

TRUMP, TRADE, AND NATIONAL SECURITY – BLOWING UP THE WTO?

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The Trump administration’s reliance on a national security provision in imposing restrictions on the import of steel and aluminum¹ will lead to serious challenges by countries in the World Trade Organization (WTO).

The administration is relying upon the rarely used Section 232 of the Trade Expansion Act of 1962.² President Trump announced that he will impose stiff tariffs (25% on steel and 10% on aluminum)³ and in his proclamation stated that this is to be done shortly.⁴

The most likely defense by the United States (U.S.) in the WTO would be to rely on the rarely raised and never-decided WTO “security exception” provided in Article XXI of the General Agreement on Tariffs and Trade (GATT).⁵ This litigation would most likely lead to the disintegration of the WTO.

As a historical note, the security exception was involved in the 1980s dispute between the U.S. and Nicaragua over the U.S. trade embargo on Nicaragua. This was a GATT case that Nicaragua brought against the U.S. as part of the Iran-Contra fiasco.⁶ However, the panel did not consider the defense because the panel mandate precluded it.⁷ In addition, the adverse panel report against the U.S. was not adopted because, inexplicably, the older GATT rules required the consent of the defending state. Needless to say, the U.S. did not consent.

Last year, Bahrain and the other Persian Gulf boycotting countries (Egypt, the United Arab Emirates, and Saudi Arabia) announced they intend to rely upon this security defense in a case that Qatar brought against them for their recent trade embargo against Qatar.⁸

If the U.S. uses the national security concerns to defend its imposition of trade restrictions using the national security provision, the result will not be beneficial to U.S. policy or to the global trading system. In fact, it will be an unmitigated disaster.

Why?

If upheld, the WTO decision would provide a precedent for other countries to take similar trade actions under GATT Article XXI. For example, China could argue that its export controls regarding minerals and its Internet rules exist for the protection of national security. In addition, the European Union (EU) could make similar claims regarding its trade sanctions against the Russian Federation if the latter were to bring an action in the WTO.

If the U.S. loses this case, on the other hand, the Trump administration will undoubtedly never honor its obligation to comply with the decision.

In this case, the major architect of the WTO and its dispute resolution system would have rejected the core aspects of today's global system. That's certainly not good.

The U.S. would likely be unable to meet the requirements of Article XXI. For example, under this article, otherwise invalid trade restrictions can be enacted in the protection of "essential security interests ... or taken in time of war or other emergency in international relations."⁹ However, a global glut of steel and aluminum exists, and the U.S. is neither in a time of war nor facing an international relations emergency.

The situation has become even more bizarre due to the Trump administration's public contemplation¹⁰ of declaring a national emergency under the International Emergency Economic Powers Act of 1977 (IEEPA)¹¹ based on China's policies requiring the transfer of intellectual property rights. (This is in addition to the administration's consideration of retaliation under Section 301.¹²) A national emergency involving these rights simply does not exist. U.S. firms are free to enter into joint ventures in China or to avoid business relationships that involve the mandatory licensing of technology. This is really a matter of global corporate strategy.

The IEEPA provides the president with broad powers when there is an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." No administration has considered the transfer of intellectual property rights or technology trade to be a national emergency. The WTO would certainly reject such a claim.

As a matter of U.S. constitutional law, the U.S. Supreme Court, in the seminal cases of *United States v. Curtis Wright Corp.* (1936),¹³ *Youngstown Sheet & Tube v. Sawyer* (1952),¹⁴

and *Dames & Moore v. Regan* (1981),¹⁵ makes it clear that the president has no inherent authority as commander in chief to impose embargoes or trade restrictions. Authorizing these actions is the exclusive authority of the U.S. Congress. The president can only act pursuant to a delegation of authority in these areas, and such actions are subject to judicial review. Thus, the president's determination of national security under Section 232, or declaration of a national emergency under the IEEPA, is reviewable by the federal courts.

The federal courts have the constitutional right to declare presidential actions unconstitutional if these actions are not within the congressional delegation of authority or the president's inherent authority. Federal judges have very closely scrutinized the president's inherent authority regarding trade powers. This includes claims that the president makes while acting as commander in chief.

