cbp.gov/trade/remedies/232-tariffs-aluminum-and-steel>.

⁴Donald J. Trump, *President Donald J. Trump is Confronting China's Unfair Trade Policies*, Fact Sheets (May 29, 2018) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-confronting-chinas-unfair-trade-policies/>.

⁵U.S.—*Certain Measures on Steel and Aluminum Products*, Request for Consultations, WTO Doc. WT/DS/544/1 (April 9, 2018); *United States — Certain Measures on Steel and Aluminium Products* (DS550), Request for Consultations, WTO Doc.DS/550/1 (June 15, 2018) [hereinafter, “Requests for Consultations”]

⁶ Understanding on Rules and Procedures Governing The Settlement of Disputes art 3.2, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter “DSU”].

⁷U.S. -*Certain Measures on Steel and Aluminium Products* (DS 544) Request for the Establishment of a Panel by China, WTO Doc. WT/DS544/8 (October 19, 2018); Canada has also requested a Panel, *United States — Certain Measures on Steel and Aluminium Products* (DS550), Request for the Establishment of a Panel, WTO Doc.DS/550/11 (October 19, 2018)

⁸*Section 232 Investigations: Overview and Issues for Congress*, CSR Report R45249, p. 18 (Updated April 2, 2019) <https://fas.org/sgp/crs/misc/R45249.pdf> (last visited April 28, 2019)[hereinafter “Section 232 Investigations”].

⁹ China also alleged that the section 232 steel and aluminum tariffs violate Articles X(3)(A) and XIX:1(a), XIX:2 of the GATT 1994 and Articles 2.1, 2.2, 4.1, 4.2, 5.1, 7, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards, but those issues are beyond the scope of this paper.

¹⁰ SAFEGUARDING NATIONAL SECURITY, 19 U.S.C. 1862(b)(1)(A) (October 11, 1962).

¹¹Office of the Press Secretary, *The White House, Memorandum to the Secretary of Commerce* (April 20, 2017) <https://www.govinfo.gov/content/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf>. [hereinafter “Steel Memo to Secretary”]

¹² Department of Commerce, Bureau of Industry and Security, *The Effect of Imports of Steel on the National Security*, p. 7 (January 11, 2018) https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf [“Steel Report”].

¹³Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 Calif. L. Rev. 1162, 1200- 1(July 1987)(Section 232 of the Trade Expansion Act of 1962 imparts a President with broad authority to limit imports for foreign policy reasons.The President’s power includes the ability to “adjust the imports” of an article that “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” Section 232 does not define the phrase “national security”, but the “accompanying statutory language”, legislative history, use of statute, and sparse case law strongly suggest that the purpose of section 232 is to limit imports of critical defense materials, principally to protect a domestic production base or to protect against an embargo by an important foreign supplier).

¹⁴ Steel Report, *supra* note 12, at 7(a capacity rate of at least 80% is deemed a measure of a healthy industry sector).

¹⁵Id. at 8 (Purdue University produced a Global Trade Analysis Project (GTAP) Model that determined a 63 percent quota could reduce steel imports by about 37 percent (13.3 million metric tons) from 2017 levels. Import levels for 2017 were projected to reach 36.0 million metric tons, based on imports from January to October. Therefore, according to the GTAP model, instituting the 63% quota would result in imports of 22.7 million metric tons, which would allow an 80 percent capacity utilization rate of 2017 demand levels (including exports))(emphasis added).

¹⁶Id.

¹⁷Id.

¹⁸Id. (Here the GTAP Model predicted that a 53 percent tariff on steel imports from the select countries, which, in 2017, accounted for less than 4 percent of U.S. steel exports, would reduce imports from 2017 levels by 13.3 million metric tons. These increases would allow domestic production to reach 80 percent capacity utilization rate of 2017 demand levels (including exports)).

¹⁹Id. at 9.

²⁰Id.

²¹*Steel and Aluminum Tariffs: Thousands of Exclusion Requests from US Firms*, www.quantgov.org, <https://quantgov.org/tariff-exclusion/> (last visited May 1, 2019)(As of March 18, 2019, there have been a total of 51,345 steel and aluminum tariff exclusion requests filed by 905 firms in 303 congressional districts across 46 states plus Puerto Rico. Of these filings, 45,328 exclusion requests ask for an exemption from the steel tariffs, and steel manufacturers have filed 19,543 objections. The BIS has reached a decision on 61.9 percent of the steel exclusion requests, 21,464 have been approved and 6,588 have been denied. Additionally, 6,017 exclusion requests ask for an exemption from the aluminum tariffs, and aluminum manufacturers have filed 935 objections. The BIS has reached a decision on 78.2 percent of the aluminum exclusion request, 4,069 have been approved and 637 have been denied.)[hereinafter “*Steel and Aluminum Tariffs*”].

²² DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, *Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum into the United States*, 83 Federal Register 12106 (March 19, 2018).

²³*Steel and Aluminum Tariffs*, *supra* note 21.

²⁴19 U.S.C. 1862(b)(1)(A).

²⁵Office of the Press Secretary, The White House, Memorandum to the Secretary of Commerce (April 27, 2017) <https://www.commerce.gov/issues/trade-enforcement/section-232-aluminumSX> [hereinafter “Aluminum Memo to Secretary”].

²⁶U.S. Department of Commerce Bureau of Industry and Security, *The Effect of Imports of Aluminum on the National Security* (January 17, 2018) https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf [“Aluminum Report”].

²⁷Id.

²⁸Id.(The Secretary suggested taking no action put the U.S. in danger of losing smelting capabilities for primary aluminum.).

²⁹ Id. at 7 (based on 2017 annualized imports).

³⁰ Id.(by 669,000 metric tons, bringing total production to 1.45 million metric tons).

³¹ Id.

³²Id. (According to the Secretary, in the Aluminum Report, “These five countries are the source of substantial imports due to significant overcapacity, and/or are potential unreliable suppliers or likely sources of transshipped aluminum from China.”).

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel Into the United States*, 83 FEDERAL REGISTER 11625, para. 5 (March 15, 2018) [“Steel Proclamation”].

³⁷*Get tariff data*, [wto.org](https://www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm), https://www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm (a tariff rate charged as percentage of the price).

³⁸ Id. at paras 6 and 8. Shannon Towaga Mercer and Matthew Kahn, *America Trades Down: The Legal Consequences of President Trump's Tariffs*, lawfareblog.com (March 13, 2018) <https://www.lawfareblog.com/america-trades-down-legal-consequences-president-trumps-tariffs> (While the Commerce Department recommended a 24 percent steel tariff, the president reportedly chose 25 percent because it “sounded better”)The President issued another proclamation on August 10, 2018, which raised the Section 232 tariff to 50% on covered steel imports from Turkey. The President justified the action by stating “imports have not declined as much as anticipated and capacity utilization has not increased to [the] target level.” Office of the White House, Presidential Proclamation Adjusting Imports of Steel Into the United States (August 10, 2018) <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-5/> [“Turkey Proclamation”].

³⁹ Id. at (2).

⁴⁰ Id.

⁴¹Presidential Proclamation 9704 of March 8, 2018, *Adjusting Imports of Aluminum into the United States*, 83 FEDERAL REGISTER 11619, March 15, 2018 [“Aluminum Proclamation”].

⁴² Id. at paras 7.

⁴³ Id. at (2).

⁴⁴ Id.

⁴⁵Office of the White House, President Trump Approves Section 232 Tariff Modifications (March 22, 2018) <https://www.whitehouse.gov/briefings-statements/president-trump-approves-section-232-tariff-modifications/> [“Section 232 Modifications”].

⁴⁶Mercer, *supra* note 38.

⁴⁷Kimberly Amadeo, *Most Favored Nation Status*, thebalance.com (November 4, 2018) <https://www.thebalance.com/most-favored-nation-status-3305840> (last visited April 21, 2019).

⁴⁸ Id.

⁴⁹Peter Van den Bossche, *Law and Policy of the World Trade Organization*, 1,161 (Werner Zdouc ed. 4th ed. 2017).

⁵⁰*European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products*, Appellate Body Report, WTO Doc. WT/DS400/AB/R WT/DS401/AB/R, para. 5.86 (May 22, 2014) [EC-Seal Products].

⁵¹Steel Proclamation, *supra* note 36; Aluminum Proclamation, *supra* note 41; Section 232 Modifications, *supra* note 45.

⁵²GENERAL AGREEMENT ON TARIFFS AND TRADE 1994, article I:1, Apr. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter “GATT 1994”]. (“Most-Favoured-Nation Treatment:1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”).

⁵³Van den Bossche, *supra* note 49 at 1,177.

⁵⁴European Communities - Regime for the Importation, Sale and Distribution of Bananas, Panel Report, para. 7.239, WTO Doc. (May 22, 1997)[hereinafter “*EC -Bananas IIP*”].

