TRADE AND WARS: CHECKING THE PRESIDENT'S OVERBROAD TRADE SANCTION AUTHORITY

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Section 232 of the Trade Expansion Act of 1962 and the International Emergency Economic Powers Act (IEEPA) grant the President the authority to impose tariffs on goods imported from foreign nations, in order to protect national security and respond to national emergencies. The Trump administration wielded this power to exert political pressure on China, Mexico, Turkey, and other trade partners, cloaking its true policy motivations beneath a pretext of national security interests. Judicial review of these tariff actions before the U.S. Court of International Trade has not been sufficient to restrict executive tariff action to those sanctions necessary to address legitimate security threats. Building on existing scholarship critiquing the overbreadth of the President's tariff authority, this Note traces the scope of that authority to the over-expansive definitions of national security and national emergencies in the current statutory scheme. The Note proceeds to consider the breadth of the President's trade sanction authority in relation to the General Agreement on Tariffs and Trade's national security exception, which was limited by the World Trade Organization's Dispute Settlement Body in Russia v. Ukraine*. With that decision's narrower definition of national security in mind, the Note concludes by recommending amendments to Section 232 and the IEEPA that would hold the President more accountable to the intended purpose of those statutes, to the electorate and to the United States' international trade commitments, while still allowing the President the flexibility to use tariffs to address ever-evolving security threats.*

* J.D., 2021, New York University School of Law. Many thanks to Professor Samuel Estreicher for his guidance throughout the writing process, and to the staff of the N.Y.U. Journal of Legislation & Public Policy for their exceptional editorial work.

Introduction

Lawyers and legislators have long treated national security as an area of exceptionalism in both domestic and international law. The fundamental concept that times of exigency may warrant and even require the invocation of executive powers beyond those ordinarily available has existed since at least the writings of John Locke,[1] and Presidents of the United States have held such powers since the Washington Administration.[2] International law also carves out an exception for national security, excluding acts of national or collective self-defense from the general prohibition on the use of force.[3] The security of nations and their peoples deserves the utmost protection, but problems arise when leaders invoke national security as a legal justification in policy areas outside the realm of actual military and other urgent threats to national security. This Note will address this issue as it pertains to national security justifications for American trade sanctions.

The Trump Presidency presents fertile ground for analysis of the President's national security trade sanction authority. From the beginning of his candidacy, President Trump made clear his desire to end what he characterized as unfair trade practices by other nations,[4] and

1. John Locke, Two Treatises of Government 203-07 (Thomas I. Cook, ed., 1947).

2. L. Elaine Halchin, Cong. Rsch. Serv., 98-505, National Emergency Powers 4 (2021). ("Congress enacted legislation providing for the calling forth of militia to suppress insurrections and repel invasions. Section 3 of this statute required that a presidential proclamation be issued to warn insurgents to cease their activity. . .On August 17, 1794 President Washington issued such a proclamation.").

3. *See* U.N. Charter art. 51, ¶ 1 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.").

4. *See, e.g.*, Time Staff, *Read Donald Trump's Speech on Trade*, Time (June 28, 2016, 4:55 PM), https://time.com/4386335/donald-trump-trade-speech-transcript/ (In a speech given in Monesson, PA, President Trump stated "I will use every lawful

trade policy played perhaps the largest role of any policy area in his nationalist and protectionist agenda. On March 8, 2018, President Trump invoked Section 232 of the Trade Expansion Act of 1962[5] to impose a 25 percent tariff[6] on steel imports and a 10 percent tariff on aluminum imports from numerous trade partners.[7] On May 30, 2019, pursuant to a national emergency he had declared a few months prior,[8] President Trump invoked the International Emergency Economic Powers Act (IEEPA)[9] to impose a 5 percent tariff on all goods imported from Mexico, and threatened periodic 5 percent increases to that tariff until Mexico took steps to reduce illegal migration from Mexico into the United States.[10] On August 10, 2018, he again cited his Section 232 authority to raise the tariffs on steel imports from Turkey to 50 percent.[11] In each of these cases—which represent only an illustrative sampling of the Trump administration's trade sanction actions—the administration justified the tariffs imposed as purportedly necessary to preserve the national security of the United States.[12] The volume of national security tariff actions taken by the Trump administration, and the variety of circumstances to which that administration applied them, have no precedent before or since the passage of the Trade Expansion Act, the IEEPA, and other delegating statutes.[13]

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presidential power to remedy trade disputes, including the application of tariffs consistent with Section 201 and 301 of the Trade Act of 1974, and Section 232 of the Trade Expansion Act of 1962.").

5. Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1962).

6. A tariff is a duty imposed by a government on imported or exported goods. *Tariff*, BLACK'S LAW DICTIONARY (11th ed. 2019). Both Congress and the Executive have Constitutional or delegated authority to set tariffs, and the tariff schedule is administered by U.S. Customs and Border Protection. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW 1, 2 (2021).

7. *See* Proclamation No. 9704, 83 Fed. Reg. 11,619 ¶ 2 (Mar. 8, 2018); Proclamation No. 9705, 83 Fed. Reg. 11,625 ¶ 2 (Mar. 8, 2018).

8. *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). President Biden terminated the emergency on his first day in office. Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

9. International Emergency Economic Powers Act, 50 U.S.C. § 1701–07 (1977).

10. Presidential Statement on Emergency Measures to Address Illegal Migration at the Mexico-United States Border, 2019 DAILY COMP. PRES. DOC. 354 (May 30, 2019); *see also* Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019, 4:19 PM), https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico (discussing the tariff measure and courts' treatment of the statutory authority under which President Trump acted).

11. Proclamation No. 9772, 158 Fed. Reg. 40,429 (Aug. 10, 2018).

12. *See, e.g.*, Proclamation No. 9704, *supra* note 7, at ¶ 7 ("Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of aluminum articles pose to the national security.").

13. *See, e.g.*, RACHEL F. FEFER, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 at 1 (2020) (noting that presidents had recommended

There are limited circumstances in which defense of national security may require tariffs on certain goods, but the current legislative scheme affords a national security pretext to actions not necessitated by legitimate security interests. The President may, for example, wish to impose a tariff on an instrument unique and necessary to military aircraft in order to ensure that domestic capacity to produce that instrument can sufficiently support the U.S. military's demand in a worst-case scenario in which all nations exporting the instrument to the United States simultaneously cut off the supply—whether they did so to intentionally undermine U.S. defense capacity or not. Such an action would constitute a proper exercise of the President's national security tariff authority under the aforementioned delegating statutes. However, as this Note will show, the statutes at issue require little explanation or verification of the existence of such a threat to U.S. defensive capacity, to the point that the President can—and has—imposed tariffs on goods the import of which did not actually undermine national security. Even if the President believed, wrongly but in good faith, that importing the good threatened national security, or that a valid non-security reason for the tariff existed, the lack of clarity and limiting principles in the current statutory structure fails to hold the President accountable for the reasoning behind any tariffs imposed and undermines the constitutional allocation of general tariff power to Congress.

One hundred and fifty years ago, one could not have imagined a President dictating trade policy so directly. Article I, Section 8 of the United States Constitution grants to Congress the exclusive "Power To lay and collect Taxes, Duties, Imposts, and Excises,"[14] and the power to "regulate Commerce with foreign nations."[15] These enumerated powers effectively grant Congress the sole authority to regulate trade between the United States and foreign nations, and Congress alone exercised the power to alter tariffs until the early 1930s.[16] However, beginning in the late nineteenth century, the need to negotiate trade agreements with other countries brought Congress's constitutional au-

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action pursuant to a Section 232 investigation only six times prior to President Trump, who acted on two investigations and commenced a third); *see also* CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE at 27 (2020) (noting that, prior to President Trump, no president had used the IEEPA to place tariffs on imports from a specific country).

14. U.S. CONST. art. I, § 8.

15. *Id.*

16. U.S. INT'L TRADE COMM'N, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS, INV. NO. 332-325, PUB. 4094 3, at 65 (2009) (SIXTH UPDATE).

thority over trade into contention with the constitutional authority of the President to direct foreign relations.[17] Additionally, because the ratification of the Sixteenth Amendment to the Constitution in 1913 legalized the imposition of direct federal income taxes,[18] tariffs accounted for less than ten percent of federal revenue by the 1930s.[19] The argument for executive input on tariffs grew stronger once objectives other than revenue began to inform tariff policy.[20]

Congress responded by gradually delegating its authority to regulate foreign trade to the Executive in a series of statutes passed over the course of the 20th century, starting with the Reciprocal Trade Agreements Act of 1934.[21] While Congress broadly intended these delegations to the Executive to liberalize trade by granting the President the authority to negotiate away international trade barriers, they also provided explicitly for presidential authority to impose tariffs in order to protect national security.[22] Recent scholarship has highlighted the extent to which this delegation of authority to the President to raise protectionist trade barriers in order to protect national security constitutes an exception in the mostly trade-liberalizing body of U.S. trade law.[23] International trade agreements have also long recognized such an exception, demonstrating that governments accept the general principle that security threats may arise which require a response that includes trade control measures.[24] Scholars have identified and analyzed the exceptional nature of national security sanctions, but have paid

17. While not stated explicitly in the Constitution, the primacy of the Executive in managing foreign relations has been inferred from several of the president's enumerated constitutional powers, including his position as the Commander in Chief of the armed forces and his power to make treaties and appoint ambassadors. *See* U.S. CONST. art. II, § 2, cl. 1–2. The Supreme Court has long recognized the "delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

18. U.S. CONST. amend. XVI (1913) ("The Congress shall have power to lay and collect taxes on incomes, form whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

19. Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, *in* NAT'L BUREAU OF ECON. RSCH., THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325 (Michael D. Bordo et al., eds., 1998).

20. *Id.*

21. Reciprocal Trade Agreements Act, 19 U.S.C. § 1351 (1934).

22. Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1115–16 (2020).

23. *See generally id.*; J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020).

24. *See, e.g.*, General Agreement on Tariffs and Trade 1994, art. XIX, 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] (providing that

less attention to exactly how the boundaries of executive national security tariff authority came to encompass the wide array of applications that the Trump administration leveraged.

Indeed, President Trump invoked his national security tariff authority as a means of implementing foreign economic policy under the guise of national security policy, and thereby avoided disclosure of and accountability for the true rationales motivating his actions. His administration appeared at times to have identified a foreign country as a target for import restrictions first, before working its way backward to a national security justification. For example, the President doubled tariffs on steel and aluminum imported from Turkey in a time of political and economic friction between Turkey and the United States.[25] In order to retaliate against Turkey for its detainment of an American pastor on espionage charges,[26] the administration targeted Turkish exports to the United States with onerous tariffs, claiming that the United States needed the import restrictions to maintain sufficient domestic capacity to produce steel and aluminum.[27] This rationale served as mere pretext, as the Department of Defense confirmed in response to a separate Department of Commerce investigation that only a small percentage of U.S. production capacity fulfilled the U.S. military's aluminum and steel needs.[28] The administration used a similar strategy with its import restrictions on Chinese goods during the President's trade war with China—a staple of his populist campaign to appeal to American industry and workers.[29]

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contracting parties may promulgate trade barriers in contravention of other provisions of the Agreement if necessary to safeguard their national security interests).

25. Proclamation No. 9772, 158 Fed. Reg. 40,429 (Aug. 10, 2018). Discussed *infra* at 704.

26. Jim Tankersly, Ana Swanson & Matt Phillips, *Trump Hits Turkey When It's Down, Doubling Tariffs*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/us/politics/trump-turkey-tariffs-currency.html.

27. Proclamation No. 9772, at ¶¶ 4–5.

28. *See* Plaintiff Transpacific Steel LLC's Response in Opposition to Defendant's Motion to Dismiss, at 5–6, Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019) (No. 19-00009) [hereinafter Plaintiff Transpacific's Response Brief] ("'U.S. Military requirements for steel and aluminum each only represent about three percent of U.S. production and '[t]herefore, DoD [the Department of Defense] does not believe that the findings in the reports [by Commerce] impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.'").

29. *See, e.g.*, Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *The Geoeconomic World Order*, LAWFARE (Nov. 19, 2018, 11:17 AM), https://www.lawfareblog.com/geoeconomic-world-order (noting that the great power rivalry between China and the United States is "characterized by. . .the clear use of economic tools to achieve strategic goals"); Bernie Becker, *Trump's 6 Populist Positions*, POLITICO (Feb. 13, 2016, 4:42 PM), https://www.politico.com/story/2016/02/donald-trump-

The use of national security and national emergency-based tariff powers to implement an administration's wider political agenda undermines the separation of federal government powers set forth in the Constitution and the democratic principles that separation supports. The Constitution delegates to Congress the power to legislate broadly within the enumerated categories of Article I, Section 8 in part because Congress is held most directly accountable to the people through frequent popular elections. Though the Supreme Court has held that Congress may delegate its constitutional policymaking authority to the Executive subject to an "intelligible principle" directing and constraining the authorized party's action,[30] the Court also precluded congressional delegation to the President of an "unfettered discretion" to make any laws the President believes necessary to pursue some general policy aim.[31] In other words, a President cannot unilaterally exercise Congress' full, discretionary lawmaking power, and to the extent a President does receive that authority from Congress, there must exist some limiting framework to which voters might hold her accountable. This Note will argue that the President's national security and national emergency tariff powers allow for unfettered discretionary policymaking in a realm of authority constitutionally assigned to Congress, and thus enable the exercise of legislative lawmaking power in the absence of sufficient democratic accountability.

While the Trump administration demonstrated a greater political will than previous administrations to exploit the statutory scheme in place, these weaknesses existed in the statutory text long before President Trump's election. This Note will examine the texts of the relevant delegating statutes and suggest how Congress might amend that text to prevent future presidents from manipulating U.S. trade policy in ways that create separation-of-powers tensions and contravene notions of democratic accountability.

Recent papers have identified and analyzed the excessive delegation of authority to the Executive in the realm of trade sanctions, but they have not considered the importance of the definition of national security to the scope of that delegation. Kathleen Claussen has identi-

working-class-voters-219231 (explaining Trump's populist position on trade and desire to bring and keep manufacturing jobs in the United States).

30. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (affirming the constitutionality of the President's adjustment of tariff rates under the flexible tariff provision of the Tariff Act of 1922).

31. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–542 (1935) (holding unconstitutional Congress's delegation to the President of the power to set "codes of fair competition" regulating trades or industries under the National Industrial Recovery Act).

fied the dichotomy between those laws that allow the President to liberalize trade and those that permit the President to restrict trade for national security reasons. She argues, correctly, that "trade law has exceptionalized security," and that, "[w]hile Congress kept tight controls on the President's free trade negotiations, it abandoned controls on the exceptional security-driven authorities, empowering the executive to handle U.S. trade interests in an unbridled way that our nation's Founders feared."[32] J. Benton Heath adds that "the twenty-first-century expansion of national security policy undermines existing models for separating security measures from ordinary economic regulation."[33] Both call for greater regulation of the invocation of national security justifications in trade, for example with greater procedural checks by agencies and more demanding legal review by courts.[34] This scholarship identifies the problem of excessive delegation at the intersection of trade and national security, but stops short of analyzing the issue in the context of the latest executive actions, domestic court decisions, and World Trade Organization (WTO) Dispute Settlement Body decisions.[35] It focuses its solutions on increased review of tariff actions and restructuring and separating trade and security powers, but does not consider the simpler but more fundamental solution of narrowing the scope of what properly counts as a national security threat—at least in the domestic trade law context. Several papers have identified and attempted to remedy President's Trump's over-extensive use of Section 232 of the Trade Expansion Act of 1962 to impose

32. Claussen, *supra* note 22, at 1097. Scholars have noted in the trade law context that the Framers of the Constitution intended a clear separation of powers to both prevent the concentration of power in one branch and protect individual rights. *See, e.g.*, Elizabeth Vincento, *Congress Has the Power to Declare War—But What About a Trade War?: How the Separation of Powers Can Combat Protectionist Use of Section 232*, 29 FED. CIR. B.J. 281, 314 (2020) (suggesting that limiting the President's national security tariff authority under Section 232 "avoids concentration of power" and "enhance[s] the existing safeguards to individual rights").

33. Heath, *supra* note 23, at 1020.

34. *Id.* at 1098 ("The classical approach of denying any legal review [of national security exceptions] is becoming increasingly unmanageable . . . ."); Claussen, *supra* note 22, at 1163 ("[E]xcessive delegation without procedural checks . . .[has] served as a recipe for trade's executive aggrandizement.").

35. The WTO sets rules for trade between nations, drawing on the authority that member states vested in it through multilateral agreements—namely, the General Agreement on Tariffs and Trade. The WTO describes its dispute settlement authority—also based in the GATT—as the "central pillar" of the multilateral trading system, and a crucial element of the organization's contribution to the stability of the global economy. World Trade Organization, *What is the WTO?*, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 25, 2021).

tariffs,[36] but they have not considered that authority in its broader context, including the similar authority granted by the IEEPA and the responses to the use of that authority in both domestic courts and the WTO's Dispute Settlement Body. This Note begins to fill this gap in the scholarship by evaluating the precise limits of executive national security trade sanction authority in light of recent tariff actions, Court of International Trade decisions, and WTO dispute settlements, and then goes further to consider the issues posed by these insufficient limits in the context of the United States' trade obligations under international law.

The broad definition—or lack of a definition—of national security in the statutes authorizing tariff actions by the President undermines the accountability of the Executive by allowing the President to conceal the true justification for her tariff policy decisions, and conflicts with the development of the national security exception in the international trade law regime. This Note will take into account the Trump administration's frequent and eyebrow-raising invocation of various tariff-authority-granting statutes and the pushback—or, more importantly, the lack thereof—from Congress, courts, and the international community against the broad scope of the trade sanction authority granted in those statutes. It will thus show that the scope of the President's authority to impose trade sanctions exceeds the authority necessary to defend against traditional security threats. Therefore, in addition to raising separation of powers concerns, this broad executive authority likely runs afoul of WTO rules in light of the recent narrowing of the WTO's national security exception by the dispute settlement panel in *Russia v. Ukraine*.[37] Compliance with the WTO's rules opens the door to bilateral and multilateral trade liberalization negotiations and agreements, and maintains a nation's reputation of compliance, which may increase its ability to elicit commitments from trade partners. However, despite the WTO's ruling in *Russia v. Ukraine*, and despite the trade-liberalizing benefits that compliance confers on

36. *See, e.g.*, Jessica Hernandez, *One Nation Under Trump: More Power to Him?*, 28 U. MIAMI BUS. L. REV. 143, 170–71 (2019) (suggesting further congressional oversight to prevent the President from defining "national security" broadly under Section 232); Jacob Ely, *The "National Security" of Nations: President Trump's Pretextual Tariff Rationale and How to Overcome It*, 3 CARDOZO J. INT'L & COMP. L. 241, 274 (2019) (demonstrating the breadth of Section 232 authority evinced by case law and recommending that the statute require the Department of Defense to justify a national security rationale for Section 232 actions); Vincento, *supra* note 32 (proposing changes to Section 232 to restore the role of Congress in developing trade policy).

37. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter *Russia v. Ukraine* Panel Report] (discussed *infra* at 719).

WTO member states, pressure from the international community will likely not constrain the President's use of these statutes in any practical sense due to the lack of effective mechanisms to enforce WTO rules.[38] At bottom, only a congressionally legislated redefinition of what constitutes a national emergency can effectively rein in the President's national security tariff authority, thereby improving executive accountability and adherence to valuable international trade norms. Absent such necessary reform, Congress will continue to abdicate its plenary tariff authority to the Executive, and American citizens will remain in the dark as to the actual motivations for significant international economic actions taken by their government. Furthermore, ill-advised tariffs and the trade wars that they may cause could harm the economy as a whole, with meaningful consequences for every worker, consumer, and citizen.[39]

As security threats take on an increasingly economic character and cybersecurity threats increase,[40] contemporary international conflict looks less than ever like the traditional forms of military engagement upon which Congress modeled the current statutory scheme. A more restrictive definition of national security interests must therefore allow the President the flexibility to respond to the changing nature of security threats. This Note does not argue that legislation should define national security so narrowly as to exclude legitimate threats of an economic, potentially trade-based nature. However, the current scope of national security, as evinced by the Trump administration's invocation of national security as justification for a variety of policy decisions, encompasses a wide array of non-security rationales. Therefore, reform can and should substantially rein in the President's tariff authority without precluding executive action warranted by economic circumstances that implicate actual security concerns.

The rest of this Note proceeds as follows: Part I sets forth the domestic statutes that establish the President's executive national security trade sanction authority, how recent decisions by the U.S. Court of International Trade and by the WTO Dispute Settlement Body have endeavored to limit that authority, and why the scope of that authority stands in conflict with the international law governing tariff actions by

38. *See infra* at 724 and note 175.

39. *See, e.g.*, Rachel Layne, *Trump Trade War with China Has Cost 300,000 U.S. Jobs, Moody's Estimates*, CBS NEWS (Sept. 12, 2019, 10:41 AM), https://www.cbsnews.com/news/trumps-trade-war-squashed-an-estimated-300000-jobs-so-far-moodys-estimates/ (noting that the White House's imposition of tariffs on Chinese goods caused the creation of 300,000 fewer jobs and reduced U.S. gross domestic product by approximately 0.3%).

40. *See infra* at 730.

countries, including the United States. Part I shows that the definition of "national security" used by governing bodies including Congress, domestic courts, and WTO dispute settlement tribunals determines the scope of the President's trade sanction authority. Part II discusses the increasingly-economic nature of security threats, and the importance of that trend to the *Russia v. Ukraine* panel's conception of valid national security exceptions to the WTO's trade law regime. Part III proposes a narrower definition of national security that excludes the types of economically-motivated tariffs that are likely to violate America's WTO commitments and the constitutional allocation of tariff authority.

I.
The Existing Limitations on Executive Trade Sanction Authority are Insufficient

Fully appreciating the scope of the President's national security trade sanction authority requires first taking stock of the limitations placed in the delegating statutes themselves. Though a number of statutes grant various degrees of trade sanction authority to the President,[41] this Note will focus on the two that offer the broadest authority and that the Trump administration therefore favored as trade sanction tools: Section 232 of the Trade Expansion Act of 1962, and the International Emergency Economic Powers Act of 1977 (which in turn relies on the National Emergencies Act[42]). This section will also examine the response of the international community, through the WTO's Dispute Settlement Body, to the United States' assertion of the national security exception as an end run around trade-liberalizing international obligations, elucidating the limitations the WTO faces in constraining the President's use of tariff powers.

Before proceeding, the distinction between "national emergency" (used in the IEEPA) and "national security" (used in Section 232) should be clarified. Though both terms lack a clear, agreed-upon definition, the National Emergencies Act (NEA) states that national emergencies may arise in response to threats "to the national security, foreign policy, or economy of the United States."[43] While this Note

41. Besides the IEEPA and Section 232 of the Trade Expansion Act of 1962, trade sanction authority is also delegated in, for example, the Trade Act of 1974, Pub. L. No. 93-617, 88 Stat. 1978, and the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057.

42. National Emergencies Act, 50 U.S.C. §§ 1601–51 (1976). President Trump has exercised IEEPA tariff authorities pursuant to a national emergency that he has declared. The resulting tariffs on steel from Turkey are discussed *infra* at 703.

43. 50 U.S.C. § 1701(a).

will ultimately argue that Congress should explicitly narrow the definition of national security under Section 232 and the IEEPA, one should keep in mind that national emergency powers go beyond national security powers to address issues of economic and foreign policy, and that the NEA and IEEPA therefore encompass non-security threats by design, for better or worse.

1. Section 232 of the Trade Expansion Act of 1962

Section 232 of the Trade Expansion Act of 1962 delegates to the President the authority to impose national security tariffs subject to procedural restrictions, but those restrictions have not had their intended effect in practice. The last formal renewal of the Reciprocal Trade Agreements Act of 1934—one of the first major delegations of trade authority from Congress to the Executive Branch—created the Trade Expansion Act of 1962. The Act reflected a partial response to congressional concern over the national security implications of U.S. reliance on oil and other raw materials from abroad.[44] Section 232 of the Act, titled "Safeguarding National Security,"[45] allows the President to restrict the importation of articles which, by virtue of their importation, threaten to impair national security, such as by undermining domestic production of goods necessary to supply national defense forces.

The imposition of trade sanctions under Section 232, while not restricted to times of war, is limited by a set of procedural requirements. Understanding the extent to which these required administrative processes actually constrain the President's national security trade sanction authority will inform this Note's approach to restricting that authority. First, Section 232(a) precludes any "decrease or elimination of duties [i.e. taxes on imports or exports]. . .if such reduction or elimination would threaten to impair national security."[46] Second, Section 232(b) empowers the President to increase or impose new trade sanctions following a required investigation and report by the Secretary of Commerce.[47] Upon request of an agency head or "interested party" or upon her own motion, the Secretary must initiate such an investigation "to determine the effects on the national security" of imports of the

44. H.R. REP. NO. 50–84, at 29 (1955) ("[T]he impact of tariff policy upon the Nation's security must be scrutinized with the greatest care. Essential industries, essential plant capacities, essential skills, and sources of essential raw materials must be preserved, developed, and expanded so that the Nation can quickly call upon them in time of emergency.")).

45. 19 U.S.C. § 1862.

46. *Id.* § 1862(a).

47. *Id.* § 1862(b)–(c).

article(s) in question.[48] The Secretary must then consult with the Secretary of Defense and other appropriate officers, and hold public hearings if appropriate. The Secretary of Defense must inform the Secretary of Commerce of the amount of the article in question required for national defense, if requested.[49] The Secretary of Commerce has 270 days to submit her findings and recommendations to the President,[50] and the President in turn has 90 days to decide "whether [the President] concurs with the finding of the Secretary, and. . .determine the nature and duration of the action. . .to adjust the imports of the article and its derivatives[51] so that such imports will not threaten. . .national security."[52] The President and Secretary of Commerce must consider both the capacity of domestic industry to meet national security needs and "other relevant factors," including any risk of "substantial unemployment, decrease in revenues of government, [and] loss of skills or investment."[53] Should the President decide to impose or adjust tariff measures in response, she must submit to Congress within 30 days of her determination the reasons for her action,[54] and the Secretary of Commerce must submit to Congress a report on the disposition of the request to investigate.[55] These procedural steps ostensibly ensure that the President does not invoke Section 232 absent a legitimate security threat substantiated by competent authorities in the Departments of Defense and Commerce. In practice, however,

48. *Id.* § 1862(b)(1)(A). Although investigations by the Secretary of Commerce are intended as a shield against imports the amount of which undermine domestic production capacity, or imports which by their very nature threaten national security, the Trump administration used these statutory provisions as more of a sword to restrict imports from particular exporting countries.

49. *Id.* § 1862(b)(2)(A)–(B).

50. *Id.* § 1862(b)(3)(A).

51. "Article" refers to the primary item or thing in question (e.g. aluminum or steel), *Article*, BLACK'S LAW DICTIONARY (11th ed. 2019), while "derivative" refers to goods developed or produced from the article, *Derivative*, BLACK'S LAW DICTIONARY (11th ed. 2019). What qualifies as a derivative is determined by the President based on the Secretary of Commerce's findings. For example, President Trump's Proclamation of January 24, 2020 adjusting tariffs on imports of aluminum and steel derivatives declared that "[f]or purposes of this proclamation. . .an article is 'derivative' of an aluminum article or steel article if. . .the aluminum article or steel article represents, on average, two-thirds or more of the total cost of materials of the derivative article . . . ." Proclamation No. 9980, 85 Fed. Reg. 5,281 (Jan. 24, 2020). The Proclamation also included annexes listing the specific derivatives of aluminum and steel to which it applied. *Id.* Annex I ("Derivates of Aluminum Articles").

52. 19 U.S.C. § 1862(c)(1)(A).

53. *Id.* § 1862(d).

54. *Id.* § 1862(c)(1)(B)–(c)(2).

55. *Id.* § 1862(e)(1). The investigation and reporting requirements of § 1862 are codified at 15 C.F.R. § 705.1–12 (2021).

these provisions have proved insufficient to limit the use of the statute as intended.

The Trump administration's frequent recourse to Section 232, and the President's imposition of tariffs as a result, broke from previous administrations' use of the statute. Prior to 2017, Presidents had initiated 26 Section 232 investigations, most of which resulted in the Department of Commerce determining that import of the good in question did not impair U.S. national security.[56] From among the ten cases in which Commerce determined that import of the good did impair national security, the President ultimately recommended action in only six.[57] In 1975, in response to a determination by the Department of Commerce that oil imports continued to threaten national security, President Ford issued a proclamation raising license fees on imported barrels of oil.[58] Several states and utility companies sued, alleging that the President had exceeded his constitutional and statutory authority in imposing the fee system. Rejecting this challenge, the Supreme Court ruled in *Federal Energy Administration v. Algonquin* that Section 232 represented a valid delegation of authority to the Executive because an "intelligible principle" cabined and set preconditions for presidential action.[59] Prior to the Trump Administration, the last imposition of Section 232 trade restrictions by a President occurred in 1986.[60] In contrast, President Trump has several times imposed and modified import restrictions on goods from a number of foreign nations using Section 232.

President Trump's use of Section 232 to impose tariffs on aluminum and steel from a host of foreign nations has, to date, faced two major challenges before the United States Court of International Trade

56. FEFER, *supra* note 13, at 1 (summarizing the outcomes of previous Section 232 investigations); BUREAU OF INDUSTRY & SECURITY OFFICE OF TECHNOLOGY EVALUATION, SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECT OF IMPORTS ON THE NATIONAL SECURITY 13–20 (2007) (detailing each prior Section 232 investigation conducted by the Department of Commerce and the resulting Presidential action, if any).

