

In Furtherance of National Interest or a Pirate’s Blockade?: The Effect of the Trade War on the U.S. Steel, Aluminum, and Solar Industries

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Abstract

Much like a pirate blockade, trade wars and tariffs slow commerce and can hurt certain industries. The current United States trade war with China has created economic stressors in the steel, aluminum, and solar industries. This Note will examine the history of tariffs in the United States and the powers of the president to shape the economic future of the country. This Note will also discuss how the steel, aluminum, and solar industries are impacted by the trade war and the possible legal paths for these industries to mitigate their losses. By applying historical analysis to the current situation, the reader will see how tariffs do not help industries so much as they create a pirate’s blockade.

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INTRODUCTION

The purpose of international law is to create order between countries.¹ Through trade, states can achieve order and supply their citizens with desired goods and services. Efforts by states to insulate themselves from international trade—i.e. by raising tariffs to protect domestic industries, thereby decreasing international trade—have created international instability.² Protectionist measures to insulate specific industries often result in hurting those industries in the long-term.³

The current tariffs imposed by the executive branch have had varying impacts on the steel, aluminum, and solar industries. The trade war itself targets China, a major trade partner for the United States’ (“U.S.”) steel, aluminum, and solar industries.⁴ Each of these industries has a different

¹ DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 9 (2002).

² Bruce Bartlett, *The Truth about Trade in History*, CATO INST. (July 1, 1998), <https://www.cato.org/publications/commentary/truth-about-trade-history>.

³ JOHN M. DOBSON, *TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE US INTERNATIONAL TRADE COMMISSION* 34 (1976), available at <https://www.usitc.gov/publications/332/pub0000.pdf>; Michael Schuman, *The Threat of a Global Trade War*, TIME (Jan. 19, 2009).

⁴ Richard Read, *These solar workers will lose their jobs if Trump doesn’t get a China deal*, LA TIMES (May 30, 2019, 4:00 AM), <https://www.latimes.com/nation/la-fi-solar->

tariff imposed on the trade of its specific goods.⁵ Because the types of tariffs are different, so are the potential legal remedies for each industry. The steel, aluminum, and solar industries do not currently have a proposed economic bailout and likely face little success in litigation.⁶ This is especially troubling given the current economic hardship these industries experience.⁷ Ultimately, the negative impacts of these tariffs outweigh any possible benefits.

First, this Note will discuss the background of the current trade war and explain the historical use of tariffs and the president's power over tariffs. This historical exploration looks at how high tariffs have contributed to economic depressions and high trade deficits.⁸ The analysis of the types of tariffs used in the current trade war will give insight in to President Donald Trump's emphasis on moving production back into the United States.

Next, this Note will discuss the economic impacts of the current trade war on the U.S. steel, aluminum, and solar industries. Specifically, the discussion focuses on doubled-up tariffs currently affecting imported

trade-trump-tariff-20190530-story.html; INT'L TRADE ADMIN., STEEL EXPORTS REPORT: CHINA (May 2019), <https://www.trade.gov/steel/countries/pdfs/exports-china.pdf> [<https://web.archive.org/web/20190623005352/https://www.trade.gov/steel/countries/pdfs/export-s-china.pdf>]; *Record Aluminum Overcapacity and Exports from China Continue Despite Section 232 Aluminum Tariffs*, THE ALUMINUM ASS'N (Feb. 14, 2019), <https://www.aluminum.org/news/record-aluminum-overcapacity-and-exports-china-continue-despite-section-232-aluminum-tariffs>; *The People's Republic of China*, USTR, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> (last accessed July 14, 2019).

⁵ See Read, *supra* note 4; *Record Aluminum Overcapacity and Exports from China Continue Despite Section 232 Aluminum Tariffs*, *supra* note 4; *The People's Republic of China*, *supra* note 4; *USTR Lighthizer Welcomes Extension of Trade Promotion Authority*, USTR (July 20, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-lighthizer-welcomes-extension>.

⁶ William Mauldin, *Lawsuit Challenges Trump's Authority to Impose Tariffs*, WSJ (June 27, 2018, 2:25 PM) <https://www.wsj.com/articles/lawsuit-challenges-trumps-authority-to-impose-tariffs-1530104915>; see Jill Jusko, *Lawsuit Challenges Constitutionality of Steel Tariffs Statute*, INDUSTRY WEEK (June 27, 2018), <https://www.industryweek.com/economy/lawsuit-challenges-constitutionality-steel-tariffs-statute>.

⁷ Emily Price, *These Are the 128 U.S. Products China Is Enacting Tariffs On*, FORTUNE (Apr. 2, 2018, 12:34 PM EST), <http://fortune.com/2018/04/02/china-tariffs-128-us-products/>; Thomas Biesheuvel, *As China Fires Back in Trade War, Here Are the Winners And Losers*, BLOOMBERG (Apr. 4, 2018, 6:34 AM MDT), <https://www.bloomberg.com/news/articles/2018-04-04/as-china-fires-back-in-trade-war-here-are-the-winners-and-losers>; *Solar Market Insight Report 2018 Q4*, SOLAR ENERGY INDUS. ASS'N (Dec. 13, 2018), <https://www.seia.org/research-resources/solar-market-insight-report-2018-q4>.

⁸ Bartlett, *supra* note 2.

panels and the steel and aluminum used to manufacture these panels.⁹ Finally, this Note will conclude with a discussion of the current legal efforts to combat these tariffs via litigation and other possible legal remedies available to these industries.

I. BACKGROUND

Before considering the current trade war, it is important to discuss the historical importance of trade and tariffs both internationally and domestically. According to international law scholar David Bederman, the central and recurring theme in international law is how to get states to work together.¹⁰ International law acts as a code of conduct for states by regulating, among other things, trade between various countries.¹¹ Because the primary goal of international law is getting states to work together, the international system becomes complicated when states choose policies favoring their own short-term interests in spite of the negative long-term international impact. Trade is historically of great importance to international law and international relations.

According to Hugo Grotius, trade is a fundamental right.¹² Hugo Grotius was a Dutch jurist in the 1600s who is most notable for his contribution to the *Santa Catarina* issue. During Grotius's time, the Dutch, Spanish, and Portuguese were in dispute over trade routes. The Portuguese and Spanish created a blockade in East Asia to prevent the Dutch from entering. In a surprising turn of events, a Dutch ship captured a Portuguese ship—the *Santa Catarina*—at the blockade and seized the ship's goods. The question posed at the time was whether the Dutch ship engaged in an act of piracy. According to Grotius, the Portuguese ship was the aggressor pirate and the Dutch ship was defending itself and its right to trade. As explained by Grotius, trade is a peaceful activity and a natural right. Trade is mutually beneficial and necessary for a country to survive. As Ileana M. Porras, a legal scholar, wrote on Grotius' ideas on trade, "...international

⁹ James Conca, *The Effects Of Trump's Steel Tariffs On Red State Energy*, FORBES (June 2, 2018, 8:00 AM), <https://www.forbes.com/sites/jamesconca/2018/06/02/the-effects-of-trumps-steel-tariffs-on-red-state-energy/#31ef90484b88>; *Aluminum Use*, THE ALUMINUM ASS'N (Dec. 7, 2018), <https://www.aluminum.org/sustainability/aluminum-use>.

¹⁰ BEDERMAN, *supra* note 1, at 9.

¹¹ *Id.* at 1.

¹² Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius De Iure Praedae - The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates,"* 31 BROOK. J. INT'L L. 756 (2006).

commerce is the life blood of the fledgling nation.”¹³ By preventing trade, the Portuguese ship was acting as a pirate and a *hosti humani generis*, an enemy of mankind.¹⁴

According to the Grotian tradition, international law is universal and applies to everyone in the resolution of disputes.¹⁵ International law, therefore, prevents states from claiming a right to wars based on moral or theological reasons. Human beings are social creatures and their states are also social and political.¹⁶ Therefore, states should behave morally and peacefully. Based on these behavioral norms—as well as Grotius’s determination that pirates are a threat to mankind—it is safe to assume that Grotius would also disapprove of other impediments to trade.

Currently, the United States is engaged in a trade war with many states, most notably with China. While the United States is not creating blockades on the high sea, it is preventing trade by raising tariffs. The four main questions to be addressed below are: (1) What is a tariff?; (2) what are the president’s powers to impose tariffs?; (3) what are the historical consequences of high tariffs?; and (4) how did the current trade war begin?

A. *What is a Tariff?*

A tariff is a tax on imported goods paid by domestic merchants seeking to deal in foreign wares.¹⁷ A country can slow or stop trade by increasing tariffs on an industry or with a country. Typically, lower tariffs help countries by increasing trade which correlates with an increase in the country’s Gross Domestic Product (“GDP”).¹⁸ Tariffs can serve as a tool to raise revenue, reduce import imbalances, protect industries inside a country, and act as “bargaining tools to extract concessions from trading partners.”¹⁹ Levying tariffs is part of the enumerated congressional power to tax, which Congress has used to raise tariffs throughout history.²⁰

¹³ *Id.*

¹⁴ Peter Judson Richards, *Hugo Grotius, Hosti Humani Generis, and the Natural Law in Time of War*, 2 LIBERTY U. L. REV. 897 (2008).