⁵⁵Id.

⁵⁶*Canada – Certain Measures Affecting The Automotive Industry*, Appellate Body Report, WTO Doc. WT/DS139/AB/R WT/DS142/AB/R (May 31, 2000).

⁵⁷Id. at para. 79.

⁵⁸Id.

⁵⁹Steel Proclamation, *supra* note 36; Aluminum Proclamation, *supra* note 41; Section 232 Modifications, *supra* note 45 (Brazil and South Korea did not negotiate exemptions from the aluminum tariffs).

⁶⁰ Steel Proclamation, *supra* note 36; Section 232 Modifications, *supra* note 45.

⁶¹ Aluminum Proclamation, *supra* note 41; Section 232 Modifications *supra* note 45.(The section 232 aluminum tariffs do not cover bauxite or alumina feedstock, aluminum waste and scrap, and/or aluminum powders or flakes).

⁶²Van den Bossche, *supra* note 49 at 1,190.

⁶³ *EC-Seal Products*, *supra* note 50 at para. 5.88.

⁶⁴Steel Proclamation, *supra* note 36; Aluminum Proclamation, *supra* note 41; Section 232 Modifications *supra* note 45 (Argentina, Australia,(indefinitely exempt) Canada, Mexico, the E.U.(exempted until June 1, 2018).

⁶⁵*EC-Seal Products*, *supra* note 50 at para. 5.82 and 5.87 (Although, article I does not ‘require a demonstration of the actual trade effects of a specific measure).

⁶⁶ *EC – Bananas III*, *supra* note 54, para. 7.239.

⁶⁷Requests for Consultations, *supra* note 5.

⁶⁸ GATT 1994, *supra* note 52, at art. II (Schedules of Concessions:(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date).

⁶⁹Id.

⁷⁰ GATT 1994, *supra* note 52, art. II.

⁷¹ Id.

⁷² Id.

⁷³ *European Communities — Customs Classification of Frozen Boneless Chicken Cuts* (DS 269), Report of the Panel (DS 269), WTO Doc. WT/DS269/R, para. 7.65. (May 30, 2005) [hereinafter "EC – Chicken Cuts"]

⁷⁴ *GATT 1994 – Article II (Jurisprudence)*, [wto.org](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf.

⁷⁵ *GATT 1994 – Article II (Jurisprudence)*, [wto.org](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf.

⁷⁶ Requests for Consultations, *supra* note 5.

⁷⁷ Id.

⁷⁸ GATT 1994, *supra* note 52, at art. XXI (b).

⁷⁹ Iryna Bogdanova, *Adjudication of the GATT security clause: to be or not to be, this is the question*, WTI Working Paper No. 01/2019 1,8, https://www.wti.org/media/filer_public/20/83/208397bd-e043-4182-8ba9-8288deaf5a81/adjudication_of_the_gatt_security_clause_iryana_bogdanova.pdf (last visited March 19, 2019).

⁸⁰ Id.

⁸¹ Id. at 8-9 (citing, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Report of the Panel, WTO Doc. WT/DS316/R (adopted June 1, 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p 685 para. 7.89).

⁸² The political question doctrine refers to the idea that an issue is so politically charged that federal courts, which are typically viewed as the apolitical branch of government, should not hear the issue. The doctrine is also referred to as the justiciability doctrine. Legal Information Institute, https://www.law.cornell.edu/wex/political_question_doctrine.

⁸³ Bogdanova, *supra* note 79 at 13.

⁸⁴ *Russia – Measures Concerning Traffic in Transit* (DS512), Responses of the United States of America to Questions from the Panel and Russia to Third Parties' (n 20) (The U.S. distinguishes between justiciability and jurisdiction. According to the U.S., jurisdiction relates to the panel's capacity to make legal decisions whereas justiciability 'relates to the nature of the inquiry that an adjudicator could make over a matter put before it.').

⁸⁵ *United States - Trade Measures Affecting Nicaragua*, Report of the Panel, Doc. No. L/6053, para. 1.1 (October 13, 1986) (This report was never adopted) [hereinafter "US – Nicaraguan Trade"].

⁸⁶ Id. at para. 3.1.

⁸⁷ GATT Council, Minutes of Meeting Held in the Centre William Rappard on May 29, 1985, at 5, C/M/188 (June 28, 1985).

⁸⁸ US – Nicaraguan Trade (1986), *supra* note 85 at para. 4.1.