57. FEFER, *supra* note 13, at 1.

58. Proclamation No. 4341, 3 C.F.R. 431 (Jan. 23, 1975).

59. Federal Energy Administration v. Algonquin, 426 U.S. 548, 557–60 (1976).

60. BUREAU OF INDUSTRY & SECURITY OFFICE OF TECHNOLOGY EVALUATION, *supra* note 56, at 15 (noting that President Reagan sought voluntary restraint agreements with foreign suppliers to revitalize domestic production of metal-cutting and metal-forming machine tools, and that thereafter each Section 232 investigation until the Trump administration resulted in no presidential action); FEFER, *supra* note 13, at 1 ("Prior to the Trump Administration, a president last imposed tariffs or other trade restrictions under Section 232 in 1986, based on a 1983 probe into imports of machine tools.").

(CIT),[61] which has exclusive jurisdiction over civil actions against the government arising from certain tariff statutes.[62] Three-judge panels heard both cases, a procedure that the CIT's governing statute reserves for cases that raise "an issue of the constitutionality of an Act of Congress, a proclamation of the President[,] or an executive order; or ha[ve] broad or significant implications in the administration or interpretation of the custom laws."[63] In the first, *American Institute for International Steel v. United States* (*AIIS*),[64] the plaintiffs—an advocacy group supporting free trade and economic growth in the steel industry—sought to enjoin enforcement of the steel tariffs on the grounds that Section 232 represented "an improper delegation of legislative authority in violation of Article I, Section 1 of the U.S. Constitution and the doctrine of separation of powers."[65] The CIT found that the Supreme Court's decision in *Federal Energy Administration v. Algonquin SNG Inc.* bound it to uphold the constitutionality of Section 232.[66] The Court in *Algonquin SNG Inc.* held that the "clear preconditions to Presidential action"[67] required by the statute constituted an intelligible principle under the standard set forth in *J.W. Hampton, Jr.,*

61. Am. Inst. for Int'l. Steel, Inc. v. United States (*AIIS*), 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019); Transpacific Steel LLC v. United States (*Transpacific*), 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019). The CIT also recently ruled on a third Section 232 challenge to President Trump's steel tariffs in *Universal Steel Prods. v. United States*, No. 19-00209, 2021 Ct. Intl. Trade LEXIS 12 (Ct. Int'l Trade Feb. 4, 2021). That ruling did not limit the scope of Section 232 authority beyond the limits imposed in *AIIS* and *Transpacific*, but did affirm that the President need not predetermine the duration of a Section 232 tariff, *id.* at *27–29, and that the threat to which a Section 232 action responds need to be "impending," *id.* at *22. The CIT recently held in a third case that President Trump's Proclamation 9705 steel tariffs did not violate Section 232. *See* Universal Steel Prods. v. United States, No. 19-00209, 2021 Ct. Intl. Trade LEXIS 12 (Ct. Int'l Trade Feb. 4, 2021).

62. 28 U.S.C. § 1581(i)(1)(B), (D) ("[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for. . .tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue. . .[or] administration and enforcement with respect to respect to [such law].").

63. 28 U.S.C. § 255.

64. *AIIS*, 376 F. Supp. 3d 1335.

65. *Id.* at 1337. Article I, Section 1 of the Constitution requires that all the powers granted in Article I shall be vested in Congress, implying that they shall not be exercised by other branches absent a proper delegation. U.S. CONST. art. I, § 1. Plaintiff's claim here rested on the notion that Section 232 improperly delegated powers contained in the Taxing and Commerce Clauses, Article I, Section 8, to the President, since it allowed the President to raise "duties" and "regulate foreign commerce." U.S. CONST. art. I, § 8; *AIIS*, 376 F. Supp. 3d at 1337.

66. *AIIS*, 376 F. Supp. 3d at 1340 (citing Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559–60 (1976)).

67. *Id.* (citing *Algonquin*, 426 U.S. at 559).

& Co. v. United States.[68] Additionally, in his dubitante *AIIS* opinion,[69] Judge Gary Katzmann noted the "flexibility that can be allowed the President in the conduct of foreign affairs," as articulated by the Supreme Court in its 1936 *Curtiss-Wright* decision.[70] The CIT affirmed the steel tariffs in question in light of these precedents. Recently, some Supreme Court Justices have registered their dissatisfaction with that Court's approach to nondelegation, so it is worth noting that these precedents may be destabilized.[71]

While acknowledging that Supreme Court precedent bound it to affirm the constitutionality of Section 232, the CIT in *AIIS* nonetheless expressed clear reservations about the scope of the delegation in the statute. The majority opinion notes the separation-of-powers implications of the fact that "the broad guideposts of subsections (c) and (d) of Section 232. . .seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach."[72] The court expressed further concern about its own dearth of capacity to review invocations of Section 232 that lack an obvious nexus with national security; it feared that—although it could review such an action for exceeding the President's statutory authority—identifying the line between a national security basis on the one hand and purely economic or other non-security bases on the other "could be elusive in some cases because judicial review would allow neither an inquiry into the President's motives nor a review of his fact finding."[73] Indeed, because the statute commits to the President's unqualified discretion both the choice of whether or not to concur with the Secretary of Commerce's determination and the nature of any remedial ac-

68. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

69. *AIIS*, 376 F. Supp. 3d at 1345 n.1 (Katzmann, J., dubitante). ("[In] the opinion entered dubitante. . .the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent.") (citing LON FULLER, ANATOMY OF THE LAW 147 (1968)).

70. *Id.* at 1352 (Katzmann, J., dubitante) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936)). The Court in *Curtiss-Wright* identified the "delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Curtiss-Wright*, 299 U.S. at 320.

71. The Supreme Court recently reaffirmed its nondelegation jurisprudence in *Gundy v. United States*, 139 S. Ct. 2116, 2120 (2019), but four justices expressed dissatisfaction with the current "intelligible principle" test and interest in taking up the delegation question again to adjust it. *See Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting); Kayla Scott, *Steel Standing: What's Next for Section 232?*, 30 DUKE J. COMP. & INT'L L. 379, 395 (2020).

72. *AIIS*, 376 F. Supp. 3d at 1344.

73. *Id.* at 1344–45.

tions,[74] the court posited that "the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress [i.e. broad trade policymaking] but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth."[75] The red flags identified by the CIT demonstrate that the vagueness of the delegating statute undermines the balance of government powers by allowing the Executive to encroach on congressional powers and evade meaningful judicial review, and creates an opportunity for a President to misrepresent the motivations for her actions to the public.

Judge Gary Katzmann, entering a dubitante opinion that lodged both substantive and procedural critiques of Section 232, expressed these concerns more directly, noting that President Trump's recent use of Section 232 "might provide an empirical basis to revisit assumptions" about the true scope of the delegation at issue.[76] He identified two general causes for concern in the statute. First, while a recommendation from the Secretary of Commerce is a prerequisite for presidential action under Section 232, the Secretary's recommendations do not bind the President, and the remedy the President prescribes need not rationally relate to the situation giving rise to the Secretary's report.[77] For example, Presidential Proclamation 9705 of March 8, 2018 imposed a 25 percent tariff on steel imports in response to "the risk that the United States may be unable to 'meet [steel] demands for national defense and critical industries in a national emergency,"[78] but a letter from the Secretary of Defense to the Secretary of Commerce during the initial Section 232 investigation stated that "U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[79] In other words, the circumstances alleged to have necessitated the steel tariff simply did not exist. Second, the opinion notes that Section 232's definition of national security is "so broad that it not only includes national defense but also encompasses the entire national economy."[80] The first concern, a procedural critique, targets the lack of sufficient procedural safeguards in Section 232. The second, a substantive critique, emphasizes the lack of a clear

74. 19 U.S.C. § 1862(c)(1)(A)(i).

75. *AIIS*, 376 F. Supp. 3d at 1345.

76. *Id.* at 1352 (Katzmann, J., dubitante).

77. *Id.* at 1351 (Katzmann, J., dubitante).

78. Proclamation No. 9705, 83 Fed. Reg. 11,625 ¶ 2 (Mar. 8, 2018).

79. *AIIS*, 376 F. Supp. 3d at 1351 (Katzmann, J., dubitante) (citing Letter from James N. Mattis, Sec'y of Def., to Wilbur L. Ross Jr., Sec'y of Commerce (Feb. 2, 2018)).

80. *Id*.

definition of "national security" in the statute. These infirmities combine to allow for Executive trade policymaking the scope of which erodes the separation of powers and precludes Executive accountability for major policy decisions.

A subsequent constitutional challenge to the steel tariffs, *Transpacific Steel LLC v. United States* (*Transpacific*), which also came before the CIT, further demonstrates the issues inherent to Section 232 by providing an exceptional adverse ruling that demonstrates the breadth of presidential power under that statute.[81] The plaintiff, a U.S. steel company and an importer of Turkish steel, challenged Presidential Proclamation 9772 of August 15, 2018, which raised the tariffs on Turkish steel imports from 25 percent to 50 percent.[82] Transpacific's argument that the President had failed to observe the statutory deadline for implementing the new tariffs (90 days following reception of Commerce's report) survived the government's motion to dismiss,[83] and the CIT ultimately invalidated the Proclamation 9772 tariffs on two grounds: first, the tariffs violated statutorily-mandated procedures, and second, they infringed upon the constitutional guarantee of equal protection.[84] Though these findings are steps in the right direction, neither limitation effectively precludes a President from abusing her trade sanction authority.

Unlike the court in *AIIS*, the *Transpacific* court imposed at least a moderate check on capricious use of Section 232, and thus proved that some means exist for checking executive authority under that stat-

81. Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019). Shortly before the publication of this Note, the Federal Circuit reversed the CIT's decision in Transpacific, finding that "[t]he President did not violate § 1862 in issuing Proclamation 9772 . . . [n]or did the President violate Transpacific's equal-protection rights in issuing Proclamation 9772." Transpacific Steel LLC v. United States, 2021 U.S. App. LEXIS 20635, at *5 (Fed. Cir. July 13, 2021). Thus, the procedural and equal-protection limitations that the CIT imposed on the President's use of the Section 232 tariff authority in its Transpacific opinion, which this section will characterize as exceptional and insufficient to rein in that authority, have in fact proven to be no limits at all. This most recent decision of the Federal Circuit offers further evidence of the need to amend Section 232 itself in order to prevent improper use of national security trade sanction authority. Unfortunately, the timing of the decision precluded more detailed analysis of it in this Note.

82. *Id*. at 1271; Proclamation No. 9772, 158 Fed. Reg. 40,429 (Aug. 10, 2018). The tariff increase was later rescinded, and the plaintiffs sought a refund of duties paid at the 50 percent level above what would have been paid at the 25 percent level. Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1251 (Ct. Int'l Trade 2020) (citing Proclamation No. 9886, 84 Fed. Reg. 23,421 (May 21, 2019)).

83. Transpacific, 415 F. Supp. 3d at 1272.

84. Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1260 (Ct. Int'l Trade 2020) ("Proclamation 9772 is in violation of mandate [Section 232] procedures and in violation of the Fifth Amendment's Equal Protection guarantees.").

ute—though those means do not abate the fundamental problems posed by the excessive delegation. The court rejected the government's claim that the 50 percent tariff constituted a mere modification of tariffs imposed pursuant to the initial report from Commerce that precipitated Proclamation 9705, and not a standalone tariff action subject to Section 232's procedural requirements.[85] Because the modification of the tariff level came later than the 90 days allotted for presidential action following the initial investigation,[86] the new tariff level would require an entirely new investigation and report to Congress of the President's reasoning.[87] *Transpacific* stands apart as a rare example in which procedural requirements in the delegating statute effectively precluded the President's attempted tariff action, but the court's finding that the Trump administration failed to comply with statutory deadlines does not resolve the more fundamental problems posed by the statute. Beyond delaying the President's action, the court's procedural check does not require that the new Section 232 investigation provide a more rational basis than that provided for the initial tariff. The 90 day time limit, on its own, is not effective in ensuring the tariffs' substantive rationality. While it arguably touches the substance underlying the action, in that circumstances that do not compel Presidential action within 90 days may not present so serious a threat after all, a President may ultimately proceed past this procedural setback by calling for a new investigation. Simply requiring a President to bring a new investigation as a procedural check before she can order a new tariff does not guarantee that the President will use her authority for proper national security purposes.

The CIT also found that Proclamation 9772 violated the Equal Protection Clause,[88] concluding that, although national security constitutes a legitimate government interest that may justify disparate treatment, the government had "submit[ted] no set of facts that justif[ied] identifying importers of steel from Turkey as a class of one."[89] The *Transpacific* court found that the President's decision to single out Turkey stood out as an extremely rare case in which "one [is] at a loss to conjure a rational justification" for presidential action taken under Section 232.[90] Though the President essentially called upon the same national security and domestic production capacity concerns as in

85. Transpacific, 415 F. Supp. 3d at 1274.
86. 19 U.S.C. § 1862(c)(1)(A).
87. *Id*. § 1862(b), (c).
88. U.S. CONST. amend. XIV, § 1.
89. Transpacific, 415 F. Supp. 3d at 1272.
90. *Id*.

AIIS, the court found that "[a] general need to increase tariffs. . .does not explain the [ ] imposition of a 50 percent tariff on Turkish steel articles" specifically.[91] *Transpacific* does therefore impose some substantive limitation on a President's tariff authority. Unfortunately, by attacking the government's lack of rational basis in the equal protection context, the court may have actually incentivized future administrations to take broader actions that apply to all exporters, in order to avoid the risk of "singling out" parties and having the tariffs reviewed and struck down under the equal protection clause.[92] Alternatively, an administration might target a particular exporting country by setting tariffs on a good or set of goods that country exports in particularly large quantities, as *AIIS* demonstrated that the validity of Section 232 tariffs does not depend on whether or not the import of a particular good actually undermines national security. Given courts' deference to national security as a legitimate government interest and the latitude granted to the President under Section 232, rational basis review may offer little resistance to such an approach—especially if undertaken by a more nimble administration than President Trump's.

The outcome of *Transpacific* demonstrates that as long as an administration provides a minimally rational justification sufficient to survive the rational basis review arising from a disparate impact claim, judicial review limits the breadth of the President's tariff authority under Section 232 only insofar as it prohibits the Executive from violating statutory procedures. The Proclamation 9772 tariffs only proved susceptible to judicial review because the President had simply violated the statutory deadline for tariff actions. Requiring the administration to commence a new investigation might cause delays and embarrassment, but the statute does not require that the new investigation show a substantial nexus between the tariff measures and national security any more than the original investigation. Thus, while *Transpacific* addressed some of the procedural concerns raised in *AIIS*, it did not address the second, substantive concern outlined in Judge Katzmann's opinion: exactly what constitutes a national security

91. *Id*.

92. An administration may also turn to its national emergency IEEPA powers to single out one nation for tariffs, as President Trump did to impose the very same tariffs invalidated in *Transpacific*. Under the IEEPA, the President could also justify such an action on economic or foreign policy grounds with no need for a national security pretext. *See infra* note 133 and accompanying text. The amendments to the IEEPA proposed below would preclude such justifications by restricting the IEEPA to national security threats alone. *See infra* at 740–42.

threat within the meaning of Section 232?[93] In other words, although the President failed on procedural grounds to base two separate tariff measures on one single Department of Commerce investigation, he could still have called for a second investigation to proceed with the second tariff. That new investigation would remain equally free from judicial review of the President's fact-finding or rationale, and the President could have relied on it to impose the same 50 percent tariffs on steel worldwide. The statute therefore offers courts only a limited and poorly-defined basis for meaningful review of the President's determination of what imports constitute a threat and what level of tariff constitutes an appropriate response. The procedural checks applied in *Transpacific* may delay the President's use of her national security powers, but absent some ground for an equal protection claim, they do not ultimately prevent the President from taking action that undermines the separation of powers and disguises the actual motivations for the policy.