¹⁵ *Id.*

¹⁶ *Id.* at 894.

¹⁷ ROGER LEROY MILLER, *ECONOMICS TODAY* 68, 223 (14th ed. 2008).

¹⁸ *See id.* at 223–24.

¹⁹ David G. Tarr, *ON THE DESIGN OF TARIFF POLICY: A PRACTICAL GUIDE TO THE ARGUMENTS FOR AND AGAINST UNIFORM TARIFFS*, 3 (The World Bank, 2000), <https://openknowledge.worldbank.org/bitstream/handle/10986/26132/111992-WP-Sept-2000-PUBLIC-WTO-HAND.pdf?sequence=1&isAllowed=y>.

²⁰ U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence

Article 1, section 8, clause 1 of the U.S. Constitution allows Congress to levy taxes and duties to pay for debts, national security, and the welfare of the country. James Madison, in a speech before the Third Congress, supported the idea of regulated free trade.²¹ Madison, like many other federalists, believed unregulated international free trade would allow powerful states—like Britain—to control U.S. interests. The Founding Fathers understood the importance of trade and tariffs and vested the authority to regulate tariffs and trade in Congress.²² When James Madison became the first Speaker of the House, he introduced the first revenue tariff bill to “pay Government wages . . . and fund the national debt.”²³ The bill became the first tariff law on July 4, 1789, imposing a five percent tariff on most goods. Tariffs produced the largest source of revenue in the early days of the United States until the establishment of the personal income tax in 1913.²⁴

By 1916, Congress established a third-party organization to analyze the effects of tariffs. This organization was known as the Tariff Commission.²⁵ When President Woodrow Wilson proposed the Tariff Commission in 1916, he intended the Commission to investigate the effects of tariffs, study the conditions of United States’ competition abroad, find instances of unfair trade practices, and perform other investigative functions.²⁶ The Commission would not create policy, but acted as an information collection and analysis organization to assist Congress and other officials in determining U.S. trade policies. The Tariff Commission also reformed the process by which Congress drafted and established tariffs.²⁷

Historically, Congress initiated tariffs with little to no knowledge of the appropriateness of the tariff or its effects.²⁸ This was particularly evident in the prosperous time after the Civil War where the “United States

and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States”).

²¹ J. Ann Tickner, *Reaganomics & the Third World: Lessons from the Founding Fathers*, 23 *POLITY* 53, 70 (Autumn 1990), <https://www.journals.uchicago.edu/doi/pdfplu/10.2307/3235143>.

²² See Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 *UCLA L. Rev.* 285 (1986).

²³ DOBSON, *supra* note 3, at 6.

²⁴ *Id.* at 1 (explaining approximately 50-90 percent of U.S. revenue before 1913 was from tariffs).

²⁵ Tarullo, *supra* note 22, at 300.

²⁶ DOBSON, *supra* note 3, at 87.

²⁷ *Id.* at 2.

²⁸ *Id.* at 6–17.

imported so many goods, despite the high duties, that its customs receipts were larger than necessary for the operation of the Federal Government.”²⁹ Because there was no separate body or committee analyzing the effects of tariffs, the American Government was unable to forecast trade trends and determine the appropriateness of tariffs on certain goods. With the introduction of the Trade Act of 1974, the Tariff Commission evolved into what we now know as the United States International Trade Commission (“ITC”).³⁰ The name change was appropriate as the Tariff Commission analyzed “import surveys and summaries of trade and tariff information” as well as “U.S. exports and general conditions of world trade.”³¹ The establishment of the ITC reaffirmed the goals and focus of the organization on the flow of goods in and out of the country through the close monitoring of tariffs.

B. *The President's Powers to Impose Tariffs*

While Congress established a Tariff Commission in 1916, Congress delegated the authority of adjusting tariff rates to the president in the Tariff Act of 1922.³²

The president, upon the recommendation of the Tariff Commission, can adjust rates as much as fifty percent from their base to equalize the costs of production in the United States and in principal competing countries.³³ The Tariff Commission also has the power to investigate unfair trade practices and recommend remedies to the president. The long-term implication of Congress's delegation of authority to the president established an important precedent for trade agreements and tariffs.

According to the nondelegation doctrine, Congress cannot delegate its Article I legislative powers to other entities.³⁴ However, the Supreme Court has established the standards for analyzing delegation and upheld Congress's delegation of the power to impose tariffs to the president.³⁵

²⁹ *Id.* at 17.

³⁰ *Id.* at 125.

³¹ *Id.*

³² Tarullo, *supra* note 22, at 298.

³³ Tarullo, *supra* note 22 at 314.

³⁴ There is much debate over whether this doctrine is a legal fiction as Congress regularly does delegate legislative functions to executive branch agencies. Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 362 (2017).

³⁵ Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 550 (1976) (“...the President is authorized to ‘take such action, and for such time, as he deems necessary to adjust the imports of (the) article and its derivatives so that...imports (of the article) will not threaten to impair the national security.’”).

The best example is in *J.W. Hampton, Jr. & Co. v. United States*.³⁶ In that case, the plaintiff challenged tariffs on barium dioxide.³⁷ The new tariff rate was adjusted by President Coolidge in a proclamation via the *flexible tariff provision* of the Tariff Act of 1922. As discussed above, the provision authorizes the president to increase or decrease an already established tariff to equalize the differences “in costs of production [of the item to which the duty applies] in the United States and the principal competing country.”³⁸ The plaintiff, an importer of barium dioxide, claimed the provision was an unconstitutional delegation of power.³⁹ While the Court agreed Congress could not broadly delegate legislative power, the Act was upheld as constitutional.⁴⁰ The Court reasoned: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁴¹ Later, in *Federal Energy Admin v. Algonquin*, the Court found that section 232 clearly met the intelligible principle standard and was therefore not an improper delegation of power by Congress.⁴²

Accordingly, Congress’s delegation of powers, duties, and responsibilities to the president needs to be clearly defined by Congress.⁴³ Congress also cannot delegate the power of legislation to the president.⁴⁴ However, when enacting tariffs, the president acts as an agent of the legislative branch with an expressed declaration from Congress. Currently, President Trump is using this authority to pursue tariffs against China.

³⁶ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

³⁷ *Id.* at 400.

³⁸ *Id.* at 401.

³⁹ *Id.* at 404.

⁴⁰ *Id.*

⁴¹ *Id.* at 409.

⁴² *Algonquin*, 426 U.S. at 548. “Since 1935 no act has been struck down as lacking an intelligible principle.” *Am. Inst. for Int’l Steel v. U.S.*, 376 F. Supp. 3d 1335, 1339 (2019).

⁴³ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935) (“But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.”).

⁴⁴ *J.W. Hampton*, 276 U.S. at 410–11.

C. Historical Trends of High Tariffs

In theory, high tariffs serve to protect domestic products.⁴⁵ By increasing tariffs, a state can protect certain domestic goods and industries. By limiting the amount of goods imported, consumers are incentivized to purchase domestic options. There is also the concern for national security.⁴⁶ Countries importing more food than they produce risk safety concerns over food security. Likewise, countries importing faulty steel can fear unsafe vehicles.

In reality, protectionist policies are dangerous and can lead to widespread economic disaster. In many early attempts to protect fledgling domestic industries, the United States established tariff acts in 1816, 1824, and 1828.⁴⁷ This led to a cycle of imposing tariffs to protect industries until they were strong enough to compete internationally. But these measures instead caused the industries to rely upon the tariffs and never attain the strength necessary to compete globally. Instead of protecting and strengthening the targeted industries, the tariff policies left the industries underdeveloped. According to Gottfried von Haberler:

Nearly every industrial tariff was first imposed as an infant-industry tariff under the promise that in a few years, when the industry had grown sufficiently to face foreign competition, it would be removed. But, in fact, this moment never arrives. The interested parties are never willing to have the duty removed. Thus temporary infant-industry duties are transformed into permanent duties to preserve the industries they protect.⁴⁸

Despite the tariff acts failing to provide the help necessary to give domestic industries an advantage, tariff policies did not actually change until the 1930s.

⁴⁵ See DOBSON, *supra* note 3, at 73.

⁴⁶ *Id.*

⁴⁷ Bartlett, *supra* note 2.

