

Intelligence MEMOS



From: Jon Johnson

To: Canadians Concerned About US Section 232 Tariffs

Date: July 27, 2020

Re: **US COURT INSISTS ON STRICT COMPLIANCE WITH SECTION 232 REQUIREMENTS**

Last year on November 15, the US Court of International Trade (CIT) denied a motion by the US Government in *Transpacific Steel LLC v. US*. The motion called for dismissal of the plaintiff's complaint that presidential Proclamation 9772, which singled out steel imports from Turkey for 50 percent tariffs, violated mandated statutory procedures that impose strict time limits, as well as the US Constitution's Fifth Amendment equal protection guarantees.

The [decision](#) was timely as President Trump had just missed the 180-day deadline in Section 232 of the *Trade Expansion Act of 1962* for imposing tariffs on automotive goods.

On July 14, the CIT issued its opinion in this case confirming that Proclamation 9772 violated mandated statutory procedures and the equal protection guarantees.

Prior to Proclamation 9772, the US imposed tariffs of 25 percent on steel imports from most countries, including Turkey, based on a report delivered to Trump by Commerce Secretary Ross finding that steel imports threatened US national security. Section 232 sets out strict time limits for taking action against imports identified in a report, and the 25 percent tariffs were imposed within these time limits.

The 50 percent tariffs subsequently imposed solely on steel imports from Turkey were not based on a report from the Secretary of Commerce as Section 232 requires. The motivation for the tariffs appears to have been based on disputes between the US and Turkey arising from defence policy, currency concerns and the detention of US pastor Andrew Brunson by Turkey.

The US maintained that there was nothing preventing the president from modifying earlier proclamations, and that the statutory deadlines were "directory, not mandatory." The CIT rejected this and found there was nothing in Section 232 giving the authority to the president to modify a proclamation. If the president wanted to impose additional duties, he should have requested a new report from the Commerce Secretary. Not having done so, the president exceeded his authority in issuing Proclamation 9772.

Significantly, the CIT also accepted the plaintiff's argument that singling out steel imports from Turkey for a 50 percent tariff (as opposed to the 25 percent that applied to steel imports from other countries) violated the equal protection guarantee in the US Constitution's Fifth Amendment. The equal protection guarantee comes into play only if the "challenged action" (here Proclamation 9772) is not "rationally related to a legitimate government purpose." The CIT found that increasing the tariffs on Turkey alone was "arbitrary and irrational" and did not meet the "legitimate government purpose" threshold.

The decision is important because it demonstrates that at least one US court will not tolerate a US administration using Section 232 in any manner it chooses. The CIT clearly has concerns with Section 232 as was demonstrated in the constitutional challenge to Section 232 brought by the American Institute for International Steel, Inc.

The CIT does not have the last word as its decisions can be appealed to the US Court of Appeals for the Federal Circuit. Nonetheless, at least one US court is willing to insist that presidential actions under Section 232 strictly adhere to the limitations imposed by the statute. The CIT's acceptance of the plaintiff's constitutional challenge and its "arbitrary and irrational" finding against the US are also significant.

However, the US courts can only do so much respecting over-zealous delegation of authority by Congress to the administration, of which Section 232 is clearly an example. Unfortunately this is a problem that only Congress can fix.

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