The CIT's rationale in *AIIS* and *Transpacific* demonstrates that Section 232 can, rather too easily, serve as an instrument to implement trade policy goals unrelated to the preservation of national security. The *Transpacific* court noted that "the President's real motivation [for imposing the 50 percent tariff on Turkey]. . .is not this court's concern,"[94] but nonetheless noted that the "Plaintiff point[ed] to [one of] the President's comment[s] on social media"[95] suggesting that the President had doubled the tariffs due to poor U.S.-Turkey relations and economic concerns.[96] In response to President Trump's attempts to justify an extended series of tariff modifications using the same

93. Am. Inst. for Int'l. Steel, Inc. v. United States (*AIIS*), 376 F. Supp. 3d 1335, 1351 (Ct. Int'l Trade 2019) ("There is no guidance provided on the remedies to be undertaken in relation to the expansive definition of 'national security' in the statute – a definition so broad that it not only includes national defense but also encompasses the entire national economy.").

94. Transpacific, 415 F. Supp. 3d at 1273.

95. *Id.* at 1273 n.7 (citing to Plaintiff Transpacific's Response Brief, at 35, Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019) (No. 19-00009) ("I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!")). The statement quoted by the court was tweeted by President Trump in August 2018. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 2:47 PM), https://web.archive.org/web/20210101094515/https://twitter.com/realdonaldtrump/status/1027899286586109955.

96. *Id.* The troubles in U.S.-Turkey relations at the time stemmed from disagreements over collective defense policy in relation to NATO and Turkey's detention of an American citizen. *See* Jacob Pramuk, *Why Trump is Attacking Turkey with Sanctions and Tariffs*, CNBC (Aug. 10, 2018, 10:08 AM), https://www.cnbc.com/2018/08/10/why-trump-is-attacking-turkey-with-sanctions-and-tariffs.html.

Department of Commerce investigation, the *Transpacific* court observed that "[t]he President's expansive view of his power under [S]ection 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose."[97] Judge Katzmann wrote separately once again to indicate that, while the constitutionality of Section 232 was not before the court, as it had been in *AIIS*, the President's continued modification of the steel and aluminum tariff regime since the initial proclamations "may well yield further evidence of the infirmity of the statute."[98] Judge Katzmann's concerns highlight the statute's failure to more explicitly preclude modification of the initial import restrictions without explanation from the President of why such modifications are necessary. Such continuous tinkering with trade policy without any check by Congress exemplifies the exact sort of trade policymaking by the Executive that erodes the constitutional balance of powers and obfuscates the true policy rationale for an administration's actions, to the detriment of democratic accountability.

Although the *AIIS* and *Transpacific* rulings do not themselves fully address the excessive authority delegated by Section 232, they raise serious concerns about the problems that authority creates for the balance of powers, and *Transpacific* at least required some higher level of fidelity to statutory procedures. Given these marginally-limiting CIT decisions regarding the validity of President Trump's tariff actions under Section 232,[99] Presidents may in the future choose to rely instead on another statute that offers a similar set of international economic powers with fewer procedural hurdles and, arguably, less of a need to justify trade sanctions in terms of traditional trade law concerns. The IEEPA is just such a statute.

2. The International Emergency Economic Powers Act

The legislative history of the Trading with the Enemy Act of 1917 (TWEA)[100] is helpful for understanding the statutory regime, and the flaws therein, of its successor, the International Emergency Economic Powers Act. Congress passed the TWEA as one of a number of statutes enacted in 1916 and 1917 to grant President Wilson the authority to regulate and appropriate private property as necessary to

97. Transpacific, 415 F. Supp. 3d at 1274.

98. *Id.* at 1277 (Katzmann, J., concurring).

99. The CIT ultimately granted Transpacific Steel LLC's motion for judgment on the agency record, holding that President Trump's tariff increase on steel imports from Turkey violated Section 232's procedural requirements and the Fifth Amendment's Equal Protection guarantees. Transpacific, 466 F. Supp. 3d at 1259–60.

100. Trading with the Enemy Act, Pub. L. No. 65-91, § 5b, 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. § 4305 (2018)).

address crises arising from the ongoing First World War.[101] Section 5(b) of the Act provided that, "during the time of war. . .the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange. . .by any person within the United States."[102] The Act created an exceptionally broad delegation of power to the President, arguably justified because it expressly limited that power to wartime. However, while Congress later repealed most of the aforementioned wartime statutes following the conclusion of the war, it did not repeal the TWEA.[103]

In 1933, Congress proceeded to expand the scope of the President's TWEA authority. Faced with the unprecedented economic challenges posed by the Great Depression, President Roosevelt likened the scale of the crisis to a foreign invasion, and requested from Congress "broad Executive power to wage war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."[104] Congress granted his request in the Emergency Banking Relief Act, amending the TWEA to apply "during time of war or any other period of national emergency declared by the President."[105] The amended TWEA gave the President the power to declare national emergencies and wield the consequent economic powers. Through the Second World War and the Cold War, the TWEA became a popular foreign policy instrument for presidents. President Truman, for example, declared a national emergency under the TWEA to impose sanctions on China and North Korea designed to check the perceived communist threat.[106] That same emergency served as the basis for later trade embargos against South Vietnam and Cambodia.

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101. CASEY ET AL., *supra* note 13, at 3 (citing CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES 241–43 (1948)).

102. Trading with the Enemy Act § 5b.

103. CASEY ET AL., *supra* note 13, at 3–4 ("Between 1916 and the end of 1917, Congress passed 22 statutes empowering the President to take control of private property for public use during the war. . .While Congress terminated many of the war powers in 1921, TWEA was specifically exempted because the U.S. government had yet to dispose of a large amount of alien property in its custody.").

104. President Franklin D. Roosevelt, Inaugural Address of 1933 (Washington, D.C., National Archives and Records Administration, 1988).

105. CHRISTOPHER A. CASEY, DIANNE E. RENNACK, IAN F. FERGUSSON & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 5 (2020) (citing Pub. L. No. 73-1, 48 Stat. 1 (Mar. 9, 1933)).

106. Proclamation No. 2914, 3 C.F.R.§ 99 (1950) ("Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world. . .world conquest by communist imperialism is the goal of the forces of aggression that have been loosed

In the later years of the Vietnam War, as political tides shifted against unbridled presidential discretion, Congress curtailed the scope of the TWEA by once again limiting it to times of war.[107] The Senate formed the "Senate Special Committee on the Termination of the National Emergency," which reevaluated the President's emergency powers and criticized the overuse of emergency declarations by the Executive.[108] Ultimately, Congress responded to that Committee's findings with the National Emergencies Act (NEA), which terminated most of the emergencies then ongoing and required the President to immediately inform Congress of new national emergency declarations.[109] The NEA also allowed Congress to review ongoing emergencies biannually and terminate them by concurrent resolution.[110]

The NEA works in concert with the IEEPA to grant the President tariff powers during national emergencies similar to those granted in times of war by the TWEA. Congress passed the IEEPA with the intent of filling the void left after it had once more restricted the TWEA to times of war, while also ensuring that any peacetime use of the authority granted would be "more limited in scope than those of section 5(b) [of the TWEA] and subject to procedural limitations."[111] The President may only exercise the trade sanction authority granted by the IEEPA pursuant to a national emergency declared under the NEA by the President "to deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[112] The President must declare the national emergency justifying the use of IEEPA powers in observance of the procedural requirements for declaring a national emergency provided in the NEA. Declaring a national emergency under the NEA unlocks executive access to a variety of powers outlined in several statutes, but the IEEPA

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upon the world. . .I, Harry S. Truman. . .proclaim the existence of a national emergency. . .").

107. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625 ("Section 5(b)(1) of the Trading With the Enemy Act is amended by striking out 'or during any other period of national emergency declared by the President' in the text preceding subparagraph (A).").

108. CASEY ET AL., *supra* note 105, at 6–7 n. 45.

109. Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. § 1601 *et seq*).

110. 50 U.S.C. §1622(b). Congressional termination of national emergencies now requires a joint resolution, pursuant to the Supreme Court's abrogation of the legislative veto in INS v. Chadha, 462 U.S. 919 (1982).

111. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625; CASEY ET AL., *supra* note 13, at 9.

112. International Emergency Economic Powers Act, 50 U.S.C. § 1701(a) (1977).

is the only congressional delegation of emergency powers to the Executive that provides for trade sanction authority. In other words, not every national emergency will require the use of IEEPA powers, but the President may not invoke any IEEPA powers without first declaring an emergency under the NEA.

Though the NEA and IEEPA each impose their own procedural hurdles before the President may exercise her IEEPA trade sanction authority, Congress has not meaningfully enforced these procedural requirements and has therefore allowed the President's trade authority under these statutes to grow unabated. In addition, the NEA defines the conditions justifying national emergency declarations so broadly that the President may employ her emergency powers, including those under the IEEPA, in response to situations of a distinctly economic or political character without any direct threat to the physical well-being of American citizens or to the fundamental stability of America's economy or institutions. The IEEPA therefore applies to more circumstances than Section 232, which focuses only on national security without mentioning the economy or foreign policy.[113] Thus, although requiring the President to satisfy the requirements of the NEA before invoking the IEEPA might appear to impose a higher standard for permitting executive action, this threshold is largely illusory; in reality, the IEEPA grants the President even more extensive and unchecked trade sanction authority than she has under Section 232.

Although seemingly robust, the procedural requirements for declaring emergencies under the NEA have not had their intended effect of limiting the emergency declarations that give rise to IEEPA and other emergency powers. The NEA requires the President to immediately transmit to Congress and publish in the Federal Register any national emergency declaration.[114] Terminating an emergency requires a proclamation of the President or joint resolution of Congress.[115] The President must specify the provision of law underlying the actions she proposes to take in response to the emergency,[116] and must report to Congress every six months the expenses attributable to the exercise of her emergency powers.[117] The NEA originally permit-

113. Despite applying to narrower subject matter, Section 232 applies to a wider geographic area. The IEEPA requires that the threat, no matter its nature, must have its source "in whole or substantial part outside the United States." 50 U.S.C. § 1701(a). Section 232 imposes no such geographical limitation. Trade Expansion Act of 1962, 19 U.S.C. § 1862.

114. National Emergencies Act, 50 U.S.C. § 1621 (1976).

115. *Id*. § 1622.

116. *Id*. § 1631.

117. *Id*. § 1641.

ted Congress to terminate emergencies by legislative veto,[118] but the Supreme Court rendered the procedure unconstitutional.[119] Resultantly, Congress's only remaining recourse is either a "joint resolution. . .referred to the appropriate committee of the House of Representatives or the Senate"[120] or a statutory amendment. Both options are rendered practically moot as a check on executive power by the requirement that Congress present the resolution or amendment to the President for her veto or approval.[121] Additionally, presidents have only rarely allowed emergencies to expire rather than renewing them,[122] meaning that presidents may invoke broad tariff and other emergency powers based on old emergencies (the oldest ongoing emergency was initially declared by President Carter in 1979)[123] the precipitating circumstances of which may well have changed meaningfully since their declaration. Congress has also neglected to hold the biannual meetings required by the NEA at which it is supposed to consider whether to end a national emergency, perhaps because maintaining the practice for the more than thirty emergencies currently in effect would consume too much of its time and attention.[124] Without consistent and substantial review by Congress of new and ongoing national emergencies, the procedural restrictions of the NEA provide no barrier to national emergency declarations, allowing the President to proceed uninhibited in using IEEPA powers.

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118. "Legislative vetoes" are vetoes by which Congress blocks federal executive or agency action taken under congressionally delegated authority. *Veto*, BLACK'S LAW DICTIONARY (11th ed. 2019). For example, a statute might include a provision allowing the House of Representatives alone to review and veto actions by an agency. *See generally* LOUIS FISHER, CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER *Chadha* (2005).

119. INS v. Chadha, 462 U.S. 919, 959 (1982) (holding that legislative vetoes are unconstitutional generally, without specific mention of the NEA's congressional termination provision).

120. National Emergencies Act, 50 U.S.C. § 1622(a)(1), (c)(1) (1976).

121. U.S. CONST. art. I, § 7.

122. *Brennan Center Calls for the Fundamental Reform of the National Emergencies Act of 1979*, BRENNAN CTR. FOR JUSTICE (May 10, 2019), https://www.brennancenter.org/our-work/research-reports/brennan-center-calls-fundamental-reform-national-emergencies-act-1976 ("The one-year expiration period [for national emergencies], which was supposed to be the default, has become the exception. There are 32 states of emergency in effect today, with the longest dating back to the Iranian hostage crisis of 1979.").

123. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979) ("Blocking Iranian Government Property" in response to the Iran hostage crisis).

124. *Brennan Center Calls for the Fundamental Reform of the National Emergencies Act of 1979*, *supra* note 122 ("Congress has simply ignored the requirement to consider a vote on existing emergencies every 6 months.").

The IEEPA itself, which expands TWEA trade authorities to any NEA national emergency, imposes additional procedural restrictions. The statute requires the President to consult with Congress "in every possible instance" before employing IEEPA powers.[125] Immediately upon exercise of IEEPA authority, the President must report to Congress why she believes the circumstances engendering her action "constitute an unusual and extraordinary threat," why they "necessitate such exercise of authority," why her proposed actions are "necessary to deal with those circumstances," and to which foreign countries the action applies.[126] Once the administration checks these procedural boxes, the trade sanction authority made available to the President closely resembles the authority granted by the TWEA. Under the IEEPA, the President may:

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.[127]

In other words, the President can block transactions, including trade, and freeze assets as long as foreign entities have some interest in the assets or transaction—a standard easily met in the international trade context. The IEEPA also states that the President "may issue such regulations. . .as may be necessary for the exercise of the authorities granted by [the IEEPA]," a broad grant of authority without any qualifying language.[128] In *Regan v. Wald*, the Supreme Court interpreted "any interest" broadly and affirmed the legality of regulations promulgated under the TWEA that prohibited any and all transactions in which Cuban nationals had a direct or indirect interest.[129] The language of the President's IEEPA powers is therefore so broad in scope that the statute itself furnishes no practical limit on the trade sanction powers that she could invoke.