⁴⁸ *Id.*

One of the most important U.S. tariff measures was the Tariff Act of 1930, known as the Smoot-Hawley tariff.⁴⁹ The Smoot-Hawley tariff was created as a response to growing anxiety about the low prices of agricultural goods throughout the 1920s. These depressed prices resulted in low revenue for farmers. The Smoot-Hawley tariff raised already high tariffs by almost twenty percent as seen in the graph below:

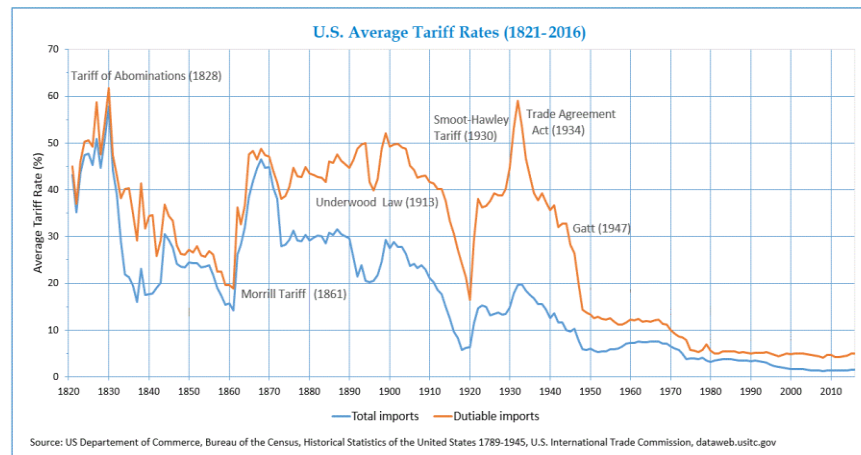


Figure 1⁵⁰

Members of the international community responded to the Smoot-Hawley tariffs with their own tariffs.⁵¹ The result of these retaliatory tariffs was the creation of highly protectionist trade policies around the world. The loss of global confidence eventually led trade to a grinding halt in 1931 and 1932, resulting in a two-thirds global decrease in trade.⁵² The U.S. economy, paralyzed by tariffs and retaliatory tariffs, sank into a depression. Ultimately, the tariffs promulgated to protect the agricultural industry only hurt America.

Trade liberalization is statistically more beneficial to economies than imposing protectionist tariffs.⁵³ On average, countries with liberalized

⁴⁹ *Id.*

⁵⁰ DOBSON, *supra* note 3, at 34.

⁵¹ *Id.*

⁵² *Id.* at 35; Schuman, *supra* note 3.

⁵³ Seyyed Mohsen Seyyed Agha Hosseini & Maryam Bayat, *Trade Liberalization and Economic Growth in Developing and Developed Countries*, 6 J. OF RESEARCH IN BUS., ECON. AND MGMT. 964, 969 (2017).

trade see a per capita income increase of 2.04 percent.⁵⁴ For small economies, this number is higher once they embrace trade liberalization. For developed countries, while the benefit is typically smaller, the overall impact of liberalized trade is beneficial.

Historically, tariffs have not helped U.S. industries mature and compete on a global level.⁵⁵ In fact, tariffs have contributed to serious U.S. economic downturns. Tariffs, therefore, act as speed bumps to trade, with high tariffs, like Smoot-Hawley, acting more like a blockade.

As seen in the graph above, U.S. tariffs have steadily decreased since the mid-1940s. From the 1970s to 2016, total tariffs have never risen above ten percent. Since the 1970s, the United States has experienced overall prosperous times even with cyclical economic slowdowns.⁵⁶ Increases to tariffs may risk these positive trends and result in economic instability or even economic depression.

D. How the Current Trade War Began

After President Trump took office in January 2016, he established his top trade priorities in March 2017.⁵⁷ These trade policies were largely based on campaign promises to address dissatisfaction with trade.⁵⁸ The Trump administration focused on four priorities for trade agreements:

- (1) [D]efend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws; (3) use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property rights; and (4) negotiate new and better trade deals with countries in key markets around the world.⁵⁹

The president's four major priorities signaled that his administration intended to focus on bilateral negotiations rather than the multilateral

⁵⁴ *Id.* at 967.

⁵⁵ See DOBSON, *supra* note 3, at 34; Schuman, *supra* note 3.

⁵⁶ The U.S. GDP has risen from \$1 Trillion in 1970 to \$19 Trillion in 2017. *GDP (current US\$)*, THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKT.P.CD?locations=US> (last visited Mar. 13, 2019).

⁵⁷ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, THE 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>.

⁵⁸ *Id.* at 1.

⁵⁹ *Id.* at 2.

negotiations favored by the World Trade Organization. By the end of March 2017, President Trump signed an executive order requiring the U.S. Commerce Department and the United States Trade Representative (“USTR”) to identify countries with trade deficits with the United States.⁶⁰ Specifically, the agencies were tasked with assessing: (1) the causes of the deficit, (2) if there was discrimination against the United States, (3) the effects on the United States, and (4) trade affecting national security. In July 2018, President Trump’s authority to negotiate trade agreements under Trade Promotion Authority was renewed through June 30, 2021 because Congress did not pass a resolution to limit his authority.⁶¹

Many industries are affected by the new trade policies implemented by the Trump administration. The U.S. steel and aluminum industries are affected by section 232 of the Trade Expansion Act of 1962, while the solar industry is affected by section 201 of the Trade Act of 1974 and section 301 of the Trade act of 1974.⁶² Each tariff section imposes different challenges because of the different purposes behind the specific tariff sections.

1. Tariff Section 232 and the Steel and Aluminum Industry

Tariff section 232—primarily affecting steel and aluminum—concerns the president’s power to impose tariffs related to national security.⁶³ The section allows for a broad interpretation of the president’s powers and allows for the president to adjust imports so they will not impair national security. The president can request a report from the U.S. Department of Commerce (“DOC”) investigating the economic impact of certain industries. After receiving a report from the DOC stating that the

⁶⁰ *Exec. Order No. 13786*, 82 Fed. Reg. 16721 (Apr. 5, 2017); *see also Presidential Executive Order on Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws*, THE WHITE HOUSE (Mar. 31, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-enhanced-collection-enforcement-antidumping-countervailing-duties-violations-trade-customs-laws/>.

⁶¹ *USTR Lighthizer Welcomes Extension of Trade Promotion Authority*, *supra* note 5.

⁶² Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018); Proclamation No. 9739, 83 Fed. Reg. 25, 20,677 (May 7, 2018); *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, U.S. INT’L TRADE COMMISSION (2017), https://www.usitc.gov/press_room/news_release/2017/er092211832.htm; Nathan Young, *These are the Tariffs Still Impacting the U.S. Solar Industry*, SOLAR POWER WORLD (March 24, 2020), <https://www.solarpowerworldonline.com/2020/03/these-are-the-tariffs-still-impacting-the-u-s-solar-industry/>.

⁶³ 19 U.S.C. § 1862 (2018).

Secretary finds there is a threat or impairment to national security, the president has 90 days to either concur with or disregard the findings.⁶⁴ The president can consider, among other things, reports from the DOC, the welfare of domestic industries, effects from jobs moving overseas, unemployment, and the country's overall economic disposition as factors impairing national security.⁶⁵ The president must submit a statement to Congress explaining the decision to take action or to not take action.⁶⁶ If the president concurs with the findings, the president will determine how to proceed, including the type and duration of the action. The president can act through negotiations, trade agreements, or other actions deemed necessary to adjust the imports and prevent further threats or impairment to national security. Notice of those actions are published in the Federal Register.

In March 2017, the *Aluminum Association Trade Enforcement Working Group*—the majority producers of U.S. Aluminum Foil—filed suit against certain aluminum foil companies from China, alleging material injury as a result of China's subsidies.⁶⁷ The U.S. aluminum producers claimed Chinese competitors sold aluminum foil from 38 percent to 134 percent less than fair market value in 2016.⁶⁸ The plaintiffs alleged these unfair practices put American jobs at risk.

By April 2017, the DOC self-initiated an investigation under section 232 of the Trade Expansion Act of 1962 to determine the effects of imported steel on United States national security.⁶⁹ President Trump also signed a memorandum directing the DOC to prioritize an investigation of imported aluminum.⁷⁰

The investigation of aluminum was much like the investigation of steel. At the beginning of 2018, the DOC submitted the results of the

⁶⁴ 19 U.S.C. § 1862(c)(1)(A)(2018).

⁶⁵ *Fed. Energy Admin.*, 426 U.S. at 550.

⁶⁶ 19 U.S.C. § 1862(c)(2) (2018).

⁶⁷ Roger Yu, *U.S. aluminum group lodges complaint over foil prices*, USA TODAY (Mar. 10, 2017), <https://www.usatoday.com/story/money/2017/03/10/us-aluminum-trade-group-targets-china-trade-complaint-over-low-prices/99001552/>.

⁶⁸ INTERNATIONAL TRADE ADMIN., U.S. DEP'T OF COMMERCE, No. C-570-054, ANTIDUMPING AND COUNTERVAILING DUTY PETITION, Volume I (2017); Yu, *supra* note 67.