This year and last, federal courts have consistently upheld their right to review executive actions in light of the executive branch's claims regarding authority over foreign policy and national security; just look at the recent batch of decisions regarding President Trump's immigration decisions.¹⁶ Recall, also, the Supreme Court's review during the Bush administration of post-9/11 cases relating to the rights of Guantanamo detainees, including the right to habeas corpus.¹⁷

There is a real chance that the federal courts might invalidate Trump's trade actions as a violation of U.S. law. In addition, there is a real chance that the WTO might declare Trump's trade actions a violation of international trade law. Most importantly, Trump's unilateral and belligerent and dangerous embrace of protectionism will do great harm to U.S. foreign policy, national security and resurrect nasty and corrosive domestic fights over tariffs.¹⁸ U.S. farmers are already petrified that retaliation will hurt them.¹⁹ The signing of the revised Trans-Pacific Partnership by our closest trading partners,²⁰ on the same day that President Trump signed his proclamations on steel and aluminum, signals the glaring U.S. retreat from the trading system that it has led for decades.

One additional comment: Congress is considering upgrading and drastically expanding the legislation concerning national security reviews by the Committee on Foreign Investment in the United States (CFIUS). The Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA)²¹ would expand the CFIUS's coverage to outbound U.S. investment into China, targeting issues of the mandatory transfer of technology by U.S. firms wishing to form joint ventures with Chinese firms. The administration is already

taking a more aggressive position on inward takeovers and focusing on wireless communications.²² It is basic economics. The flipside of trade deficits is the flow of foreign direct investment into the U.S. This is to be encouraged for economic development and job creation.²³

Many U.S. firms oppose the dramatic expansion and aggressive application of CFIUS, but defense and intelligence interests support this and reflect a certain global trend across Australia and the EU.²⁴ This tilt toward national security in trade and investment issues reflects the administration's earlier reliance on Section 232 in domestic remedy cases (such as those involving steel and aluminum). As one commentator states, "The White House has made an attack on Beijing's intellectual property regime and technology trade the centerpiece of its approach towards China."²⁵

The Trump administration's decision to use national security concerns or to declare a national emergency (under Section 232 or the IEEPA) as justification for imposing trade restrictions on steel and aluminum imports or on the transfer of intellectual property rights could lead to a trade disaster of the first order. Such a situation has not occurred in U.S. trade diplomacy since the founding of the postwar international economic order.

On a diplomatic and litigation note, the Trump administration should reconsider using the WTO dispute resolution system to address China's predatory pricing and subsidies. There is no valid reason for the Trump administration not to follow-up and request a panel to hear the subsidies case filed by the Obama administration concerning aluminum during its last few days in office.²⁶

Starting a trade war is easy. It is apparent through President Trump's recent announcement to impose new steel and aluminum tariffs that he has decided to jump-start a trade war.²⁷ Placing trade policy within a comprehensive context of diplomacy, foreign policy, and national security is far more difficult. Policies that address the totality of U.S.–China relations are desperately needed as we move forward.

However, based on recent indications from the White House, such as tilting more toward Peter Navarro and Robert Lighthizer, the White House is clearly moving further away from this more positive direction.²⁸ The last major trade war was launched by two Republican lawmakers Smoot and Hawley in the 1930s and spurred on the Great Depression

and World War II.²⁹ It also ended the reign of Republican presidents with the election of President Roosevelt and his new era of reciprocal trade agreements.

Indeed, a day before announcing his initial intent to impose tariffs on steel and aluminum, the president released his 2018 trade agenda report to Congress.³⁰ It states, “[T]he WTO has in some cases given (countries) unfair advantage over the United States [O]ur trade policy should be consistent with, and supportive of, our national security strategy (The administration) will continue to use U.S. trade laws and international enforcement mechanisms Accordingly, the United States vigorously defends the use of U.S. trade laws against challenges in a number of WTO disputes as a top Administration priority.”³¹

Thus, it tells the world we are suspicious of the WTO, we are going to rely upon national security, and we are going to continue to use trade laws and defend them as a weaponized tool.

Let the fireworks begin.

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¹ “Secretary Ross Release Steel and Aluminum 232 Reports in Coordination with the White House.” Press Release, U.S. Dept. of Commerce. Available at <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination> (last accessed on Feb. 25, 2018). See also Gregg Ip, “The Flaw in Trump’s National Security Tariffs Logic.” Wall Street Journal (March 10, 2018) Available at <https://www.wsj.com/articles/the-flaw-in-trumps-national-security-tariffs-logic-1520612895> (last accessed on March 10, 2018).