Absent significant procedural restrictions following the President's declaration of a national emergency, and besides the threat of

125. 50 U.S.C. § 1703(a) (1976).
126. *Id.* § 1703(b).
127. *Id*. § 1702(a)(1)(B).
128. *Id*. § 1704.
129. Regan v. Wald, 468 U.S. 222, 225–27 (1984) (affirming a regulation promulgated under the TWEA that prohibited transactions in which Cuba or its nationals had "any interest of any nature whatsoever, direct or indirect").

an equal protection claim akin to the one that succeeded in *Transpacific*,[130] the breadth of the President's national security tariff authority under the IEEPA is rooted in the lack of limitations on the initial declaration of national emergencies under the NEA. That statute contains no meaningful constraints either, as the NEA defines qualifying emergency circumstances even more broadly than Section 232. The CIT's opinions in *AIIS* showed how—in the Section 232 context—"national security" alone could encompass economic threats if not defined in a sufficiently descriptive and limiting fashion,[131] but the IEEPA goes even further, allowing threats to the "foreign policy[ ] or economy of the United States" to justify the imposition of tariffs and other economic sanctions by the president.[132] Without meaningful restrictions on what circumstances constitute an "unusual or extraordinary" threat to national security and therefore permit action under the IEEPA, the inclusion of economic threats as justification for the NEA emergencies that unlock the suite of IEEPA powers effectively constitutes an unbridled delegation of Congress's tariff power to the Executive whenever the President is unsatisfied with the current state of international economic affairs.

The failure of NEA and IEEPA restrictions to prevent President Trump's invocation of IEEPA authority demonstrated that the IEEPA statutory framework constitutes an even more extensive and unencumbered delegation of trade sanction authority than Section 232. The actions President Trump took with his IEEPA powers did not face litigation challenges like his Section 232 actions did. After the CIT invalidated President Trump's 50 percent tariff on Turkish steel when it was promulgated under Section 232, President Trump still successfully promulgated the tariff, this time under the IEEPA, pursuant to a national emergency he declared in response to the incursion of Turk-

130. If they treat parties disparately, tariffs imposed under the IEEPA are presumably susceptible to constitutional equal protection claims like those arising under Section 232. However, the President's ability to justify IEEPA tariff actions on economic and foreign policy grounds in addition to national security justifications may render an Equal Protection claim less likely to succeed. *See infra* note 133 and accompanying text. Amending the IEEPA to cover only national security threats may prove helpful in this regard. *See infra* pp. 61–62.

131. *See, e.g.*, Am. Inst. for Int'l. Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1351 (Ct. Int'l Trade 2019) (Katzmann, J., dubitante) ("There is no guidance provided on the remedies to be undertaken in relation to the expansive definition of 'national security' in the statute – a definition so broad that it not only includes national defense but also encompasses the entire national economy.").

132. 50 U.S.C. § 1701.

ish forces into Syria.[133] Even assuming that the elevated steel tariff came as a direct response to the crisis between Turkey and Syria, the President could have implemented the same measure under the IEEPA before that crisis even began by declaring that the circumstances in Turkey that existed before the incursion qualified as a national emergency under the NEA. The President's declaration of a national emergency at the U.S.-Mexico border in Proclamation 9844 of February 15, 2019 to secure funding for his proposed border wall constitutes further evidence that Presidents can use the NEA to allocate resources to causes with a questionable relationship to national security interests.[134] The IEEPA is not only susceptible to the same overbroad conception of national security as Section 232, but is indeed even more vulnerable to political manipulation because of the broad definition of what constitutes a national emergency.

3. The General Agreement on Tariffs and Trade and the World Trade Organization

As an inherently international policy area, U.S. tariff policy also implicates international regulation in the form of General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO)

133. Exec. Order No. 13,894, 84 Fed. Reg. 55851 (Oct. 14, 2019) ("By the authority vested in me as President by. . .the [IEEPA and] the National Emergencies Act. . .I. . .find that the situation in and in relation to Syria. . .constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States."); Presidential Statement on Turkey's Actions in Northeast Syria, 2019 DAILY COMP. PRES. DOC. 721 ("Likewise, the steel tariffs will be increased back up to 50 percent, the level prior to reduction in May."). The effect of a Turkey-Syria conflict on the national security of Americans may raise eyebrows, but this is where the NEA's inclusion of threats to foreign policy matters—the President could more easily argue that the ongoing situation in Syria undermined U.S. foreign policy goals including the campaign to defeat the Islamic State of Iraq and Syria, regardless of whether those foreign policy goals relate to domestic security.

134. Proclamation 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) ("Now, therefore, I, Donald J. Trump, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 *et seq*.), hereby declare that a national emergency exists at the southern border of the United States."). Sixteen states, the Sierra Club, El Paso County, and the Border Network for Human Rights sought to enjoin the emergency action, alleging that the diversion of funds for the border wall by way of emergency powers violated the separation of powers under the Appropriations Clause. Ultimately, the Supreme Court and Court of Appeals for the Fifth Circuit denied these injunctions. *See* Trump v. Sierra Club, 140 S. Ct. 1 (2019); El Paso Cty. v. Trump, 982 F.3d 332 (5th Cir. 2020). President Trump renewed the emergency for another year in February 2020. Niv Ellis, *Trump Extends Emergency Declaration at Border*, HILL (Feb. 13, 2020, 4:49 PM), https://thehill.com/policy/finance/483039-trump-extends-emergency-declaration-at-border. The Supreme Court has since rejected another challenge by the Sierra Club. *See* Trump v. Sierra Club, 140 S. Ct. 2620 (2020).

rules. Similar to the national laws discussed above, these rules (ostensibly) restrict the capacity of the United States to raise tariffs on goods from foreign nations but are themselves subject to an explicit national security exception. This section will discuss a recent decision of the WTO's Dispute Settlement Body, *Russia v. Ukraine*, that limits the scope of that exception with potential consequences for the resilience of Section 232 and IEEPA tariff actions to challenges by affected nations before the Dispute Settlement Body. The section then analyzes the practical effect of that panel decision and of WTO regulation as a whole on U.S. executive action, and the relevance of the GATT regime to the potential reform of domestic national security tariff statutes.

A country cannot trade without a trade partner, and a President's national security tariffs therefore influence not only domestic actors like consumers and workers, but also the standing of the United States in the international trade framework, and in particular in the WTO. The WTO is both a system of global trade rules, codified in the GATT, that promote the lowering of trade barriers like tariffs, and also a forum for the negotiation of trade agreements and the settlement of trade disputes.[135] A contracting party to the WTO can seek consultation by the Dispute Settlement Body if it believes a trade partner has violated an international trade obligation, and the ultimate decision adopted by the Dispute Settlement Body binds the parties to the dispute (though enforcement is left to the member states themselves, who may implement retaliatory trade barriers if a party does not comply with the Body's decision).[136] Before she implements trade barriers that may violate GATT provisions, a U.S. President must consider the United States' international trade obligations and the harm to U.S. workers, consumers, and industries that may result if a violation results in retaliatory tariff measures and trade wars. Moreover, the re-

135. *About WTO*, WORLD TRADE ORG. (Nov. 26, 2020), https://www.wto.org/english/thewto_e/thewto_e.htm.

136. The procedures for WTO dispute settlement are set forth in Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 404 [hereinafter DSU]. "The (adopted) report of a panel or the Appellate Body [ ] constitutes an obligation for the losing party to put to an end the WTO inconsistency [e.g. the tariff measure] (and is in addition to the primary obligation not to maintain WTO-inconsistent measures in the first place)." *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm#txt1 (last visited Mar. 15, 2021).

strictions the WTO places on protectionist tariff measures,[137] especially following the WTO Dispute Settlement Body's recent panel decision in *Russia v. Ukraine*, provide a roadmap for domestic reforms that would align presidential trade policymaking with WTO rules while also addressing constitutional separation of powers concerns.

A number of foreign nations have challenged President Trump's national security tariffs before the WTO Dispute Settlement Body, citing several provisions of the GATT that grant authority to that body to provide a binding resolution of trade disputes between WTO members. In its request for consultations (i.e. its complaint to the Dispute Settlement Body) in response to the steel and aluminum tariffs imposed under Section 232 by proclamations 9704 and 9705, China alleged that the United States had committed several violations of GATT provisions: (1) the United States had "failed to make proper determination and to provide reasoned and adequate explanation" of imports "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers" as required by GATT Article XIX:1(a) to justify increased tariffs on those imports;[138] (2) the United States had failed to notify China of its actions under Article XIX:2;[139] (3) the U.S. tariffs were invalid under Article II:1(a)-(b) because they exceeded the tariff levels that existed in 1994, when then-current levels were locked in as the maximum;[140] and (4) the tariffs failed to treat foreign nations equally and to extend to them the same privileges, in contravention of Articles I:1 and X:3(a), which require member states to extend any trade barrier or advantage applied

137. WTO rules generally preclude contracting parties from using customs duties, internal taxes, quotas, or other such measures to favor domestic industry over foreign exporters, or to favor certain foreign exporters over other exporters of the same goods. *See* GATT 1994 arts. I, III, XI.

138. Request for Consultations by China, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/1 (Apr. 9, 2018); GATT 1994 Article XIX:1(a) reads as follows: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession." GATT 1994 art. XIX:1(a).

139. Request for Consultations by China, WTO Doc. WT/DS544/1, at 2 (Apr. 9, 2018); GATT 1994 art. XIX:2.

140. GATT 1994 art. II:1(a) ("Each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.").

to one country to all contracting parties, and to administer their laws uniformly with respect to other contracting parties.[141] In their respective requests for consultations in response to the same Section 232 tariffs, other countries including Turkey and Switzerland cited the same GATT Articles and also argued that the United States had violated GATT Article XIX:1 by imposing "restrictions other than duties, taxes, or other charges"—namely, trade quotas that cap the total value of goods that may be imported from or exported to a particular country.[142]

By invoking the GATT's Article XXI national security exception to attempt to justify its protective tariffs, the United States demonstrated that the exception holds the same potential for abuse as the United States' domestic national security "exceptions," Section 232 and the IEEPA. The United States' communications to the WTO in response to these requests for consultation each stated that the President had found the tariffs in question necessary to adjust steel and aluminum imports the levels of which "impair[ed] the national security of the United States."[143] Furthermore, the United States made clear its belief that it possessed the sole authority to determine the validity of the alleged national security threat, as "[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement."[144] The United States essentially argued that states should have the sole authority to decide for themselves what constitutes a national security threat triggering Article XXI; it did so because it could then define national security as broadly as necessary to ensure that it could shoehorn any politically or economically motivated tariff actions into the national security exception, and thereby shirk its commitments arising from other GATT provisions.

The question of who decides the scope of the national security exception determines the extent to which WTO member states may misuse Article XXI, in the same way that the definitions of national security and national emergencies in Section 232 and the IEEPA re-

141. GATT 1994 arts. I:1, X:3(a).

142. Request for Consultations by Switzerland, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/1 (July 12, 2018); Request for Consultations by Turkey, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/1 (Aug. 20, 2018); GATT 1994 Art. XI:1. Each request for consultation also invoked provisions of the Agreement on Safeguards, a separate WTO instrument which elaborates on the procedures required to take "emergency actions" under GATT Article XIX. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

143. Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/2 (Apr. 17, 2018).

144. *Id.*

spectively dictate the potential for abuse of those statutes. Article XXI, the GATT 1994's national security exception, in relevant part, provides that:

> Nothing in this Agreement shall be construed:
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment
>
> (iii) taken in time of war or other emergency in international relations[145]

Whether a tariff is exempt from GATT regulation under Article XXI(b) depends entirely on how one defines "essential security interests" and what constitutes an "emergency in international relations." Previous parties to WTO trade disputes have invoked the national security exception, including in disagreements over a U.S. embargo against Nicaraguan goods in the 1980s and between the United States and the European Union over American legislation allowing lawsuits against companies that dealt in property expropriated by Cuba.[146] However, parties have often settled these disputes diplomatically before a WTO panel issued any ruling, and prior to 2019 the Dispute Settlement Body had not addressed the important question of *who* decides what constitutes a valid national security interest under Article XXI.[147]

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145. GATT 1994 art. XXI. Subsection (b) of this Article is most relevant to this Note, as the tariffs in question concern neither the disclosure of dangerous information under subsection (a) nor U.N. Charter obligations under subsection (c).

146. BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10223, THE "NATIONAL SECURITY EXCEPTION" AND THE WORLD TRADE ORGANIZATION (2018), https://fas.org/sgp/crs/row/LSB10223.pdf; Article XXI—Note by the Secretariat, WTO Doc. MTN.GNG/NG7/W/16, at 5 (Aug. 18, 1987) (listing historical invocations of Article XXI by contracting parties).

147. The WTO dispute settlement system prioritizes the settlement of disputes without resort to panel adjudication by requiring disputing parties to engage in 60 days of bilateral consultations before the complainant may request a panel. *The Process—Stages In a Typical WTO Dispute Settlement Case*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm. For example, in 2016, the United States and Vietnam settled two trade disputes simultaneously through the

The decision of the WTO Dispute Resolution Body panel in *Russia v. Ukraine* provides an answer to the question of who determines whether a national security interest exists under Article XXI.[148] In response to claims by Ukraine that Russia wrongfully restricted use of road and rail transit routes at the Ukraine-Russia border, Russia invoked Article XXI(b)(iii), justifying its actions by arguing that a 2014 emergency in international relations involving Ukraine had threatened its national security.[149] Russia did not actually identify the emergency but indicated that it began in 2014 and persisted through 2019,[150] from which one could infer that the emergency in question involved the 2014 Ukrainian revolution and ensuing Russian invasion of Crimea, a Ukrainian province.[151] Several third parties, including the United States, joined the dispute, arguing in support of Russia that the panel lacked the authority to determine whether an Article XXI(b)(iii) national emergency existed. The rationale given by the United States in its submissions to the panel echoes the language it provided in defense of its aluminum and steel tariffs: "a [WTO] Member [nation] has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens."[152] Specifically, the United States argued that the plain meaning of the phrase "which it [the GATT member state] considers" in Article XXI(b)(iii) is that the member state itself, and no other party, must regard its tariff action as necessary.[153] The United States also asserted that this qualifying language is conspicuously absent from other GATT 1994 Articles, including the general exceptions set forth in Article XX, therefore indicating that the drafters of the convention intended the phrase to carry substantive weight in Article XXI.[154] The United States further argued that GATT Article XXI lacks any language providing for review of a Member's

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WTO consultation process. Julia Gray & Philip Potter, *Diplomacy and the Settlement of International Disputes*, 64 J. CONFLICT RESOLUTION 1358, 1383 (2020).

148. *See infra* note 178 and accompanying text for discussion of the relative authoritativeness of the panel decision within the WTO system.

149. *Russia v. Ukraine* Panel Report, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019), at ¶ 7.4.

150. *Id.* ¶ 7.27.

151. *See generally* Alan Yuhas, *Ukraine Crisis: An Essential Guide to Everything That's Happened So Far*, GUARDIAN (Apr. 13, 2014, 1:01 PM), https://www.theguardian.com/world/2014/apr/11/ukraine-russia-crimea-sanctions-us-eu-guide-explainer (summarizing the main events in the 2014 Ukraine Crisis).

152. Annex D-10: Executive Summary of the Arguments of the United States, *Russia – Measures Concerning Traffic and Transit*, WTO Doc. WT/DS512/R/Add.1, at ¶ 1 (adopted Apr. 5, 2019) [hereinafter Executive Summary].

153. *Id.* ¶ 2.