⁶⁹ See *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, U.S. DEP'T OF COMMERCE (May 23, 2018), <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.

⁷⁰ *Presidential Memorandum for the Secretary of Commerce*, THE WHITE HOUSE (Apr. 27, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-commerce>.

section 232 investigation into steel imports and U.S. national security.⁷¹ The DOC also submitted the results of the investigation into aluminum imports.⁷² The announcements, however, did not disclose whether any threats to national security were found. By March 2018, President Trump determined there was a threat to national security, and the administration-initiated tariffs of twenty-five percent on imported steel and ten percent on imported aluminum.⁷³

President Trump exempted steel and aluminum tariffs under section 232 from late March 2018 until May 1, 2018 for imports from Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the European Union (“EU”).⁷⁴ Based on agreements between the U.S. and South Korea, all steel tariffs under section 232 from South Korea are permanently exempted.⁷⁵

As a result of the tariffs announced by the United States, China announced the possibility of imposing retaliatory tariffs of up to twenty-five percent on imported U.S. products worth \$3 billion annually in April 2018.⁷⁶ By the end of April 2018, President Trump announced an

⁷¹ David Lawder & Eric Walsh, *U.S. Commerce Dept Sends Trump Steel Probe Findings, Keeps Details Under Wraps*, REUTERS (Jan. 11, 2018), <https://www.reuters.com/article/us-usa-trade-steel/u-s-commerce-dept-sends-trump-steel-probe-findings-keeps-details-under-wraps-idUSKBN1F104>.

⁷² *Id.*

⁷³ Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018); Proclamation No. 9739, 83 Fed. Reg. 25, 20,677 (May 7, 2018)

⁷⁴ Proclamation No. 9710, 83 Fed. Reg. 13,355 (Mar.28, 2018).

⁷⁵ *Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim*, OFFICE OF THE U.S. TRADE REP. (Mar. 28, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-release/s/2018/march/joint-statement-united-states-trade>; see *New US Trade Policy and National Security Outcomes with the Republic of Korea*, OFFICE OF THE U.S. TRADE REP., (Mar. 2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/new-us-trade-policy-and-national>.

⁷⁶ Ben Blanchard & Tony Munroe, *China Hammers US Goods with Tariffs as “Sparks” of Trade War Fly*, REUTERS (Apr. 1, 2018), <https://www.reuters.com/article/us-usa-trade-china/china-hammers-u-s-goods-with-tariffs-as-sparks-of-trade-war-fly-idUSKCN1H81J3>; World Trade Organization [WTO], *Immediate Notification Under Article 2.5 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 China* (Mar. 29, 2018), https://docs.wto.org/dol2fe/Pages/FE_Sear_ch/FE_S_S009-DP.aspx?language=E&CatalogueIdList=244218,244221,244219,244222,244237,244241&CurrentCatalogueIdIndex=4&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False.

extension to the exemption from section 232 tariffs for Argentina, Australia, Brazil, Canada, Mexico, and the EU.⁷⁷

In May 2018, President Trump announced the end of exemptions for steel and aluminum tariffs under section 232 for Canada, Mexico, and the EU.⁷⁸ The implementation of the twenty-five percent tariff for steel and the ten percent tariff for aluminum was set to begin June 1, 2018. However, the United States reached an agreement with Australia, Brazil, and Argentina before that deadline.

In August 2018, President Trump announced via social media that he intended to double the tariffs under section 232 for steel and aluminum from Turkey.⁷⁹ The new tariff rates were fifty percent for steel and twenty percent for aluminum with an effective date of August 13, 2018.⁸⁰

By the end of August 2018, President Trump signed two proclamations allowing companies to request product exclusions from tariffs on steel and aluminum from certain countries, namely Argentina, that were imposed in lieu of section 232 tariffs on imports of products from certain countries.⁸¹

2. Tariff Section 201, 301, and the Solar Industry

Tariff section 201—primarily affecting solar panels—concerns the president's powers to regulate specific items negatively affecting similar items produced in the United States.⁸² Once the ITC determines that an item is imported at a rate that makes U.S. produced items non-competitive, the president can limit the importation of that item. This tariff section has

⁷⁷ See *President Donald J. Trump Approves Section 232 Tariff Modifications*, THE WHITE HOUSE (Apr. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-section-232-tariff-modifications/>; Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018); Proclamation No. 9739, 83 Fed. Reg. 25, 20,677 (May 7, 2018).

⁷⁸ Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018); Proclamation No. 9739, 83 Fed. Reg. 25, 20,677 (May 7, 2018); *Updated: Trump Imposes Section 232 Tariffs on Steel and Aluminum Imports from the EU, Canada, and Mexico*, PRACTICAL L. LEGAL UPDATE, w-008-4160.

⁷⁹ *Trump Doubles Tariffs on Turkish Steel and Aluminum*, REUTERS (Aug. 10, 2018), <https://www.reuters.com/article/turkey-currency-usa/trump-doubles-tariffs-on-turkish-steel-and-aluminum-idUSL1N1V10IN>.

⁸⁰ Proclamation No. 9777, 83 Fed. Reg. 45,025 (Sept. 4, 2018); Proclamation No. 9776, 83 Fed. Reg. 45,019 (Sept. 4, 2018).

⁸¹ Proclamation No. 9776, 83 Fed. Reg. 45,019 (Sept. 4, 2018); Proclamation No. 9777, 83 Fed. Reg. 45,025 (Sept. 4, 2018).

⁸² 19 U.S.C. § 2251(a) (2018).

rarely been employed.⁸³ Meanwhile, tariff section 301—also affecting the solar industry through import taxes on China—is more focused on the manufacturing of products with semiconductors which impacts solar inverters and modules rather than solar panels.⁸⁴

Tariff section 201 is much more protectionist in nature than section 232. While section 232's purpose is to protect national security, the purpose of section 201 is to make U.S. products more competitive.⁸⁵ By limiting imports and increasing their costs, the government can make U.S. consumers buy American by default. This, in some ways, is an affront to basic capitalist principles by not allowing the market to regulate itself. However, job security may be enhanced by ensuring American consumers buy goods manufactured in the United States.

In September 2017, the ITC unanimously determined that increased imports of certain solar panel equipment had seriously injured producers in America.⁸⁶ The investigation was conducted under the rarely used section 201 of the Trade Act of 1974.⁸⁷ A little over a month later, in October 2017, the ITC announced its remedy recommendations in the section 201 global-safeguard investigation involving imported solar cells and modules.⁸⁸

A year later, in September 2018, the USTR announced that some solar products were immediately subject to tariffs under section 201 of the Trade Act of 1974.⁸⁹ Solar panels from South Korea and the Philippines were exempt and by December 2018 South Korea's parliament approved the revised Free Trade Agreement with the United States, eliminating the need for tariffs on South Korean solar panels.⁹⁰

⁸³ Since the creation of this tariff section in 1975, this section has only been cited to 35 times by cases (as of Nov. 15, 2018).

⁸⁴ Because the focus of this Note is more on solar panels and their relation to the solar industry, I chose not to expand the discussion into section 301's impact on semiconductors and the solar industry. Young, *supra* note 62.

⁸⁵ See 19 U.S.C. § 2251(a).

⁸⁶ *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, *supra* note 62.

⁸⁷ *Id.*

⁸⁸ *USITC ANNOUNCES REMEDY RECOMMENDATIONS IN ITS GLOBAL SAFEGUARD INVESTIGATION INVOLVING IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC CELLS (WHETHER OR NOT PARTIALLY OR FULLY ASSEMBLED INTO OTHER PRODUCTS)*, U.S. INT'L TRADE COMM. (Oct. 31, 2017), https://www.usitc.gov/press_room/news_release/2017/er103111857.htm.

⁸⁹ Exclusion of Particular Products from the Solar Products Safeguard Measure, 83 Fed. Reg. 47393 (Sept. 19, 2018).

⁹⁰ *Id.*; Jane Chung, *South Korea's Parliament Ratifies Revised FTA with U.S.*, REUTERS (Dec. 7, 2018, 9:05 AM), <https://www.reuters.com/article/us-southkorea-trade-usa/south-koreas-parliament-ratifies-revised-fta-with-u-s-idUSKBN1O61Y7>.

