

Intelligence MEMOS



From: Jon Johnson

To: Canadian Trade Watchers

Date: December 21, 2022

Re: **WTO PANEL FINDS AGAINST US SECTION 232 TARIFFS, USTR SLAMS FINDINGS**

Section 232 of the *Trade Expansion Act of 1962* permits the US President to “adjust” imports of a product the Secretary of Commerce finds impair national security. Based on such findings, the Trump administration imposed broad trade restrictions on imports of steel and aluminum products. The Biden administration has used such tariffs as a means of extracting trade-limiting tariff rate quotas from trading partners such as the EU.

In *United States – Certain Measures on Steel and Aluminum Products*, a WTO panel [found](#) that actions taken by the US under Section 232 violate multiple provisions of the WTO Agreement.

One finding of particular significance is that the trade restrictions imposed by the US Section 232 cannot be justified under the GATT 1994 Security Exceptions provision in Article XXI.

Article XXI states that GATT 1994 does not prevent a party from taking action “which it considers necessary for the protection of its essential security interests.”

However, Article XXI sets out three specific instances in which such action may be taken, namely: relating to fissionable materials; relating to traffic in arms, ammunition, etc.; and taken in time of war or other emergency in international relations. The panel found that while the “it considers necessary” language confers broad discretion on the party taking action, one of the three circumstances specifically described must actually exist.

The US argued that the circumstances with steel over-supply constituted an “emergency in international relations.” In its 88-page report, the panel carefully considered the language in this provision and rejected the US argument.

USTR Spokesperson Adam Hodge [reacted](#) in the strongest possible terms, rejecting “the flawed interpretation and conclusions in the World Trade Organization (WTO) Panel reports released today regarding challenges to the United States’ Section 232 measures on steel and aluminum.” The US “has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security,” said Hodge.

But this statement is, at best, a self-serving reinterpretation of history. The US was a key party both to the drafting of the original GATT language in 1947 and, as one of the driving forces behind the creation of the WTO, agreed to this language being carried forward into GATT 1994. If the WTO parties had intended that national security issues could not be reviewed in WTO dispute settlement procedures, they would have said so.

The US can now appeal the panel’s report to the now non-existent Appellate Body, a practice known as “appealing into the void” where the panel’s findings remain in limbo in perpetuity. This effectively is turning the clock back to pre-WTO days under the old GATT, where there was no right to appeal, and a losing party could simply block the adoption of a panel finding against it.

The message conveyed in the USTR statement is that the US will accept nothing less than a WTO dispute settlement system that would let it to do whatever it likes in the name of protecting its essential security interests. CUSMA article 32.2 sets out such a self-judging provision, providing that nothing in CUSMA will “preclude a Party from applying measures that it considers necessary for ... the protection of its own essential security interests.”

As Fareed Zakaria wrote in the *Washington Post*: “As one statesman said to me: ‘We are constantly being lectured by Americans that we must uphold the rules-based international system – only to then see Washington announce measures that are in total violation of the core principles of that order.’”

Canada has already taken note of this tendency toward unilateralism in the interpretation of trade rules.

Let’s hope it can continue to build alliances among like-minded countries to protect and strengthen a rules-based system that provides appropriate safeguards against unilateral interpretation of what constitutes justified protectionist actions.

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