² §1862. Safeguarding national security -- “No action shall be taken ... to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security.” (Emphasis added). 19 U.S. Code § 1862 (a). Available at <https://www.law.cornell.edu/uscode/text/19/1862> (last accessed on Feb. 25, 2018).

³ “Trump to Impose Stiff Tariffs on Steel and Aluminum.” New York Times (March 1, 2018). Available at https://www.nytimes.com/2018/03/01/business/trump-tariffs.html?emc=edit_na_20180301&nl=breaking-news&nid=1146225&ref=cta (last accessed on March 1, 2018).

⁴ “Presidential Proclamation on Adjusting Imports of Steel into the United States.” White House News (March 8, 2018). Available at <https://www.nytimes.com/2018/03/08/opinion/donald-trump-trade-tariffs.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region®ion=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region> (last accessed on March 8, 2018). “Presidential Proclamation on Adjusting Imports of Aluminum into the United States.” White House News (March 8, 2018). Available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/> (last accessed on March 9, 2018). See also “President Donald J. Trump is Addressing Unfair Trade Practices that Threaten to harm our National Security. White House (Fact Sheet) (March 8, 2018). Available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/> (last accessed on March 9, 2018).

⁵ Article XXI Security Exception – “Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ... (iii) taken in time of war or other emergency in international relations” “Article XXI Security Exceptions (1994 General Agreements on Tariffs and Trade),” Available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (last accessed on Feb. 25, 2018).

⁶ “United States – Trade Measures Affecting Nicaragua.” L/6053 (October 13, 1986, not adopted). (Paragraphs 5.2 and 5.3.) Available at https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf (last accessed on Feb. 26, 2018). The panel report stated in part:

5.2 The Panel further noted that, in the view of Nicaragua, this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the United Nations and of the International Court of Justice and should therefore be regarded as merely providing contracting parties subjected to an aggression with a right to self-defense. The Panel also noted that, in the view of the United States, Article XXI applied to any action which the contracting party taking it considered necessary for the protection of its essential security interests and that the Panel, both by the terms of Article XXI and by its mandate, was precluded from examining the validity of the United States' invocation of Article XXI.

5.3 The Panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate.

⁷ “Boycotting Countries Invoke WTO’s ‘National Security Clause in Qatar Row.” Al-Arabia English (July 1, 2017) Available at <http://english.alarabiya.net/en/business/economy/2017/07/01/Boycotting-Gulf-Arab-countries-invoke-WTO-s-national-security-clause-in-Qatar-row.html> (last accessed on Feb. 26, 2017).

⁹ “Article XXI Security Exceptions (1994 General Agreements on Tariffs and Trade),” Available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (last accessed on Feb. 25, 2018).

¹⁰ “U.S. Plans Trade Measures Against China.” Wall Street Journal (August 1, 2017). Available at <https://www.wsj.com/articles/u-s-plans-trade-measures-against-china-1501635127> (last accessed on Feb. 28, 2018). “And Trump aides are also probing whether to use a 1974 trade law (Section 301 ‘Retaliation’) to impose broad trade and investment penalties on China over widespread allegations that Beijing forces U.S. companies to turn over valuable intellectual property as the price of market access.” “U.S. Weighs Tariffs, Quotas on Metals Imports.” Wall Street Journal (Feb. 18, 2018) Available at <https://www.wsj.com/articles/u-s-recommends-tariffs-and-quotas-on-steel-aluminum-imports-1518801588> (last accessed on Feb. 29, 2018).

¹¹ 50 U.S. Code Chapter 35 - INTERNATIONAL EMERGENCY ECONOMIC POWERS Available at <https://www.law.cornell.edu/uscode/text/50/chapter-35> (last accessed at Feb. 26, 2018).

¹² “USTR Announces Initiation of Section 301 Investigation of China.” USTR Press Release (August 18, 2017). Available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section> (last accessed March 8, 2018).

¹³ *United States v. Curtis Wright Corp.* (1936), 299 U.S. 304 (1936).

¹⁴ *Youngstown Sheet & Tube v. Sawyer* (1952), 343 U.S. 579 (1952).

¹⁵ *Dames & Moore v. Regan* (1981), 453 U.S. 654 (1991).

¹⁶ For example, *State of Washington and State of Minnesota v. Donald J. Trump*. 847 F. 3d 1151 (9th Circuit 2017).

¹⁷ For example, *Boumediene v. Bush*, 553 U.S. 73 (2008).