154. *Id.* ¶ 4.

judgment of national security necessity, whereas Article 26.1 of the WTO Dispute Settlement Understanding, for example, includes the phrase "to the extent that such party considers *and* a panel or the Appellate Body determines."[155] By arguing that member states should determine the existence of national emergencies for the purposes of Article XXI, the United States intended to turn the Article XXI exception into a vehicle for economically and politically motivated trade sanctions—the same role played by the affirmative grants of power in Section 232 and the IEEPA under U.S. national law. In both the domestic and international contexts, the question of what qualifies as a national emergency holds the key to whether security exceptions may serve as an end-run around a body of restrictions on executive trade sanction authority.

The United States also contended that its interpretation of Article XXI was consistent with GATT parties' historical understanding of the security exception. The United States cited negotiations resulting in a dispute between itself and Czechoslovakia which arose shortly after the conclusion of the GATT 1947[156] and in which it also invoked Article XXI. The United States further cited a comment from that dispute that "every country must have the last resort on questions relating to its own security."[157] In 1982, the European Communities (a precursor international organization to the European Union) defended their use of trade restrictions against certain imports for non-economic reasons as an application of "their inherent rights, of which Article XXI of the General Agreement was a reflection."[158] Such examples are uncommon because parties have rarely invoked Article XXI prior to the recent outbreak of disputes—a trend attributed by some scholars to "a combination of WTO member restraint and fortuitous circumstances[.]"[159]

155. *Id.* ¶ 6 (citing DSU art. 26.1) (emphasis added).

156. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]. The provisions of the GATT 1947 are incorporated into the GATT 1994 and continue to have legal effect as part of the GATT 1994, which is itself incorporated into the agreement creating the WTO. *GATT 1947 and GATT 1994: What's the Difference?*, WTO, https://www.wto.org/english/docs_e/legal_e/legalexplgatt1947_e.htm (last visited Feb. 22, 2021). The GATT 1994 also incorporates "Understandings" between the contracting parties on the interpretation of certain GATT 1994 provisions, the provisions of legal instruments concluded under the GATT 1947, and the Marrakesh Protocol of Tariff Concessions. U.N. Conference on Trade & Dev., Dispute Settlement: World Trade Organization, at 5–6, U.N. Doc. UNCTAD/EDM/Misc.232/Add.33 (2003).

157. Executive Summary, *supra* note 150, at Annex D-10 ¶¶ 11–12.

158. *Id.*

159. Tania Voon, *Can International Trade Recover? The Security Exception in WTO Law: Entering a New Era*, 113 AM. J. INT'L L. UNBOUND 45, 45 (2019).

Unconvinced by the arguments of the United States and its fellow third-party intervenors, the panel in *Russia v. Ukraine* found that the jurisdiction to determine whether an action meets the requirements of Article XXI(b) lies within the panel's authority under Article XXIII of the GATT 1994—which grants the Dispute Settlement Body its authority—and the DSU.[160] The panel determined that the phrase "which it considers" in Article XXI(b), which served as the basis for the treaty interpretation advanced by the United States, does not extend to subparagraphs (i) through (iii) of subsection (b) which lay out the criteria for an essential security interest.[161] The panel considered

160. *Russia v. Ukraine* Panel Report, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019), at ¶ 7.104. Article XXIII of the GATT 1994 reads as follows:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the
> provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
>
> 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

161. *Russia v. Ukraine* Panel Report, at ¶ 7.101. For the full relevant text of Article XXI, see *supra* note 145 and accompanying text.

this a reasonable conclusion because the subparagraphs "qualify and limit the exercise of the discretion accorded to members" in subparagraph (b), and it is therefore unreasonable, "given their limited function, to leave their determination exclusively to the discretion of the invoking member."[162] The panel also found that each of the subparagraphs of Article XXI(b) were "subject to objective determination,"[163] and it relied on the negotiating history of Article XXI in forming its conclusion.[164]

The existence of an "emergency in international relations" is therefore not "self-judging" (i.e., left to the judgment of the member state), but is rather subject to the objective determination of the WTO panel as the neutral factfinder in the dispute settlement procedure. Taking into account the matters addressed in GATT Article XXI subparagraphs (i) and (ii) (fissionable materials and traffic in arms, respectively), and the reference to war in subparagraph (iii),[165] the panel noted that "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," all of which suggest circumstances of greater and more immediate danger than that posed by the trade imbalances that engendered President Trump's tariff orders.[166] Most importantly for the prospects of Section 232 or IEEPA sanctions before future panels, the panel interpreted Article XXI to provide that "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)."[167] Accepting that political or economic conflicts with other countries may require urgent responses, the panel nonetheless concluded that such conflicts "will not be 'emergencies in international relations' within the meaning of subparagraph (iii) unless they give rise to defense and military interests, or maintenance of law and public order interests."[168] Though this was the first formal interpretation of the scope of Article XXI by the WTO, it constitutes a more restrictive view of that scope than the prior practice of member states might suggest. For its part, the panel found that the

162. *Id*. ¶ 7.65.
163. *Id*. ¶ 7.77.
164. *Id*. ¶ 7.83.
165. Full provision text quoted *supra* pp. 37–38.
166. *Russia v. Ukraine* Panel Report, at ¶ 7.76.
167. *Id*. ¶ 7.75.
168. *Id.*

situation between Russia and Ukraine[169] that gave rise to the challenged actions by Russia "constitute[d] an emergency in international relations" under its interpretation of Article XXI(b)(iii), and that the measures at issue were "taken in time of" that emergency, meaning that unrest arising from the 2014 Ukrainian revolution served as a legitimate justification for Russia's actions under Article XXI.[170] Ukraine could have appealed this decision to the WTO Appellate Body but did not do so.

The panel also concluded that, despite the presence of the phrase "which it [the GATT member state] considers" in the chapeau of Article XXI(b), the Article constrains a member state's discretion to determine what counts as its "essential security interests."[171] Noting that general principles of law and international law require good faith interpretation of treaties,[172] the panel concluded that it could not reasonably interpret Article XXI(b)(iii) as leaving determination of a "time of war or other emergency in international relations" entirely to the discretion of the member state invoking Article XXI to justify its trade policies.[173] Rather, the existence of such circumstances constitutes "an objective fact, subject to objective determination," similar to the existence of war, fissionable materials, or traffic in arms which constitute the other concrete examples of security threats in Article XXI.[174] The ability of the panel to objectively determine the existence of these treaty elements does not necessarily mean that the panel itself should do so, but the purpose of the GATT 1994—"promot[ing] the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade"—supports the neutral, independent determination of these

169. Russia was intentionally vague in its description of the justifying emergency, but likened the situation with Ukraine to a series of hypothetical circumstances: "a. unrest within the territory of a country neighboring a member, occurring in the immediate vicinity of the Member's border; b. The loss of control by that neighboring country over its border; c. Movement of refugees from that neighboring country to the Member's territory; and d. Unilateral measures and sanctions imposed by that neighboring country or by other countries, which are not authorized by the United Nations, similar to those imposed against Russia by Ukraine." *Id.* ¶ 7.114 (citing Russia's Opening Statement at the Second Meeting of the Panel, *Russia–Measures Concerning Traffic and Transit*, at ¶ 24).

170. *Id.* ¶¶ 7.123–7.125.

171. *Id.* ¶¶ 7.62–7.77.

172. *See, e.g.*, Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

173. *Russia v. Ukraine* Panel Report, at ¶ 7.132.

174. *Id*. ¶¶ 7.62–7.77.

factors.[175] The panel concluded that "[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and WTO Agreements. . .to interpret Article XXI as. . .subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."[176] The panel therefore affirmed that Article XXI(b) "vest[s] in [dispute settlement] panels the power to review whether the requirements of the enumerated subparagraphs [of XXI(b)] are met, rather than leaving it to the unfettered discretion of the invoking Member."[177]

Relative to U.S. courts' limited imposition of restrictions on the novel use of Section 232 and IEEPA sanction power, the panel in *Russia v. Ukraine* delivered a stronger rebuke of the use of national security justifications as pretext for trade sanctions motivated by political or economic concerns. While WTO panel and Appellate Body reports do not bind member states outside of the particular dispute in question, the Appellate Body has observed that "WTO members attach significance to reasoning provided in previous panel and Appellate Body reports," and "the legal interpretation embodied in adopted[178] panel and Appellate Body reports becomes part and parcel of the [acquired experience] of the WTO dispute settlement system."[179] The panel decisions in the various consultations requested to challenge President Trump's aluminum and steel tariffs—which remain pending as of March 2021—will therefore likely involve objective evaluation by the panel of whether the circumstances cited by the administration in Proclamations 9704 and 9705 constituted a true "emergency in international relations" as articulated by the panel in *Russia v. Ukraine*.[180] Since the *Russia v. Ukraine* panel's ultimate ruling in favor of Russia as the state invoking Article XXI, a panel has yet to rule against a state invoking the exception. However—given that steel and aluminum are

175. *Id*. ¶ 7.79.

176. *Id*.

177. *Id*. ¶ 7.102.

178. The reports of WTO dispute settlement panels only bind the member states once adopted by the Dispute Settlement Body (DSB). The DSB must adopt reports between 20 and 60 days following their dissemination unless either party notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. These procedures apply whether the panel finds a violation or not. *See* DSU Art. 16; *The Process—Stages in a Typical Dispute Settlement Case*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm.

179. Report of the Appellate Body, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc. WT/DS344/AB/R, at ¶ 160 (Apr. 30, 2008).

180. *Russia v. Ukraine* Panel Report, at ¶ 7.76.

neither fissionable material nor weapons, and given that no war exists between the United States and the countries affected by the tariffs—such tariffs may, in an appropriate case, run afoul of the statutory framework established by the *Russia v. Ukraine* panel.

Given the WTO's lack of an enforcement mechanism[181] and the Trump administration's hostile attitude toward the WTO's authority generally, the *Russia v. Ukraine* decision cannot serve as a hard limitation or even as a persuasive guide to presidential use of executive national security trade sanction authority. Whether the United States would comply with an adverse ruling from a WTO panel depends largely on the President's use of her discretion. President Trump openly criticized the WTO during his term and repeatedly threatened to withdraw the United States from the organization entirely for its allegedly unfair treatment of the United States.[182] The Trump administration also took the more concrete step of blocking the appointment of judges to the Appellate Body, which effectively nullified the body entirely when the number of active judges fell below the three-judge minimum in December 2019.[183] The Biden administration has also refused to appoint new Appellate body members, citing "systemic concerns" with the Body's functioning.[184] The prospect of an adverse ruling in the Dispute Settlement Body is unlikely to meaningfully deter a President's use of her national security tariff authority, and that President would likely disregard an actual adverse ruling. Some even

181. *See, e.g.*, Michael Goodyear, *Helping David Fight Goliath: Preserving the WTO in the Trump Era*, 11 TRADE L. & DEV. 372, 381 (2019) ("Like the GATT, the DSU is largely premised on political willingness for compliance. The current WTO system does not work unless countries feel inclined to cooperate. This is in part due to the weakness of the DSU sanction system. With sanctions limited to retaliation, the DSU does not have serious enough teeth to cow a determined and powerful country from breaching the WTO.").

182. *Trump Threatens to Pull US Out of World Trade Organization*, BBC (Aug. 31, 2018), https://www.bbc.com/news/world-us-canada-45364150. The results of adjudicated WTO disputes suggest that the United States is subject to the same "pro-complainant bias" as other member states, prevailing in approximately 90 percent of disputes when it is a complainant and losing on approximately 90 percent when it is complained against. This "bias" is due in large part to the fact that members only bring complaints when they are confident that they have a winning argument should the issue enter dispute settlement proceedings. Dan Ikenson, *US Trade Laws and the Sovereignty Canard*, FORBES (Mar. 9, 2017, 10:02 AM), https://www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/#6eedf4c8203f.

183. Keith Johnson, *How Trump May Finally Kill the WTO*, FOREIGN POL'Y (Dec. 9, 2019, 9:58 AM), https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/.

184. Bruce Baschuk, *Biden Picks Up Where Trump Left Off in Hard-Line Stances at WTO*, BLOOMBERG (Feb. 22, 2021), https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto.

speculated that an adverse ruling would have pushed President Trump to withdraw the United States from the WTO entirely.[185] The Biden administration seems no more likely to comply with adverse WTO dispute settlement rulings, having reaffirmed explicitly that it believes member states have the right to determine when its own security interests are implicated.[186] That said, the new administration may need to cooperate to some extent if it wishes to follow the Obama administration and prioritize the use of WTO enforcement actions by the United States against other countries, particularly China.[187] Regardless, U.S. law should not leave compliance with WTO rules to executive discretion, as future presidents may well shirk the rules like President Trump did. In order for the United States to adhere consistently to its WTO obligations and thereby benefit fully from its WTO membership, executive discretion under Section 232 and the IEEPA should be reined in to better ensure that those tariff actions taken by the President will withstand scrutiny by the Dispute Settlement Body.

Even assuming an administration supported the Dispute Settlement Body's authority, the remedies available for successful challenges to U.S. tariffs would likely not sufficiently deter arbitrary use of Section 232. These are relatively uncharted waters, as there have been few past examples of WTO disputes in which a country invoked the Article XXI national security defense against challenges to an import-restricting policy.[188] Hypothetically, if the panel were to rule in favor of eliminating the tariff, the United States would have 30 days to either implement the ruling or explain why immediate compliance would be impracticable and suggest a reasonable alternative timeline.[189] One could imagine how the United States might cite its national security concerns once more as grounds for the impracticability

185. Linfan Zha, *The Wall on Trade: Reconsidering the Boundary of Section 232 Authority Under the Trade Expansion Act of 1962*, 29 MINN. J. INT'L L. 229, 270 (2020).

186. Baschuk, *supra* note 184.

187. *See* WHITE HOUSE, OFF. OF THE PRESS SEC'Y, *FACT SHEET: The Obama Administration's Record on the Trade Enforcement* (Jan. 12, 2017), https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/fact-sheet-obama-administrations-record-trade-enforcement (Under Obama, "the United States has filed 25 enforcement actions at the WTO. . .[and] won every single one. . .including seven against China alone").

188. Chad P. Brown, *Export Controls: America's Other National Security Threat*, 30 DUKE J. COMP. & INT'L L. 283, 305 (2020).

189. DSU art. 21(3). The Dispute Settlement Body has not yet ruled on the challenges brought against President Trump's aluminum and steel tariffs, and will likely not do so before the second half of 2021. *See, e.g.*, Communication from the Panel, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/11 (Feb. 8, 2021) ("[D]ue to the delays caused by the global COVID-19 pan-

of compliance. Any member state can bring issues of implementation before the WTO Dispute Settlement Body until the issue is resolved, and the WTO would require the United States to report on the status of its implementation 10 days prior to subsequent DSB meetings planned as a result.[190] The United States would likely decline to draw back its security measures, so the winning party would gain the right to compensation or the suspension of concessions (i.e., permitting the winning party to suspend compliance with trade commitments to which it had previously agreed with the losing party) under DSU Article 22. "Compensation is voluntary" for the losing party,[191] so the only practical remedy would be the suspension of concessions and implementation of retaliatory tariffs by the winning party. China has already demonstrated that affected countries with the will and economic capacity to issue retaliatory tariffs often do so long before receiving the green light from the DSB,[192] and countries like Switzerland may lose more than they would stand to gain in imposing retaliatory tariffs against a trading partner as important to them as the United States.[193] Because the WTO lacks authority to meaningfully enforce the rulings of its Dispute Settlement Body, the threat of the mild effects that an adverse ruling would have on the United States would not likely alter a President's calculus in deciding whether to invoke her authority under Section 232 or the IEEPA.

