Intelligence MEMOS

From: Jon Johnson

To: Canadians Concerned About Section 232 Tariffs

Date: September 9, 2019

Re: **Constitutional Challenge to Section 232 – On to Appeal**

On March 25, the US Court of International Trade (CIT) denied the American Institute for International Steel, Inc. (AIIS) motion challenging the constitutionality of Section 232 of the *Trade Expansion Act of 1962* because the CIT considered itself bound by the US Supreme Court decision in *Federal Energy Administration v. Algonquin SNG, Inc*. However, one judge wrote a separate opinion expressing serious doubts about whether Section 232 is constitutional.

Section 232 confers upon the president sweeping powers to "adjust" (i.e. restrict) imports of goods that the Department of Commerce finds threaten "national security", the definition of which is virtually open-ended. AIIS maintains that Section 232 is an unconstitutional delegation of legislative power to the president. Section 232 has been used to impose high tariffs on steel and aluminum, and a Department of Commerce report has now empowered the president to "adjust" imports of automotive goods.

Because the AIIS challenge was heard by a three-judge CIT panel rather than the usual single judge, a direct appeal to the US Supreme Court was possible if the Supreme Court consented. However, the Supreme Court did not to consent.

Accordingly, on August 9, AIIS appealed the CIT decision to the US Court of Appeals for the Federal Circuit. The hearing will likely occur in April 2020. The US Court of Appeals could accept AIIS's arguments, but the court could also deny the appeal on various grounds including considering itself bound by *Algonquin*. The court's decision will almost certainly be appealed to the Supreme Court, meaning that any judicial resolution of the difficulties caused by the Trump administration's aggressive use of Section 232 will not occur until 2021 or later.

There have been several Congressional attempts to curtail aimed presidential powers under Section 232. Last January, Senator Pat Toomey (R-PA) introduced a bill requiring that the national security determination be made by the Department of Defence (which would be preferable) rather than the Department of Commerce, and that any presidential adjustment of imports be approved by Congress before going into effect. Senator Rob Portman (R-OH) agrees that the Department of Defence should make national security determination but proposes expanding the Congressional joint resolution of disapproval process that already applies to petroleum products in Section 232. Senator Toomey points out that, unlike his approval approach, any resolution of disapproval can be vetoed by the president. These differences will have to be resolved before legislation can proceed.

Section 232 restrictions could soon become a major problem for the US auto industry. President Trump has invoked a Section 232 provision permitting a 180-day postponement of a decision if the president is negotiating agreements with exporting countries to limit exports. The exporting countries targeted are Japan and the EU. There have been media reports of an "agreement in principle" with Japan but not with the EU. If effective agreements with exporting countries have not been concluded when the 180-day period expires at the end of October, Section 232 requires the president to proceed with "adjusting" imports of automotive goods.

Aggressive US Section 232 actions against imported automotive goods could cause serious economic fallout for the US in terms of increased costs of automotive goods for US consumers and retaliation by trading partners. The Canadian automotive industry can take some comfort in the CUSMA side letter with the US that sets high thresholds before imports of automotive goods from Canada can be impacted by Section 232 restrictions.

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