

<https://globaltraderelations.com/2019/04/12/national-security-trade-new-u-s-and-wto-cases-troubles-for-trumps-trade-policy/>

Malawer's Blog GLOBAL TRADE RELATIONS ... Trade News & Legal Commentary.

[April 12, 2019]

## **National Security & Trade Law: New U.S. and WTO Cases --- *An Invitation to Even More Struggles for the Trump Administration.***

Stuart S. Malawer, J.D., Ph.D. *Distinguished Service Professor of Law and International Trade* at George Mason University (Schar School of Policy and Government). Member of Virginia's Advisory Committee on International Trade.

Two historic cases involving the issues of national security and trade law have been decided recently, one by a federal court and one by a panel at the World Trade Organization (WTO). Despite the grave importance of these two cases for the United States and the global trading system, not much attention has been given to them.

The first case, *American Institute for International Steel v. United States*, was decided by the Court of International Trade in New York on March 25, 2019. This upheld the president's authority to impose tariffs under Section 232(b) of the Trade Expansion Act of 1962 in cases involving threats to national security. This is the first time in over forty years that a federal court has addressed this issue and upheld the president's delegated authority to do this.

The second case, *Ukraine v. Russia Concerning Traffic in Transit*, was decided by a panel within the dispute resolution system of the WTO on April 5, 2019. The panel upheld the right of the Russian Federation to impose restrictions on Ukraine under GATT Article XXI, the national security exception. This is the first time the WTO has ever applied this provision. The panel decided that national security as a defense was reviewable by the WTO. Additionally, it determined that Russia's reliance on it was justifiable. The US submission, as a third-party, argued against the WTO's jurisdiction to hear this issue.

What do these cases mean for the U.S. and the Trump administration's trade and tariff policies? To me, they mean big trouble. Why?

Reading the federal case closely discloses serious concerns about the court's judgment: "To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority." A blistering separate opinion questioning the delegation of authority to the president is provided in an even graver

**tone: “If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?”**

**The report of the WTO panel concluded, “This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI ....” It argued that under customary international rules of interpretation, the panel can judicially review invocation of national security and that Russia met its requirements. The panel went on to warn, “However, this does not mean that a member is free to elevate any concern to that if an ‘essential security’ interest.”**

**So what does this mean for the Trump administration?**

**It ought to be very concerned. The Court of International Trade decision will undoubtedly be appealed directly in the US Supreme Court. The warnings in its opinions are ominous. The WTO panel decision is more than ominous. It considers claims of national security to be both reviewable by the WTO panel and subject to a decision on their merits.**

**My guess is that the Trump administration will fight to preclude a Supreme Court review of the issue of the legality of the delegation of national security powers and will outwardly be even more hostile to the WTO, if that’s even possible. No one can say that law and trade aren’t among the crucial issues of the day.**