3. *Conclusions on the Current Trade War's Inception*

From September 2017 to January 2019, the U.S. government conducted an economic analysis to determine whether there were enough threats to justify implementing hefty tariffs against many countries, including China.⁹¹ But with tariffs, long-term results matter. The current trade war has resulted in crude steel production in the United States increasing by 6.2 percent in 2018.⁹² Aluminum has seen similar growth in the United States, with monthly production rates going from nearly 800 metric tons per month in January 2018 to over 1,100 metric tons in January 2019.⁹³ This rate of production is only indicative of American industries capitalizing on the tariffs and is not indicative of success in protecting these industries from foreign competitors or lowering any trade deficits. This is most apparent in countries like Brazil and India, where there are high tariffs and high trade deficits.⁹⁴ These tariffs have also caused other industries to suffer. For example, the solar industry experienced a twenty percent drop in total solar installations between April 2018 and October 2018.⁹⁵

President Trump may intend to promote fairness and protect U.S. economic interests, but the real gauge of success is measuring how these industries fare long-term in the wake of high tariffs. This is especially true considering that, historically, high tariffs have not created strong industrial results, as already demonstrated by the economic downturn as the result of the Smoot-Hawley Act.

⁹¹ Exec. Order No. 13785, 82 Fed. Reg. 16,719 (Mar. 31, 2017); Exec. Order No. 13786, 82 Fed. Reg. 16,721 (Mar. 31, 2017).

⁹² Anindya Barman, *Tariffs Boost US Steel Stocks' FY18 Earning: Worries Ahead?*, YAHOO! FIN. (Mar. 5, 2019), <https://finance.yahoo.com/news/tariffs-boost-us-steel-stocks-133301672.html>.

⁹³ Ryan Olsen & Henry F. Sattlenthight, *U.S. Primary Aluminum Production: Report for Feb. 2019*, THE ALUMINUM ASS'N (Mar. 8, 2019), <https://www.aluminum.org/sites/default/files/USPrimaryProduction022019.pdf>.

⁹⁴ Dom Yanchunas, *5 Things we Learned at US National Association of Steel Pipe Distributors Convention*, FASTMARKETS (Mar. 8, 2019, 10:31 PM), <https://www.fastmarkets.com/article/3863456/5-things-we-learned-at-us-national-association-of-steel-pipe-distributors-convention>.

⁹⁵ SOLAR ENERGY INDUS. ASS'N, *supra* note 7.

II. STEEL, ALUMINUM, AND SOLAR INDUSTRY

The United States is the world's fourth-largest producer of steel.⁹⁶ In 2017, the United States produced over 81 million tons with steel creating more than \$500 billion in economic output.⁹⁷ The steel industry accounts for more than 140,000 jobs across the United States.⁹⁸ The United States is also the largest importer of steel, importing 36 million metric tons in 2017.⁹⁹ The renewable energy industry is dependent on steel because wind turbines and solar panels are made with the material.¹⁰⁰ In fact, renewable energy sources require more steel than traditional energy sources.¹⁰¹

The United States is the world's eighth-largest producer of aluminum.¹⁰² The aluminum industry contributes more than \$173 billion to the U.S. economy and supports 700,000 jobs across the country.¹⁰³ Aluminum, while not a natural resource on its own, is a part of the renewable energy industry because aluminum enhances solar panel efficiency.¹⁰⁴

The U.S. solar energy industry employs more than 242,000 people across the country.¹⁰⁵ The solar industry in the United States has

⁹⁶ *World crude steel output increases by 5.3% in 2017*, WORLD STEEL ASS'N (Jan. 24, 2018), <https://www.worldsteel.org/internet-2017/media-centre/press-releases/2018/World-crude-steel-output-increases-by-5.3—in-2017.html>.

⁹⁷ *Id.*; *The Economic Impact of the American Iron and Steel Industry*, AM. IRON & STEEL INST., <https://www.steel.org/economicimpact> (last visited Jan. 2, 2019).

⁹⁸ James McBride, *The Risks of U.S. Steel and Aluminum Tariffs*, COUNCIL ON FOREIGN RELATIONS (Mar. 8, 2018), <https://www.cfr.org/backgroundunder/risks-us-steel-and-aluminum-tariffs>.

⁹⁹ Meghan Keneally, *Key Facts About the U.S. Steel and Aluminum Industries*, ABC NEWS (Mar. 8, 2018, 4:14 PM), <https://abcnews.go.com/Business/key-facts-us-steel-aluminum-industries/story?id=53616380>.

¹⁰⁰ *#SteelBriefs Profile - Representative Rick Nolan*, AM. IRON & STEEL INST., <https://www.steel.org/public-policy/resources/steel-briefs/representative-rick-nolan—mn-8> (last visited Jan. 2, 2019).

¹⁰¹ Conca, *supra* note 9.

¹⁰² Georgia Williams, *8 Top Aluminum-producing Countries*, INVESTING NEWS NETWORK (Sept. 4, 2019), <https://investingnews.com/daily/resource-investing/industrial-metals-investing/aluminum-investing/aluminum-producing-countries>.

¹⁰³ *The Economic Impact of Aluminum*, THE ALUMINUM ASS'N, <https://www.aluminum.org/aluminum-advantage/economic-impact-aluminum> (last visited Jan. 2, 2019).

¹⁰⁴ THE ALUMINUM ASS'N, *supra* note 9.

¹⁰⁵ *About SEIA*, SOLAR ENERGY INDUSTRIES ASS'N, <https://www.seia.org/about> (last visited Jan. 2, 2019).

experienced fifty percent growth annually over the last ten years.¹⁰⁶ This growth has led to decreased costs of production, resulting in the costs of solar panels dropping by more than fifty percent since 2010.¹⁰⁷ With the fast growth of the industry, the solar industry contributed \$17 billion to the U.S. economy in 2017.¹⁰⁸ The current solar generation offsets eighty-eight million metric tons of carbon dioxide per year, which is the equivalent of taking more than 19 million passenger or planting over 1 billion trees.¹⁰⁹

The tariffs imposed by the Trump administration have temporarily increased the growth of the steel and aluminum industries while slowing the growth of the solar industry.¹¹⁰ The combined tariffs on steel, aluminum, and the solar industry could raise solar energy costs by two cents per watt.¹¹¹ This price increase is enough to upset the U.S. solar energy industry by increasing the initial upfront cost of installation. In fact, the U.S. solar industry has experienced its first slowdown in installation since 2015 with a drop of twenty percent in installation between April and October 2018.¹¹²

Initially, the U.S. steel and aluminum industries experienced negative impacts from the trade war.¹¹³ From August—when tariffs were implemented—to October 2018, both the U.S. steel and aluminum industries suffered double-digit drops in share prices.¹¹⁴ The result of this

¹⁰⁶ *Solar Industry Research Data*, SOLAR ENERGY INDUSTRY ASS’N, <https://www.seia.org/solar-industry-research-data> (last visited Jan. 2, 2019).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Climate Change*, SOLAR ENERGY INDUSTRY ASS’N, <https://www.seia.org/initiatives/climate-change> (last visited May 4, 2020); I input the information about solar energy offsets of carbon dioxide emissions into the greenhouse gas calculator to generate the number of equivalent passenger vehicles and planted trees. Greenhouse Gas Equivalencies Calculator, EPA, <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator> (last visited May 4, 2020).

¹¹⁰ *Solar Industry Research Data*, *supra* note 103.; THE ALUMINUM ASS’N, *supra* note 93; Barman, *supra* note 92.

¹¹¹ DAVID FELDMAN & ROBERT MARGOLIS, NAT’L RENEWABLE ENERGY LAB., Q1/Q2 2018 SOLAR INDUSTRY UPDATE 10 (2018), <https://www.nrel.gov/docs/fy18osti/72036.pdf>.; Julia Pyper, *Trump’s Steel, Aluminum Tariffs Create ‘Another Headache’ for Renewables*, GREENTECH MEDIA (Mar. 8, 2018), <https://www.greentechmedia.com/articles/read/steel-aluminum-tariffs-renewables-elon-musk#gs.OIHnQy0>.

¹¹² SOLAR ENERGY INDUS. ASS’N, *supra* note 7.

¹¹³ Mark Perry, *Trump’s Tariffs Are Backfiring Even on Industries That Were Supposed to Benefit from Trade Protectionism*, AM. ENTER. INST.: CARPE DIEM (Oct. 28, 2018, 8:26 PM), <http://www.aei.org/publication/trumps-tariffs-are-backfiring-even-on-industries-that-were-supposed-to-benefit-from-protectionism>.

Source supports assertion.

¹¹⁴ Price, *supra* note 7; Biesheuvel, *supra* note 7.

decrease is a loss of hundreds of millions of dollars in market value. However, production has since increased in both the U.S. steel and aluminum industries.¹¹⁵ Despite this boon to production, these industries still seek to repeal the tariffs imposed against them.

III. THE CURRENT LEGAL EFFORTS TO COMBAT TARIFFS

Looking at the early economic impact of tariff sections 232 and 201 on the steel, aluminum, and solar panel industries, it comes as no surprise business and trade groups have looked at ways to combat these provisions.