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demic, the Panel now expects to issue its final report to the parties no earlier than the second half of 2021.").

190. DSU art. 21(6).

191. *Id*. art. 22(1).

192. Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Article 8.2 of the Agreement on Safeguards–*Request by China*, WTO Doc. G/L/1218; G/SG/N/12/CHN/1, (Mar. 29, 2018), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=244292,244291,244237,236486,235988,231386,61766,62577,46843,96880&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=true&HasFrenchRecord=true&HasSpanishRecord=true [hereinafter China Article 12.5 Notification] (notifying the WTO of China's intent to increase tariffs on U.S. exports to China in retaliation against U.S. tariffs on steel and aluminum imports, six days after the United States imposed those tariffs); *see also* Zha, *supra* note 185, at 243 (2020) (noting that in response to Section 232 tariffs imposed by the United States, China announced retaliatory tariffs on approximately $3 billion of U.S. products).

193. In 2019, Switzerland was only the United States's nineteenth-largest export market for goods, receiving approximately 1% of U.S. exports. The United States, on the other hand, was the second-largest consumer of Swiss exports, receiving 14% of them. *See Switzerland*, OFF. OF THE U.S. TRADE REPRESENTATIVE (last visited Jan. 23, 2021), https://ustr.gov/countries-regions/europe-middle-east/europe/switzerland; *Switzerland*, OBSERVATORY OF ECON. COMPLEXITY (last visited Mar. 15, 2021), https://oec.world/en/profile/country/che.

The requests for consultation brought under the GATT 1994 in response to President Trump's tariffs resemble in spirit the domestic legal challenges to his use of Section 232. Like the plaintiffs in *Transpacific Steel*, China challenged the 2018 steel and aluminum tariffs on procedural grounds, in this case under GATT 1994 Article XIX. China's claims of unfair treatment under Articles I, II, and X resemble the equal protection claims brought in *Transpacific*. The belief that the "measures of the United States are safeguard measures although [they are] in the name of national security" underlies these arguments in both the domestic and international context.[194] The panel ruling in *Russia v. Ukraine* opened the doors of the DSB to entertain just such a claim, and that forum seems much more likely to challenge a President's use of her national security trade restriction authority than do the courts of the United States. Unfortunately for those who would like to see executive trade sanction authority reined in, the DSB lacks the enforcement mechanism necessary to meaningfully deter tariff-setting of this sort. It is not mere coincidence that the same national security exceptionalism that provided the basis for the Trump administration's authority also serves as a key pillar of the national sovereignty rationales that undermine WTO enforcement efforts. Nonetheless, the conclusions of the *Russia v. Ukraine* panel on the nature of national security can serve as a basis for the sort of domestic statutory reform that could meaningfully constrain national security trade sanction authority.

4. Summary: The Delegating Statutes Define National Security Too Broadly

In each of the three legal regimes discussed above, the breadth of the President's control over tariff policy traces back to a nebulous definition of national security. As the CIT noted in *AIIS*, Section 232's conception of national security justifications encompasses "the entire national economy,"[195] including "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."[196] The President can invoke the sanction powers granted by the IEEPA in a national emergency declared in response to a threat to the "foreign

194. China Article 12.5 Notification, *supra* note 192, at ¶ 2.
195. Am. Inst. for Int'l Steel, Inc. v. United States (*AIIS*), 376 F. Supp. 3d 1335, 1351 (Ct. Int'l Trade 2019).
196. *Id*. at 1339 (citing 19 U.S.C. § 1862(d)).

policy[ ] or economy of the United States" originating abroad.[197] The language of both statutes clearly provided for the imposition of trade sanctions for solely economic or political purposes even before an administration came to power with the nationalist policy goals and political will to apply the statutes in such a fashion. In the absence of a clear definition of national security threats, or procedural rules that effectively force disclosure of a President's policy motivations, these statutes create fertile ground for unilateral executive action in a policy area traditionally and constitutionally reserved to Congress. As the leader of a branch of government premised on political accountability, the President must be required to disclose the true reasoning underlying her actions, and statutes delegating so much power must at the very least contain the means to compel that disclosure.

Pretextual national security justifications for tariffs also directly oppose the regime contemplated by the GATT 1994. As articulated by the *Russia v. Ukraine* panel, "political or economic conflicts with other Members or states. . .will not be 'emergencies in international relations' within the meaning of [Article XXI(b)(iii)]."[198] The WTO and DSB have neither the enforcement power nor influence over U.S. executive decision-making to impose a narrower definition of national security on the President, but the definitions proposed by the panel in *Russia v. Ukraine*—and international law principles limiting the national security exception[199]—can contribute to a reformulation of domestic policy in this area. Such a reformulation would reduce the likelihood of the United States running afoul of its obligations under the GATT, which matters for maintaining good trade relations with China and other trade partners. Good trade relations would in turn prevent retaliatory tariffs and trade wars that not only open the door to international conflict in other policy areas, but also directly harm U.S. industry, workers, and consumers.[200] However, proposing a narrower definition of national security first requires consideration of meritorious arguments in favor of a definition that includes some economic concerns, because technological advances in both the military and civilian contexts have blurred the line between purely economic actions and those actions that may endanger the physical well-being of citizens.

197. 19 U.S.C. § 1701(a).

198. *Russia v. Ukraine* Panel Report, ¶ 7.75, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

199. International law requires, for example, an imminent security threat before a country uses force in response. *See infra* at 733–34.

200. *See* Layne, *supra* note 39.

II.
Is Economic Conflict the "New Normal" for National Security Threats?

The *Russia v. Ukraine* panel's definition of valid national security threats, which excludes entirely economic conflicts unless they "give rise to defense and military interests,"[201] offers an attractive starting point for limiting the President's trade sanction authority under Section 232 and the IEEPA. However, before excising economic conflicts entirely from the realm of legitimate security threats, it is worth taking a step back to acknowledge the ways in which national security has expanded beyond traditional notions of military conflict. This Note argues for reining in the scope of the President's national security tariff authority, but such statutory reform must not go so far as to leave the President unable to address new and credible varieties of national security threats. Indeed, if any area of the law warrants a preference for over-delegation of executive authority, national security deserves such treatment. That said, this section will show that the proper statutory language could significantly curtail a President's ability to dictate broad trade policy with her national security powers without infringing on the Executive's capacity to respond deftly to a constantly evolving security environment.

Recent reforms to the Committee on Foreign Investment in the United States (CFIUS)[202] illustrate the increasingly economic nature of international security threats. There has long existed an overlap between economic measures and national security, with trade embargoes and economic sanctions standing out as the classic examples of nominally economic measures with substantial national security implications.[203] As technology plays an increasingly critical role in all aspects of daily life, the ability to hack and take control of that technology will afford both state and nonstate actors greater power to effect real harm through cyberattacks. Because data and information can open the door to cyberattacks and other real-world threats, economic transactions that involve potential foreign access to domestic data or systems now pose legitimate national security concerns. For example,

201. *Russia v. Ukraine* Panel Report, at ¶ 7.75.

202. CFIUS includes several agency and department heads and exists to advise the President on the national security implications of foreign investment in critical economic sectors. *See* Patrick Corcoran, *Investing in Security: CFIUS and China After FIRRMA*, 52 J. Int'l L. & Pol. Online F., at 7 (discussing CFIUS's role and development in the context of the Committee's response to Chinese investment in the United States).

203. *See* J. Benton Heath, Essay, *National Security and Economic Globalization: Toward Collision or Reconciliation?*, 42 Fordham Int'l L.J. 1431, 1441 (2019).

from 2007 to 2016, Chinese foreign direct investment in the United States grew from $356 million to $45.2 billion per year, increasing Chinese access to and influence over various sectors of the U.S. economy—some of them with potentially significant ties to national security.[204] The nature of Chinese investment also changed as China began to target high technology sectors, including artificial intelligence, robotics, and semiconductors.[205] In the eyes of U.S. policymakers, this investment strategy constituted a serious national security threat.[206] Setting aside the prospective commercial value of investment in these tech sectors, the U.S. Department of Defense views these technologies as fundamental to the foreseeable future of military innovations.[207] In order to better empower CFIUS to review and block national security threats arising from such investment, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2019.[208] The Act marginally expanded the scope of CFIUS's review power to include investments in companies dealing in "critical technology" (which includes emerging or foundational technologies and articles or materials related to various forms of weaponry) and the "sensitive personal data of U.S. citizens."[209] The IEEPA reflects similar concerns in a section dedicated to economic or industrial espionage in cyberspace.[210] The national security institutions of the United States should and have begun to expand their focus to account for nonconventional threats like cyberattacks. For example, although FIRRMA targets the squarely economic act of foreign investment, such investment could give rise to technology-based industrial espionage, broad access to personally identifying information, and other breaches that could

204. Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SEC. L.J. 1, 22–25 (2018).

205. *See generally* INST. FOR SEC. & DEV. POL'Y, MADE IN CHINA 2025 (2018), https://isdp.eu/content/uploads/2018/06/Made-in-China-Backgrounder.pdf.

206. Wakely & Indorf, *supra* note 204, at 9 (citing OFF. OF SEN. JOHN CORNYN, BACKGROUND ON FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT (FIRRMA), at 1 (Nov. 7, 2017)).

207. *Id.* at 24 (citing MICHAEL BROWN & PAVNEET SINGH, DEFENSE INNOVATION UNIT EXPERIMENTAL, CHINA'S TECHNOLOGY TRANSFER STRATEGY: HOW CHINESE INVESTMENTS IN EMERGING TECHNOLOGY ENABLE A STRATEGIC COMPETITOR TO ACCESS THE CROWN JEWELS OF U.S. INNOVATION (2017), https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_(1).pdf).

208. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 1636.

209. Stephanie Zable, *The Foreign Investment Risk Review Modernization Act of 2018*, LAWFARE (Aug. 2, 2018, 3:39 PM), https://www.lawfareblog.com/foreign-investment-risk-review-modernization-act-2018.

210. 50 U.S.C. § 1708.

clearly "give rise to defense and military interests."[211] An investment identified for intervention by CFIUS could thus satisfy even the *Russia v. Ukraine* panel's narrower definition of national security interests. Even as the U.S. government begins to respond to the new normal of cyber conflict and data privacy, much ambiguity remains in the overlap between those technologies that hold major economic potential in their civilian applications, and those that foreign actors may seek to exploit to undermine U.S. national security.

Where then lies the line between those economic conflicts that implicate military and defense interests and those that do not? A nation's capacity to defend itself against military threats will always depend in part on the strength of its economy, which in turn depends on countless factors. The question is therefore how closely the economic action in question must resemble a potential military action against the United States in order for the economic action to constitute a national security threat in and of itself. To count as a national security threat, the economic act or circumstance need not present a likelihood to create military conflict in itself, but the situation should substantially impair the capacity of the United States to respond to an imminent threat, for example by fundamentally destabilizing America's economy or institutions. Under this more demanding standard, a Department of Defense finding that domestic production of a good satisfies the military's needs for standard combat readiness would likely preclude the President from citing national security to justify tariffs on imports of that good.[212] Between the extremes of purely economic and military actions, there remains a vast gray area of economic circumstances that could arguably constitute security threats or not, based on the political agenda of the administration addressing them.

The difficult question of whether an economic act or circumstance justifies a national security response may be addressed in part by comparison to the imminence requirement for self-defense in the international law governing the use of force. A strict interpretation of

211. *Russia v. Ukraine* Panel Report, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019), at ¶ 7.75.

212. The Department of Defense said as much with regards to domestic production of steel during the Department of Commerce's investigation into that good for purposes of President Trump's Section 232 tariff on steel, but that finding was not fatal to the tariff action. Plaintiff Transpacific's Response Brief, at 5–6, Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019) (No. 19-00009) ("U.S. Military requirements for steel and aluminum each only represent about three percent of U.S. production and '[t]herefore, DoD [the Department of Defense] does not believe that the findings in the reports [by the Department of Commerce] impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.'").

Article 51 of the U.N. Charter would permit a state to employ self-defensive measures only in response to an armed attack against it.[213] In practice, states will not wait until they are under attack, but instead will engage in anticipatory self-defense if a military threat is imminent. International law scholars continue to debate what counts as an imminent threat, and the debate has evolved with the advent of new military technologies and strategies. On the one hand, the most restrictive standards allow for the use of force by a country facing an actual attack only when the need to react is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation";[214] obviously, such an approach would completely exclude economic actions. On the other hand, proponents of a broader standard would assert that the advent of ballistic missiles and nuclear warheads raises concerns that a restrictive standard would leave no way to avoid a devastating nuclear first strike, because massive damage from such weapons would already be unavoidable by the time the strike reached the higher standard for imminence.[215] The United States has adopted similar arguments to justify preemptive actions against non-state terrorist actors.[216] The United States' broad interpretation of imminence has drawn criticism because, in practice, nations have justified a wide array of military actions and operations without clear evidence that the measures taken satisfy the other customary international law criteria for anticipatory self-defense: proportionality and necessity.[217] Although the United States has not favored the restrictive standard for imminence in deciding when to deploy a military response, some consideration of the immediacy of the potential harm posed by an economic circumstance (e.g. a trade imbalance) can help to clarify whether the situation actually justifies the invocation of national security and emergency tariff powers.

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213. U.N. Charter art. 51, ¶ 1 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member.").

214. Ashley Deeks, *Taming the Doctrine of Pre-emption*, *in* THE OXFORD HANDBOOK ON THE USE OF FORCE 661, 662 (Marc Weller ed., 2015) (citing Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842)).

215. Leo Van den hole, *Anticipatory Self-Defense Under International Law*, 19 AM. UNIV. INT'L L. REV. 69, 88–90 (2003).

216. Deeks, *supra* note 214, at 667 (citing 2002 U.S. National Security Strategy, at 15 ("[W]e do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with [weapons of mass destruction] are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize.")).