⁸⁹*United States - The Cuban Liberty And Democratic Solidarity Act*, Request for the Establishment of a Panel by the European Communities, WTO Doc. WT/DS38/2 (October 8, 1996)(President Clinton originally opposed the Act, but signed it into law in March 1996, following the downing by the Cuban Air Force of two light planes flown by members of an anti-Castro organization based in the United States)[hereinafter “U.S. — Helms Burton”]; John H. Jackson, *Helms-Burton, the U.S., and the WTO*, [asil.org](https://www.asil.org) (March 3, 1997) <https://www.asil.org/insights/volume/2/issue/1/helms-burton-us-and-wto> (“Helms-Burton does several things. It freezes the 35 year-old U.S. embargo against trade with and investment in Cuba, which applies not only to U.S. firms but also to overseas firms owned or controlled by “U.S. persons”. It opens third country companies “trafficking” in Cuban property once owned by Americans to suits in the United States by the former owners, suits that could result in damages equal not to the value of trade being conducted by the defendants, but to the value of the property once owned by the American plaintiffs, and possibly even to three times that value. And it requires exclusion from the United States, even for visits, of officers or controlling shareholders -- and their families -- of companies that “traffic” in property formerly owned or claimed to be owned by American nationals.”).

⁹⁰*Id.*

⁹¹*Id.*

⁹²The WTO hoped Clinton's re-election in November and the WTO ministerial meeting in Singapore in December 1996 could advance the opportunity for compromise between the United States and E.U.; Rene Brown, *Revisiting “National Security” in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 Geo. L.J. 405, 407-408 (November 1997)(citing E.U. Proposes Naming Panel to Handle WTO Complaint Against Helms-Burton, 14 Int'l Trade Rep. (BNA), No. 6, at 230-31 (Feb. 5, 1997)).

⁹³Van den Bossche, *supra* note 49 at 2,171; *U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle*, 14 Int'l Trade Rep. (BNA), No. 9, at 351 (Feb. 26, 1997).

⁹⁴Peter Lindsay, *The Ambiguity Of GATT Article XXI: Subtle Success Or Rampant Failure?* DUKE L.J. Vol. 52:1277, 1306 (2003).

⁹⁵*Russia – Measures Concerning Traffic in Transit*, Report of the Panel, WTO Doc. WT/DS512/R (April 5, 2019) [hereinafter “Russia – Traffic in Transit”].

⁹⁶*Id.* at para. 2.1.

⁹⁷*Id.* at 7.27

⁹⁸*Id.*

⁹⁹*Id.* at 7.28.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 7.33.

¹⁰²*Id.* at 7.31.

¹⁰³Terence P. Stewart and Shahrzad Noorbaloochi, *The WTO Panel Report on Article XXI and its Impact on Section 232 Actions*, [stewartlaw.com](http://www.stewartlaw.com) (April 9, 2019)http://www.stewartlaw.com/Article/ViewArticle/1155#_ftn49 (last visited April 25, 2019).

¹⁰⁴*Russia – Traffic in Transit*, *supra* note 95 at para. 7.60; Stewart, *supra* note 113.

¹⁰⁵*Id.* at paras 7.82, 7.132, 7.146; Stewart *supra* note 113.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at paras. 7.102.

¹⁰⁸*Id.* at para. 7.103.

¹⁰⁹Request for Consultations, *supra* note 5.

¹¹⁰*Russia – Traffic in Transit*, *supra* note 95 at para. 7.123.

¹¹¹*Id.* at para. 7.122.

¹¹²*Id.* at para. 7.122.

¹¹³*Id.* at para. 7.122.

¹¹⁴Steel Report, *supra* note 12 at 5.

¹¹⁵James Pethokoukis, *Trump's national security excuse for trade protectionism is almost as bad as the economic one*, [aei.org](https://www.aei.org/publication/trumps-national-security-excuse-for-trade-protectionism-is-almost-as-bad-as-the-economic-one/), (February 20, 2018) <https://www.aei.org/publication/trumps-national-security-excuse-for-trade-protectionism-is-almost-as-bad-as-the-economic-one/> (last visited April 30, 2019).

¹¹⁶*See* Letter from James N. Mattis, Secretary of Defense, to Wilbur L. Ross Jr., Secretary of Commerce, 2018, https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf. (“[T]he US military requirements for steel and aluminum each only represent about three percent of US production. Therefore, DoD does not believe that the finds in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.”)[hereinafter “Mattis Letter”]

¹¹⁷Aluminum Report, *supra* note 26 at 15.