A. *Suits under Section 232*

In May 2018, the American Institute for International Steel (“AIIS”) filed suit in the U.S. Court of International Trade against the twenty-five percent tariffs on steel.¹¹⁶ The AIIS claimed the tariffs are unconstitutional as an improper delegation of authority to the president and a violation of the separation of powers principle.¹¹⁷ The AIIS did not claim that there is no issue of national security with steel imports, but instead claimed the current tariffs are an issue of policy, and policy decisions belong under the purview of Congress.¹¹⁸ According to AIIS, tariff section 232(d) impermissibly grants limitless policy decisions to the president.¹¹⁹ The AIIS further argued against the actual delegation of tariffs under section 232(d) as unconstitutional because the responsibility is passed to the president with no guidance on “how to resolve the very difficult policy choices that imposing massive tariffs inevitably entails.”¹²⁰ This argument was not likely to succeed as the U.S. Supreme Court has

¹¹⁵ THE ALUMINUM ASS’N, *supra* note 93; Barman, *supra* note 92.

¹¹⁶ Avery Anapol, *Steel Group Files Lawsuit Challenging Trump Tariffs*, THE HILL (May 27, 2018, 1:58 PM), <https://thehill.com/policy/finance/394441-steel-group-files-lawsuit-challenging-trump-tariffs>.

¹¹⁷ *AIIS Lawsuit Challenging Constitutionality of Section 232 Steel Tariffs*, AM. INST. FOR INT’L STEEL (June 27, 2018), http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_Lawsuit_Q_A_AIIS.pdf.

¹¹⁸ *Id.*

¹¹⁹ Complaint at 5, *Am. Inst. for Int’l Steel v. U.S.*, 376 F. Supp. 3d. 1335 (Ct. Int’l Trade 2018) (No. 18-00152).

¹²⁰ AM. INST. FOR INT’L STEEL, *supra* note 115.

historically given great deference to the president, as seen in *J.W. Hampton, Jr. & Co.*¹²¹

The suit concluded in March 2019. The AIIS moved for summary judgment and the government moved for judgment on the pleadings.¹²² Despite AIIS's arguments that *Algonquin* did not control the case because "the President is not an agency," the three judge panel found that they were bound by the U.S. Supreme Court's decision in *Algonquin* and that the President does have discretion to set tariffs.¹²³ On the issue of whether the President's discretion was a "limitless grant of discretionary remedial powers" only limited by the President's imagination, the court found that sections 232 (c) and (d) do allow the President to regulate commerce with expansive power.¹²⁴ The court found "the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President's motives nor review of his fact-finding."¹²⁵ However, in concluding, the court stated that "the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority," but that because of *Algonquin* those issues were "beyond this court's power to address."¹²⁶

After the ruling by the U.S. Court of International Trade, the AIIS petitioned the United States Supreme Court to review the case.¹²⁷ As of early May 2020, the Court had not ruled on whether to grant or deny certiorari. However, if the petition is granted, it could signal that the Court is interested in revisiting the nondelegation doctrine.

Independent of the U.S. Court of International Trade's consideration of the issue, the U.S. Supreme Court has already discussed the president's authorized power specifically under tariff sections 232(b) and (c) in *Algonquin*.¹²⁸ In the seminal case *Algonquin*, the respondents argued that

¹²¹ *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.

¹²² *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d. at 1335.

¹²³ *Id.* at 1340–41.

¹²⁴ *Id.* at 1343–44.

¹²⁵ *Id.* at 1344–45.

¹²⁶ *Id.* at 1345.

¹²⁷ *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d. at 1335, *petition for cert. filed*, 88 U.S.L.W. 3319 (U.S. Mar. 25, 2020) (No. 19-1177); Globe Newswire, *NCLA Amicus Brief Asks Supreme Court to Hear Tariffs Case to Revise its Standard for Delegation-Doctrine Claims*, DAILY JOURNAL (Apr. 27, 2020), https://www.djournal.com/ncla-amicus-brief-asks-supreme-court-to-hear-tariffs-case-to-revise-its-standard-for/article_16de3428-f149-551f-91bf-96826856ccd7.html.

¹²⁸ *Algonquin*, 426 U.S. at 569–71.

the president did not have the power to impose a license-fee system on petroleum.¹²⁹ The president essentially controlled the flow and amount of imports and derivatives through the license-fee system imposed on petroleum¹³⁰ by determining that petroleum imports were a matter of national security.¹³¹ The Supreme Court found that the president was well within his powers and was in fact authorized by Congress to take this specific style of action.¹³² The Court stated:

To the contrary, the provision's original enactment, and its subsequent re-enactment in 1958, 1962, and 1974 in the face of repeated expressions from Members of Congress and the Executive Branch as to their broad understanding of its language all lead to the conclusion that tariff section 232(b) does in fact authorize the actions of the President challenged here.¹³³

There have been thirty-six decisions in U.S. courts citing to tariff section 232 prior to May 2020.¹³⁴ Of those cases, only one involved a claim under tariff section 232(d) prior to March 2019.¹³⁵ In *Consumers Union of U.S., Inc. v. Kissinger*, a consumer organization sued the State Department, steel producers, and the executive branch for a self-imposed limitation on steel imports.¹³⁶ Then-President Nixon regarded increases in steel imports as a matter of national security. Rather than impose tariffs or quotas for fear of retaliation, the executive branch decided that voluntary import restraints by the foreign steel producers would yield the same benefits without the risk of economic retaliation. The court of appeals affirmed the district court's decision that the president was not preempted from entering into agreements with "private foreign steel concerns so long as these undertakings did not violate legislation regulating foreign commerce."¹³⁷ No other case has come before the U.S. Supreme Court with the specific tariff section 232(d) claims that AIIS alleged.¹³⁸

¹²⁹ *Id.* at 555–56.

¹³⁰ *Id.* at 559.

¹³¹ *Id.* at 554.

¹³² *Id.* at 570.

¹³³ *Id.* at 570–71.

¹³⁴ This total case number is based off a Westlaw search dated May 4, 2020.

¹³⁵ This total case number is based off a Westlaw search dated March 31, 2019.

¹³⁶ *Consumers Union of U. S., Inc. v. Kissinger*, 506 F.2d 136, 138 (D.C. Cir. 1974).

¹³⁷ *Id.* at 140.

¹³⁸ As seen above, AIIS argues the delegation of tariffs under section 232(d) is unconstitutional as the responsibility is passed to the president with no guidance on "how to resolve the very difficult policy choices that imposing massive tariffs inevitably entails." AM. INST. FOR INT'L STEEL, *supra* note 115.

B. Suits under Section 201

In a case heard by the U.S. Court of International Trade in 2018, solar companies challenged President Trump's tariff under section 201.¹³⁹ In *Silfab Solar Inc. v. United States*, three Canadian solar companies and one U.S. company filed suit in the Court of International Trade¹⁴⁰ challenging President Trump's ability to impose tariffs under section 201.¹⁴¹ The Court of International Trade denied petitioners an injunction due to lack of merit. The companies appealed to the U.S. Court of International Trade.¹⁴² The U.S. Court of International Trade examined the findings of the ITC and its specific analysis of Canadian solar companies.¹⁴³ The ITC determined that Canada only contributed two percent of solar imports and therefore did not significantly contribute to U.S. solar imports.

In examining the merits of the case, the U.S. Court of International Trade decided to focus on the petitioner's likelihood of success of the claim.¹⁴⁴ The petitioner argued that there was no support for the application of tariffs on Canada because the ITC determined Canadian imports were not substantial.¹⁴⁵ The court reasoned "where the statute authorizes a Presidential 'determination,' the courts have no authority to look behind that determination to see if it is supported by the record."¹⁴⁶ Although the actions of President Trump may have conflicted with the conclusion of the ITC, the ITC's findings "in no way bind the President."¹⁴⁷ Finally, the court determined the Court of International Trade's ruling was appropriate and the petitioners did not have a likelihood of success based on the merits of their case.¹⁴⁸

Overall, the outcome of current litigation against tariff sections 232 and 201 have been unsuccessful. Litigants challenging these tariffs face an uphill battle due to the heavy presumption in favor of presidential discretion on matters of national security.

¹³⁹ *Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018).

¹⁴⁰ *About the Court*, COURT OF INT'L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited Mar. 12, 2019) (also referred to as the U.S. Court of International Trade).

¹⁴¹ *Silfab Solar, Inc.*, 892 F.3d at 1344.

¹⁴² *Id.* at 1345.

¹⁴³ *Id.* at 1343.

¹⁴⁴ *Id.* at 1345.

¹⁴⁵ *Id.* at 1348.

¹⁴⁶ *Id.* at 1349.

¹⁴⁷ *Id.* at 1348.

¹⁴⁸ *Id.* at 1349.