217. Van den hole, *supra* note 215, at 95–97.

As security threats grow increasingly economic in nature, one of the greatest challenges to the international legal order governing the use of force is how to apply the imminence framework to threats whose intangible nature makes applying these standards even more difficult. Economic activity may well prove adversarial to the United States without imminently endangering the nation's security per se. True national security and "economic security" differ in that threats to national security often present true "zero-sum" choices—in other words, one actor's gain is the other's loss.[218] Conversely, most economic activities are "positive-sum" in that the competition among states has the net effect of increasing the welfare of the world as a whole and, on a smaller scale, even those economic activities that the government perceives as harmful to the United States likely benefit at least some groups of Americans in most cases.[219] One could argue that nuclear weapons pose a positive-sum national security threat because their existence actually deters resort to conventional weaponry in some cases, but this state of affairs is a mere byproduct of a standoff resulting from the use of a zero-sum weapon, and not the natural outcome of the use of the weapon itself. Despite this fundamental distinction between security and economic threats, politicians often find it politically expedient to frame economic conflict in the "'us-against-them' language of national security," which may or may not constitute an accurate representation depending on whether the conflict actually has national security implications.[220] President Trump himself incorrectly characterized international trade as a "zero-sum game" in which trade deficits represent money lost by the United States, when in reality both trading countries stand to gain by bargaining in a win-win series of trade transactions.[221]

Technological advances and the globalization of commerce have intertwined economics and national security in new and significant ways, but a narrower definition of national security as suggested in *Russia v. Ukraine* can nonetheless account for this new reality. To the extent that the U.S. government must monitor economic transactions like the import of foreign goods and foreign investment for security reasons, the economic activities in question qualify as having implica-

218. C. RICHARD NEU & CHARLES WOLF, JR., RAND NAT'L DEF. RSCH. INST., THE ECONOMIC DIMENSIONS OF NATIONAL SECURITY 4 (1994).
219. *Id.*
220. *Id.*
221. Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115, 125, 155 (2019); *see also* Brown, *supra* note 188, at 287–89 (describing the Trump administration's rhetoric linking national and economic security).

tions for "defense and military interests." Expanding the definition further to include all economic activity, as Section 232 and the IEEPA currently do, widens the definition beyond what is needed to account for new threats. For reasons given above, this approach has proven unsustainable and allows for capricious use of the statutes. The broad definition of national security interests in these statutes allows the President to target any economic transaction with adverse effects on the U.S. economy, no matter how remote or different that adverse action might be from a traditional direct military threat. Indeed, in its latest Section 232 ruling, the CIT explicitly rejected the argument that Section 232 implicitly required an "impending" security threat, or that the statute precluded actions in response to "distant in time or conjectural" threats.[222] Concerns over the advent of novel security threats, while valid and deserving of the continued attention of U.S. national security regulators like CFIUS, should not stand in the way of a narrowing of the definitions of national security or national emergencies in the trade context.

III.
Proposing A Narrower Definition of National Security

As the preceding sections have demonstrated, the fundamental source of the breadth of the President's national security trade sanction authority lies in the delegating statutes' expansive and vague definition of national security. Moreover, a narrower definition of national security emergencies, such as the one suggested by the *Russia v. Ukraine* panel, can curtail presidential overreach and abuse of power while still providing the Executive with sufficient leeway to remain responsive to an ever-evolving security climate. While these weaknesses in the statutory scheme predated the Trump administration, the Trump administration's unprecedented, numerous, overbroad, and often questionable trade sanctions left no doubt that, short of a major statutory redefinition, the institutions intended to regulate presidential use of national security trade sanctions hold relatively little power—and an administration more savvy than Trump's, which could more deftly navigate the ambiguities in this legislation, could further erode these institutions' power to prevent abuse.

222. Universal Steel Prods. v. United States, No. 19-00209, 2021 Ct. Int'l Trade LEXIS 12, at *23, n.14 (Ct. Int'l Trade Feb. 4, 2021) (granting the Government's motion for judgment on the pleadings in a challenge to President Trump's steel tariffs brought by U.S. steel importers).

Congress must narrow the legal grounds for presidential invocation of emergency tariff powers, add procedural requirements that will force presidents invoking Section 232 and IEEPA powers to show that they operate within Congress's newly strengthened definition, and provide for stricter judicial review of the President's finding of circumstances threatening national security or which constitute a national emergency. These changes will ensure that actions taken by the President under these statutes do not stretch the national security exception to the anti-trade-protectionism provisions of the GATT beyond the limits imposed on it by the WTO in *Russia v. Ukraine*. They will also prevent the President from disguising tariffs motivated by economic or other non-security considerations beneath the pretext of a national security rationale.

1. Changes to Section 232 of the Trade Expansion Act of 1962

Congress should amend Section 232 to include a definition of national security that excludes those economic threats that do not immediately implicate actual military concerns. A definition that fails to exclude purely economic threats will allow the President to execute economic policy in the guise of a national security response, and thereby obfuscate which decisions are elective economic policymaking and which are necessary to keep Americans secure. This backdoor path to economic policymaking shirks public accountability and can instigate (and has instigated) trade policy standoffs with other countries that economically harm U.S. workers and consumers.[223] As a more technical matter, the current broad definition of national security also permits the imposition of tariffs that are vulnerable to challenge by other countries before WTO DSB panels. A narrower definition could be inserted as an additional subsection in § 1862, and might read as follows:

> **Definition of national security interests.** For the purposes of this section, imports of articles will be considered to impair national security only if they impair the capacity of the United States to address threats which bear directly on the military and/or defense interests of the United States, including armed conflict endangering the lives of United States citizens. Threats to United States interests that are of a purely political, economic, or other such nature will not be considered to impair national security, except to the extent that such conflicts implicate the military and defense interests of the United States.

223. *See, e.g.*, Layne, *supra* note 39.

In addition, an amendment to § 1862(d) should eliminate purely economic considerations from the universe of factors that the President can consider when deciding whether to act. Specifically, the language related solely to the "economic welfare of individual domestic industries" and the "weakening of our internal economy" must be removed,[224] such that the only economic needs that qualify must arise from the essential requirements of the U.S. military to remain prepared to defend U.S. citizens. The following is a potential amendment of § 1862(d) to implement these changes:

> **Domestic production for national defense.** For the purposes of this section, the [Commerce] Secretary and the President shall, in the light of the requirements of national security, 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.

Finally, to ensure that the action taken by the President is responsive and proportionate to circumstances that fall within the definition and circumstances outlined above, Congress should amend Section 232 to require that the justifications the President gives to Congress do in fact involve legitimate military and defense interests. Accordingly, Congress could amend § 1862(c)(2) to read as follows (emphasis indicates added text):

> By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1). *Reasons for action under this section must fall within the national security interests of the United States as articulated in [the section defining national security] above.* Such statement shall be included in the report published under subsection (e).

Ideally, these statutory reforms would preclude the President from implementing broad foreign and economic policy under Section

224. Trade Expansion Act of 1962, 19 U.S.C. § 1862(d).

232, given that the statute is only intended as a means of reacting to bona fide security threats. At the very least, a clearer statement of the nature of the national security concerns in question will provide reviewing courts with a stronger basis to interrogate the rationality of the President's decision. More robust judicial review of this nature would render tariffs imposed under Section 232 less susceptible to challenge by affected states before the WTO Dispute Settlement Body, as U.S. courts could better verify that an essential security interest justified the tariff action. More importantly, this proposed language and the threat of judicial review will substantially narrow the scope of the President's trade sanction authority, correcting an imbalance of power between Congress and the Executive and forcing Presidents who wish to implement trade policy for economic reasons to disclose that rationale to the public. Others who have suggested similar amendments have raised that this increased scrutiny may preclude the expedient implementation of necessary measures, but have also identified alternative measures which would remain available, including antidumping and countervailing duties and other unfair trade practice proceedings.[225] Furthermore, judicial review occurring *ex post* would not likely delay the initial implementation of measures absent a preliminary injunction, and courts may be reluctant to grant such injunctions given the overwhelming weight of the government's interest in responding promptly to national security issues—although Congress might nonetheless see fit to preclude injunctive relief more explicitly via statutory amendment.

Short of implementing the above proposals, Congress might deter, though likely not eliminate, the capricious use of Section 232 with more conservative procedural changes to the statutory scheme. Congress could, for example, impose a mandatory latency period between the President's announcement of a Section 232 tariff action and the actual application of that tariff to the goods in question. A delay of six months to a year might blunt the political usefulness of strategic use of the statute, thereby disincentivizing its use as a merely economic or political instrument. On the other hand, such delay may render legitimate uses of the statute ineffective in countering the threats to which the President intends to respond. Perhaps Congress could apply a delay to some measures but not others, but the determination of whether such a conditional delay applied to a particular situation would make

225. *See, e.g.*, Zha, *supra* note 185, at 274 (advocating for the narrowing of Section 232 authority and rebalancing of executive and congressional power through restoration of congressional oversight and restructuring of procedural and structural constraints on Section 232 power).

no difference if made by the President and would still require some waiting period if made by Congress. Congress could go a step further by inserting such a delay period as a "lay before provision" in the statute. Lay before provisions require that agencies present administrative regulations to the legislature before they take effect, and England has used them especially when "the powers given to an administrative body are great or where the powers might be misconstrued, abused or overstepped by such body."[226] Others have proposed various versions of amendments that would re-insert congressional approval at some stage for at least some executive tariff actions.[227] The constitutional issues that such a provision might present in the United States lie beyond the scope of this Note,[228] but it is possible that, notwithstanding such concerns, a lay before provision could serve as an effective solution if it stopped short of creating a legislative veto.

2. Changes to the International Emergency Economic Powers Act

Reform of Section 232 will have little impact if Congress does not similarly amend the IEEPA, which has proven to be the more resilient to judicial review of the two statutes in some circumstances.[229] Congress should therefore amend the text of the IEEPA to bring the scope of the statute's national security exception in line with WTO standards. While the NEA addresses threats arising in national security, the economy, foreign policy or other contexts, the economic powers granted within the IEEPA specifically should not extend beyond national security threats. Otherwise, the IEEPA serves as a vehicle by which the President may address a broad range of economic and other policy issues with plenary tariff authority, which constitutes an improper exercise of congressional tariff power without sufficient democratic accountability. A potential amendment to the text of § 1701(a)

226. Harold Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 639 (1956). The laying system has not been implemented in the United States, likely because of the constitutional questions it raises. *Id.* at 651–61.

227. *See, e.g.*, Zha, *supra* note 185, at 271–73 (discussing several proposed bills that would have restored congressional oversight over Section 232 actions); Vincento, *supra* note 32, at 309–10 (suggesting an amendment that would require joint resolutions of Congress to approve Section 232 actions both before and once they take effect).

228. For a discussion of these constitutionality concerns, see Boisvert, *supra* note 226, at 651–61.

229. For example, President Trump used the IEEPA to impose tariffs on Turkey, the imposition of which the U.S. Court of International Trade had previously overturned under Section 232. *See* Exec. Order No. 13,894, 84 Fed. Reg. 55851 (Oct. 14, 2019).

of the IEEPA[230] would read as follows (emphasis indicates added text):

> Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security of the United States, if the President declares a national emergency with respect to such threat. *For the purposes of this section, national security threats will include only those threats that bear directly on the military and/or defense interests of the United States, including armed conflict endangering the lives of United States citizens, or heightened tension or instability that suggests that such conflict is imminent.*

In addition to removing "foreign policy[ ] or economic interests" from the list of qualifying threats, the added clauses aim to ensure that purely foreign policy or economic interests do not re-enter the statute under the guise of "national security" threats, as they have under Section 232. The NEA overall would remain responsive to emergencies of a non-security character, but the IEEPA would constrain executive exercise of constitutionally legislative commerce and tariff powers to circumstances implicating national security.

As with the proposed changes to Section 232, some changes to the procedural requirements set out in 50 U.S.C. § 1703 should accompany the substantive changes to the definition of national security in the IEEPA regime. In order to bring this section in line with the updated definition of national security under § 1701, Congress should amend § 1703 as follows (emphasis indicates added text):

> **Report to Congress upon exercise of Presidential authorities.** Whenever the President exercises any of the authorities granted by this title [50 USCS §§ 1701 et seq.], he shall immediately transmit to the Congress a report specifying—
>
> 1. the circumstances which necessitate such exercise of authority;
>
> 2. why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security of the United States *as defined in 50 U.S.C. § 1701(a);*

Additionally, Congress should amend § 1703(c) to require that the President's periodic follow-up reports specify why the President still needs her IEEPA powers to address a qualifying national security threat (emphasis indicates added text):

230. International Emergency Economic Powers Act, 50 U.S.C. § 1701–07 (1977).

> **Periodic follow-up reports.** At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities under this title [50 USCS §§ 1701 et seq.], the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b). *Each report shall include an explanation of why the exercise of such authorities continues to be necessary to counter a national security threat of the nature described in § 1701(a).*

Ideally, these changes, or a set of changes similar to them, may better deter the declaration of frivolous new national emergencies and prevent the prolonged use of emergency powers even after the emergency giving rise to their initial use has abated. More modestly, the changes would at least require a President to disclose when she invoked the IEEPA to adjust tariffs for purely economic or foreign policy "emergencies," shedding more light on the potentially pretextual use of that power. Legislators have proposed narrower definitions of national emergencies for purposes of the NEA, but have excluded the IEEPA from the suggested reforms despite the IEEPA's equal potential for abuse by the Executive.[231] As with the proposed changes to Section 232, the most realistic goal is to at least grant Congress and reviewing courts a more substantial, precise record of the President's reasons for exercising her broad tariff power. That way, if the President still desires to use that authority as an instrument of foreign policy to exert political pressure on foreign exporters, she must disclose her true reasoning to the voting public and to courts—or potentially WTO panels—reviewing that pretextual tariff action, allowing for heightened political accountability and more empowered judicial review. These domestic pressures, more than pressure from abroad, may prevent an administration from imposing tariffs that do not satisfy the *Russia v. Ukraine* panel's conception of the Article XXI national security exception.

CONCLUSION

President Trump's protectionist economic agenda and irreverent approach to governance, coupled with rising tensions with China and other major U.S. trade partners, laid bare the true extent of the Presi-

231. Rachel Riegelhaupt, Note, *Manufactured Emergencies: The Crisis at the Core of the National Emergencies Act*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 277, 314–15 (2021).

dent's national security tariff powers. With the exception of one very limited victory before the Court of International Trade, those seeking to rein in the President's seemingly boundless power to direct tariff policy have found no recourse against the expansive use of these statutory regimes based on malleable, self-serving conceptions of national security and national emergencies. This indefinite conception of national security defies effective review and accountability, allowing a President with the requisite political will to direct the tariff policy of the United States under the guise of maintaining national security. The result is a legislative scheme for trade policy that flouts the obligations of the United States under the GATT 1994, especially after the *Russia v. Ukraine* panel narrowed the scope of the Article XXI security exception, and one that undermines the Constitution's delegation of plenary authority to regulate trade to Congress and not the Executive.

At the heart of this excessive delegation of tariff-setting authority lies the lack of a clear definition of national security that accords with traditional conceptions of national security threats. A correction of the underlying statutory language must therefore begin with a redefinition of which threats qualify as national security threats warranting direct tariff action by the President. Using the language offered by the panel in *Russia v. Ukraine* as a starting point, this Note proposes updated statutory language that provides such a definition while still accounting for the reality of novel economic threats that may implicate legitimate national security concerns.

Improved statutory language alone will not sufficiently address the excessive delegation of Congress's Article I, Section 8 powers to the Executive. The use of that language to meaningfully check the President's abuse of national security powers for political and economic reasons will require the political will to challenge the Executive on issues of foreign policy and national security, a task which courts and Congress alike have proven reluctant to undertake. Perhaps the realization of the full scope of executive tariff power by the Trump administration will motivate such action, and, if so, the findings of this Note may serve as a helpful guide.