¹¹⁸Daniel Workman, *U.S. Aluminum Imports By Supplying Country*, [worldstopexports.com](http://www.worldstopexports.com) (March 14, 2019) <http://www.worldstopexports.com/us-aluminum-imports-by-supplying-country/China's-subsidised-aluminium-distorting-global-supply-demand>

¹¹⁹NATIONAL TECHNOLOGY AND INDUSTRIAL BASE: PERIODIC DEFENSE CAPABILITY ASSESSMENTS, 10 U.S. Code § 2505(1994)(In US law, the national technology and industrial base (NTIB) comprises the industrial bases of the United States and three of its closest historical allies (Australia, Canada, and the United Kingdom)).

¹²⁰ Andy Home, The United States' aluminum tariff wall is crumbling: Andy Home, [reuters.com](https://www.reuters.com/article/us-usa-trade-aluminium-ahome/the-united-states-aluminum-tariff-wall-is-crumbling-andy-home-idUSKCN1Q9044) (February 19, 2019) <https://www.reuters.com/article/us-usa-trade-aluminium-ahome/the-united-states-aluminum-tariff-wall-is-crumbling-andy-home-idUSKCN1Q9044> (last visited May 3, 2019).

¹²¹*China's subsidised aluminium 'distorting global supply, demand'*, [businesstimes.com](https://www.businesstimes.com.sg/energy-commodities/chinas-subsidised-aluminium-distorting-global-supply-demand) (February 7, 2019) <https://www.businesstimes.com.sg/energy-commodities/chinas-subsidised-aluminium-distorting-global-supply-demand> (last visited April 30, 2019).

¹²²*Russia – Traffic in Transit*, *supra* note 95 at para. 7.76.

¹²³*Id.* at 7.81.

¹²⁴*Id.*

¹²⁵Obiter dictum: A judicial comment made while delivering an official opinion, the one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive.) Blacks Law Dictionary (3rd Pocket Ed. 2006).

¹²⁶DSU, *supra* note 6.

¹²⁷ *Id.* at art 7.2.

¹²⁸Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, piie.com, 1-13, 1 (March 2018) <https://piie.com/system/files/documents/pb18-5.pdf> (last visited April 26, 2019).

¹²⁹*Id.*

¹³⁰Appellate Body Members, [wto.org](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm), https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

¹³¹Id.

¹³²Payosova, *supra* note 127 at 1-13.

¹³³The Trump administration has taken issue with AB members finishing work on cases after their terms of service expired; instead believing they should seek prior permission from the WTO membership. William Alan Reinsch, Jack Caporal, Jonas Heering, *Article 25: An Effective Way to Avert the WTO Crisis?*, [csis.org](https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis) (January 24, 2019) <https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis>.

¹³⁴DSU, *supra* note 6 at art. 17.2.

¹³⁵Id. at art. 16.1.

¹³⁶DSU, *supra* note 6 at art. 17.2 (AB members are appointed to four-year terms and serve in three member panels called “the division”. Each Member the option for a second term. Terms are staggered, so that members of the Appellate Body do not complete their terms at the same time).

¹³⁷Steel Proclamation, *supra* note 36; Aluminum Proclamation, *supra* note 41.

¹³⁸Section 232 Investigations, *supra* note 8, p. 12, 14-15 (According to data released by the American Iron and Steel Institute (“AISI”), the steel capacity utilization rate through Jan. 12 reached 79.5%, up from the 73.6% posted during the same period in 2018. By the end of last year U.S. primary aluminum output was running at an annualized rate of 1.15 million tonnes, equivalent to 63 percent of domestic capacity, according to figures from the Aluminum Association).

¹³⁹François Rousseau and Luca Caruso, Bain & Company, *Improving Returns in Capital-Intensive Industries*, [industry-week.com](https://www.industryweek.com/finance/improving-returns-capital-intensive-industries) (February 24, 2016) <https://www.industryweek.com/finance/improving-returns-capital-intensive-industries>; Home, *supra* note 120. (The metal industries are capital intensive. Capital-intensive industries have ‘painfully low’ margins, which means they are under intense pressure to produce profits and keep return on capital employed (“ROCE”) above the cost of capital. This means that slight changes in output have significant effects on profitability.) (last visited April 29, 2019).

¹⁴⁰Section 232 Investigations, *supra* note 8, p. 14-15.

¹⁴¹Id.