IV. REMEDIES FOR THE STEEL, ALUMINUM, AND SOLAR INDUSTRIES

The U.S. steel, aluminum, and solar industries do not currently have a safety net in the form of a federal bailout or subsidies. This has led some U.S. steel and aluminum trade groups to litigate against tariffs and argue that the statutes themselves are an improper delegation of power to the president.¹⁴⁹ A government bailout is unlikely for either industry as the cost of a steel industry bailout alone is estimated at \$8.8 billion.¹⁵⁰ These are powerful industries that employ thousands of people and produce massive amounts of products, providing the capacity to lobby for their interests.

Some solar companies have also sought litigation as a remedy mentioned above in *Silfab*.¹⁵¹ This litigation is unlikely to succeed, and the solar industry should consider other alternatives like shifting to imports from countries exempted from the tariffs. Additionally, some foreign companies are considering incorporating in the U.S.¹⁵² The current solar panel tariffs under section 201 are intended to bring manufacturing jobs back to the United States. For the most part, since the start of the trade war, large solar companies—LG, JinkoSolar, and Hanwha Q CELLS—have now opened factories in the United States.¹⁵³ Additionally, companies can continue to promote the annual savings solar panel owners can receive as well as the federal tax credit to new buyers. This monetary savings is a large incentive for new buyers. Despite some speculation that the tax credit would decrease in early 2018, the residential renewable tax

¹⁴⁹ Mauldin, *supra* note 6; Jusko, *supra* note 6.

¹⁵⁰ Mike Ciandella, *Report: It would Cost taxpayers \$39 billion to Bailout Industries Hurt by Trump's Tariffs*, THE BLAZE (July 31, 2018), <https://www.theblaze.com/news/2018/07/31/report-it-would-cost-taxpayers-39-billion-to-bailout-industries-hurt-by-trumps-tariffs>.

¹⁵¹ *Silfab Solar, Inc.*, 892 F.3d at 1340.

¹⁵² Kely Pickerel, *Two brand-new manufacturing names want a piece of the Made in USA Solar Panel Market*, SOLAR POWER WORLD (Nov. 8, 2018), <https://www.solarpowerworldonline.com/2018/11/two-brand-new-manufacturing-names-want-a-piece-of-the-made-in-usa-solar-panel-market/>; Exclusion of Particular Products From the Solar Products Safeguard Measure, 83 Fed. Reg. at 47393.

¹⁵³ Christian Roselund, *Hanwha Q Cells opens the largest solar factory in the Western Hemisphere*, PV MAGAZINE (Sept. 23, 2019), <https://pv-magazine-usa.com/2019/09/23/hanwha-q-cells-officially-opens-the-largest-solar-factory-in-the-western-hemisphere/>.

credit remains a thirty percent tax credit for individuals with solar energy.¹⁵⁴

Alternatively, states can intervene and invest more in the solar panel industry or incorporate more solar panels into their states. States can maintain these jobs by providing monetary incentives for the purchase of solar panels because they have an interest in maintaining the thousands of jobs created through the solar industry. States can also incorporate solar energy into their energy plans, like Colorado's low-income renewable energy program.¹⁵⁵ Colorado has a program that "pays for low-income customers to get electricity from community solar projects, which are shared solar arrays that offset electricity costs for subscribing residents and businesses."¹⁵⁶ This is all in an effort to reduce greenhouse gas emissions and decrease "low-income families' electricity bills."¹⁵⁷

In the wake of the trade war, state and local governments are left to create programs to protect their constituents and combat the trade war's negative effects. Short of states investing money into the industries to provide a monetary cushion while the trade war continues, there are few viable solutions for these industries.

CONCLUSION

Trade is essential to the life of a country. Because of the importance of trade, some countries will go to great lengths to maximize their trade potential and limit the potential of others on the international stage. This pattern can be tracked through the historical actions of the Portuguese and Spanish blockade on the Dutch. However, as pointed out by Hugo Grotius, such embargos and limits to trade are akin to piracy. Much like a blockade, tariffs act to impede the flow of trade. Therefore, tariffs act as a barrier or speed bump akin to modern trade piracy.

The intention and justification of these trade speed bumps is to protect domestic jobs and national security. If a country creates too much of a speed bump, it risks creating a blockade. A large speed bump, like the

¹⁵⁴ *Residential Renewable Energy Tax Credit*, U.S. DEP'T. OF ENERGY, <https://web.archive.org/web/20190317123722/https://www.energy.gov/savings/residential-renewable-energy-tax-credit> (last visited Mar. 12, 2019).

¹⁵⁵ Dan Gearino, *Solar is Saving Low-Income Households Money in Colorado. It Could be a National Model*, INSIDE CLIMATE NEWS (July 2, 2018), <https://insideclimatenews.org/news/02072018/colorado-rooftop-solar-panels-clean-energy-utility-bill-savings-low-income-households-weatherization>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Smoot-Hawley Act, can risk an economic depression. Currently, the trade war is creating speed bumps for the steel, aluminum, and solar industries.

Tariffs imposed under section 232 on the steel and aluminum industry have led to more serious economic concerns. The tariffs on these industries did not take effect until August, and the industries faced the loss of millions of dollars. As seen in previous times of high tariffs, these protectionist policies will not help domestic industries as much as they will impede growth and stifle development. Instead of helping the industries, the trade war will cause a long-term financial burden. With little hope of federal bailout, these industries are taking a more litigious approach. The deference of policies concerning national security to the president by the Court leads these industries to face an uphill battle.

The solar industry also faces economic concerns due to tariffs imposed under section 201 and the increased prices of steel and aluminum. While this protectionist trade policy looks like it may help bring solar manufacturing jobs to the United States, the increasing upfront cost of solar panels may dissuade new buyers. The increased price per watt is a heavy financial burden for individuals looking to convert to solar energy, despite the thirty percent tax credit. As noted above, the U.S. solar industry has experienced the first dip in installation during the past four years and attributes this decrease to tariffs under section 201.

The solar industry faces serious long-term concerns unless there is a boost in marketing by the industry or the help of individual states in the U.S. With large solar panel manufacturers looking to set up shop in the United States, this may be a better time to create more federal incentives to purchase solar panels. Individual states should also look at investing more in solar panel programs to both combat climate change and provide energy for low-income housing.

As a solution to trade imbalances, the United States should also look at incentivizing innovation in these fields to create more efficient panels with larger storage capacity and help create a solar industry capable of competing more broadly on the global market. Otherwise, the United States will fall into yet another cycle of creating tariffs to protect companies that never reach full strength.

In a trade war, consumers ultimately pay the price with higher tariffs being passed on to consumers by manufacturers. Countries facing higher tariffs can also choose to create retaliatory tariffs—as seen by China—and further slow trade. The United States should balance the line between protecting interests and committing borderline piracy. The United States should create and maintain incentive programs to manufacture and buy American products. Specifically, the United States should further

incentivize manufacturing, purchasing, research, and development of U.S. solar panels instead of raising trade barriers. Otherwise, the tariffs will act more as an assault on industries than an advancement of U.S. interests.

AFTERWORD

Since concluding research for this Note in 2019, many developments in the trade war have occurred.¹⁵⁸ Namely, President Trump and Chinese President Xi have engaged in further trade discussions and signed a phased trade agreement through which both countries would begin phasing out their respective tariffs and China would purchase more U.S. products.¹⁵⁹ However, the trade war has become further complicated by the recent outbreak of COVID-19 and its impacts on the global economy.¹⁶⁰

I. THE (CONTINUING) TRADE WAR

The trade war increased uncertainty and volatility in the stock market.¹⁶¹ This ongoing volatility and uncertainty led to some speculation of the trade war actually causing a recession.¹⁶² To further add to the instability, President Trump demanded that the United States cut ties with China.¹⁶³ However, in January 2020, both countries came to a phased trade agreement.

¹⁵⁸ *Key dates in the U.S.-China trade war*, REUTERS (Aug. 23, 2019, 4:30 P.M.), <https://www.reuters.com/article/us-usa-trade-china-timeline-idUSKCN1VD2KR>; *U.S. Relations With China*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/us-relations-china> (last accessed Aug. 25, 2019).

¹⁵⁹ Keith Johnson, *As If Things Aren't Bad Enough, Trump Mulls Fresh Trade War with China*, FOREIGN POLICY (May 4, 2020, 1:42 P.M.), <https://foreignpolicy.com/2020/05/04/trump-china-trade-war-restoring-tariffs-2020-election/>; Yukon Huang & Jeremy Smith, *Pandemic Response Reflects Unlearned Lessons of U.S.-China Trade War*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (April 27, 2020), <https://carnegieendowment.org/2020/04/27/pandemic-response-reflects-unlearned-lessons-of-u.s.-china-trade-war-pub-81651>.

¹⁶⁰ Johnson, *supra* note 159; Huang & Smith, *supra* note 159.

¹⁶¹ Leslie Josephs, *Corporate earnings show trade war straining US economy as companies lean on shoppers to prop up profits*, CNBC (Aug. 22, 2019, 7:56 A.M.), <https://www.cnbc.com/2019/08/22/lackluster-q219-earnings-growth-raises-pressure-on-consumers-to-keep-spending-amid-us-china-trade-war.html>.

¹⁶² *Id.*

¹⁶³ David Lawder & Se Young Lee, *Trump heaps another 5% tariff on Chinese goods in latest tit-for-tat escalation*, REUTERS (Aug. 23, 2019), <https://www.reuters.com/article/us-usa-trade-china/trump-heaps-another-5-tariff-on-chinese-goods-in-latest-tit-for-tat-escalation-idUSKCN1VD21E>.

Prices of steel have continued to decline since the imposition of the tariffs, and were thirty percent lower in January 2020 than they were before the tariffs were imposed in March 2018.¹⁶⁴ Since tariffs were imposed in 2018, prices of aluminum commodities have also fallen from \$2,000 per metric ton in March 2018 to \$1,435 per metric ton in May 2020.¹⁶⁵

New data has also begun to emerge analyzing the full impact of the tariffs on the steel and aluminum industries.¹⁶⁶ Tariffs seem to have spurred U.S. steel *producers* to increase the number of jobs by “roughly 1,000.” However, the tariffs have also led to a decrease in approximately 75,000 jobs associated with steel and aluminum *manufacturing*.¹⁶⁷ Neither are expected to recoup losses from the trade war in the near future.

In the midst of these economic trends, in February 2020, President Trump expanded section 232 tariffs on steel and aluminum tariffs to include items like “nails, staples, electrical wires” and other parts used in vehicle manufacturing through Presidential Proclamation 9980.¹⁶⁸

On May 1, 2020, Farrier Product Distribution, Inc.¹⁶⁹ filed a complaint in the U.S. Court of International Trade arguing that the expansion of tariff section 232 under Proclamation 9980 did not meet the statutory requirements imposed on the president.¹⁷⁰ Namely, the Secretary of Commerce did not conduct an investigation and create a report on whether these “derivative steel products at issue threatened national security.”¹⁷¹ Because this is an issue of process, this case has more likelihood of success than those claiming a direct attack on the president’s authority to impose tariffs.

¹⁶⁴ Joe Deaux, *Trump Expands Aluminum, Steel Tariffs to Some Imported Products*, BLOOMBERG (Jan. 24, 2020, 8:08 P.M.), <https://www.bloomberg.com/news/articles/2020-01-25/trump-expands-aluminum-steel-tariffs-to-some-imported-products>.

¹⁶⁵ On May 5, 2020, analysts expected aluminum to trade at \$1452.01 per metric ton by the end of the quarter and estimated it to trade at \$1362.88 in the next year. *Aluminum*, TRADING ECONOMICS, <https://tradingeconomics.com/commodity/aluminum> (last visited May 5, 2020).

¹⁶⁶ Lydia Cox & Kathryn Russ, *Steel Tariffs Hurt Manufacturers Downstream, Data Shows*, PBS (Feb. 7, 2020, 9:13 A.M.), <https://www.pbs.org/newshour/economy/making-sense/steel-tariffs-hurt-manufacturers-downstream-data-shows>.

¹⁶⁷ *Id.*

¹⁶⁸ Deaux, *supra* note 164; Cox & Russ, *supra* note 166.

¹⁶⁹ Farrier Product Distribution, Inc. is a distributor of horseshoes and other products for professional farriers.

¹⁷⁰ Complaint at 1–2, Farrier Product Distribution, Inc. v. United States, Case 1:20-cv-00098-N/A (Ct. Int’l Trade 2020) (No. 20-00098).

¹⁷¹ *Id.* at 2–3.

The tariffs under section 201 for the solar panel industry are set to expire in 2022.¹⁷² As a result, the ITC performed and released a report on the impacts of the section 201 tariffs. The report found that while foreign based companies—Hanwha Q Cell, Junko, and LG—have established manufacturing plants in the U.S. as a result of the tariffs, U.S.-based companies lost approximately 62,000 jobs and close to \$19 billion in investments.¹⁷³ In addition to these jobs and investments, the country also lost opportunities to benefit the environment by expanding the availability of solar energy.

The results of tariffs and the trade war on the steel, aluminum, and solar panel industries are mixed. Some businesses have been able to increase their labor force, like steel producers. However, this increase in labor does not offset the jobs lost in the steel, aluminum, and solar panel manufacturing industries.

II. COVID-19 AND THE TRADE WAR

COVID-19 was first reported in China in November 2019 and has since been transmitted via human contact around the world. In March 2020, COVID-19 was officially declared a pandemic by the World Health Organization.¹⁷⁴ Many states issued stay-at-home orders and only allowed essential businesses—like manufacturing—to remain open during the outbreak.¹⁷⁵ While some solar panel plants stayed open as essential businesses, others closed. All solar companies have been affected by increased construction delays and disruption to the supply chain. As of May 4, 2020, the Solar Energy Industry Association estimated that more than half of solar industry workers will lose their jobs as a result of

¹⁷² *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products: Monitoring Developments in the Domestic Industry*, USITC (February 2020), <https://www.usitc.gov/publications/other/pub5021.pdf>; Emma Foehringer Merchant, *Solar Tariffs Boosted US-produced Modules, But Industry Remains Split on Their Future*, GREENTECH MEDIA (Feb. 10, 2020), <https://www.greentechmedia.com/articles/read/solar-tariffs-put-wins-on-the-board-for-u.s-produced-modules-but-industry-remains-split-on-their-future>.

¹⁷³ “The tariffs have effectively constrained solar development in the United States.” Merchant, *supra* note 172.

¹⁷⁴ *CDC's Response*, CENTER FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html> (last visited May 6, 2020).

¹⁷⁵ Emma Foehringer Merchant, *Most US Solar Manufacturing Continues Despite Coronavirus Restrictions*, GREENTECH MEDIA (Mar. 27, 2020), <https://www.greentechmedia.com/articles/read/much-u.s-solar-manufacturing-continues-despite-covid-19-restrictions>.

COVID-19.¹⁷⁶ Some in the solar industry are calling on Congress to pass legislation to help the industry stay viable through programs like tax credits and regulatory reform on renewable energy investments.¹⁷⁷

Even with many states beginning to slowly phase out of stay-at-home orders, the question left to be addressed by this Note is: How will COVID-19 impact the trade war? In accordance with the trade deal established by the United States and China in early 2020, some tariffs have already been reduced and are being phased out by both countries.¹⁷⁸ However, the Trump Administration alluded to rekindling the flames of the trade war in an effort to hold China “accountable” for the COVID-19 pandemic.¹⁷⁹ On May 7, 2020, President Trump announced China was not upholding its end of the phase 1 trade agreement by buying enough U.S. products.¹⁸⁰ As a result, President Trump announced he was seriously considering restarting the trade war and re-imposing high tariffs.

FINAL THOUGHTS

Only time will tell the result of the trade war and the extent of its impacts. It remains unclear whether: 1) the President will reignite the trade war and 2) COVID-19 will lead the United States into a recession or economic depression. Experts are still unsure to what extent the trade war has already impacted the economy. If the steel, aluminum, and solar panel industries are any indication, the recent COVID-19 pandemic will only make a bad trade situation worse. These industries have not flourished under these protectionist policies, and businesses have no real legal recourse against the president’s tariff power. Instead of protectionist tariffs, Congress could help bolster these industries—especially the solar

¹⁷⁶ “SEIA has found that up to half of the 250,000 workers in the solar industry could lose their jobs over the upcoming weeks, and nearly 34,000 jobs have already been lost.” Nat Eng & Peter Lawrence, *Solar, Wind Industries Disrupted by COVID-19 Pandemic, Would Benefit from Legislative Action*, NOVOGRADAC (May 4, 2020, 12:00 A.M.), <https://www.novoco.com/notes-from-novogradac/solar-wind-industries-disrupted-covid-19-pandemic-would-benefit-legislative-action>.

¹⁷⁷ *Id.*

¹⁷⁸ Johnson, *supra* note 159; Huang & Smith, *supra* note 159.

¹⁷⁹ Jesse Pound, *China Will be Held Accountable for Coronavirus Says White House Economic Advisor Larry Kudlow*, CNBC (May 1, 2020, 4:08 P.M.), <https://www.cnbc.com/2020/05/01/china-will-be-held-accountable-for-coronavirus-says-white-house-economic-advisor-larry-kudlow.html>.

¹⁸⁰ Nathaniel Taplin, *Meet the New Trade War. It’s Not the Same as the Old Trade War.*, THE WALL STREET JOURNAL (May 7, 2020, 8:55 A.M.), <https://www.wsj.com/articles/meet-the-new-trade-war-its-not-the-same-as-the-old-trade-war-11588854324>.

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industry—through programs like tax credits or other incentives to support U.S. businesses and encourage U.S. consumers to buy more domestic products.