¹⁸ Paul Krugman, “Oh, What a Trumpy Trade War.” New York Times (March 9, 2018). Available at <https://www.nytimes.com/2018/03/08/opinion/trump-trade-tariffs-steel.html> (last accessed on March 9, 2018).

¹⁹ Monica Davey and Patricia Cohen, “Pro-Trump Farmers Fear His Tariffs.” New York Times (March 10, 2018), Available at <https://www.nytimes.com/2018/03/10/business/economy/tariffs-farmers.html> (last accessed on March 10, 2018).

²⁰ Ernesto Londono and Motoko, “Allies Sign Sweeping Pacific Trade Accord in a Challenge to Trump.” New York Times (March 9, 2018). Available at <https://www.nytimes.com/2018/03/08/world/asia/us-trump-tpp-signed.html> (last accessed on March 9, 2018).

²¹ H.R.4311 – “Foreign Investment Risk Review Modernization Act of 2017.” (115th Congress) (2017-2018) Available at <https://www.congress.gov/bill/115th-congress/house-bill/4311> (last accessed on Feb. 28, 2018); S.2098 – “Foreign Investment Risk Review Modernization Act of 2017.” (115th Congress) (2017-2018) Available at <https://www.congress.gov/bill/115th-congress/senate-bill/2098> (last accessed on Feb. 28, 2018).

²² The administration has ordered a delay for further investigation in the takeover of Qualcomm Inc.) (the leading American chip maker) by the Singapore’s Broadcom Ltd. in order to assess the national security impact on the U.S. chip industry. “U.S. Stalls Takeover Bid by Broadcom over Security.” New York Times (March 6, 2018). Available at <https://www.nytimes.com/2018/03/05/business/dealbook/broadcom-qualcomm-cfius.html> (last accessed March 6, 2018).

²³ Editorial, “How a Trade War Escalates.” *Wall Street Journal* (March 8, 2018). Available at <https://www.wsj.com/articles/how-a-trade-war-escalates-1520467475> (last accessed on March 8, 2018).

²⁴ “Shawn Donnan, “Trump’s Protection Plan to Keep ‘Competitor’ China at Bay.” *Financial Times* (Feb. 27, 2018). Available at <https://www.ft.com/content/a3870776-1724-11e8-9e9c-25c814761640> (last accessed on Feb. 28, 2018).

²⁵ “Shawn Donnan, “Trump’s Protection Plan to Keep ‘Competitor’ China at Bay.” *Financial Times* (Feb. 27, 2018). Available at <https://www.ft.com/content/a3870776-1724-11e8-9e9c-25c814761640> (last accessed on Feb. 28, 2018). “[T]he fight between the two financial superpowers is increasingly on a single issue: technology.” Cecilia King and Alan Rapport, “U.S. and China Battle for Edge in Technology.” *New York Times* (March 7, 2018). Available at <https://www.nytimes.com/2018/03/06/business/us-china-trade-technology-deals.html> (last accessed on March 7, 2018).

²⁶ DS 519 -- “China -- Subsidies to Primary Producers of Aluminum.” Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS519_e.htm (last accessed on March 8, 2018).

²⁷ The Trump administration argues generally and loudly that US tariffs are much lower than those of other countries. But a review of the weighted-average applied tariffs, as opposed to bound or ceiling level of tariffs, discloses that the U.S weighted-average tariff of 2.4% is comparable to Japan’s 2.1% and the EU’s 3% and not that much lower than China’s 4.4%. Martin Wolfe, “Trump Follies Presage More Protectionism.” *Financial Times* (March 7, 2018). Available at <https://www.ft.com/content/995063be-1e0a-11e8-956a-43db76e69936> (last accessed on Feb. 7, 2018).

²⁸ “Trump Tilts Hard-Line Ahead of Trade Decisions.” *New York Times* (Feb. 27, 2018). Available at https://www.washingtonpost.com/business/economy/trump-tilts-toward-hard-liners-ahead-of-key-trade-decisions/2018/02/26/ffe93e46-1b32-11e8-b2d9-08e748f892c0_story.html?utm_term=.e760bd77d26a (last accessed on Feb. 28, 2018).

²⁹ Editorial, “Trump’s Hoover Temptation.” *Wall Street Journal* (March 9, 2018). Available at <https://www.wsj.com/articles/trumps-hoover-temptation-1520551832> (last accessed on March 10, 2018).

³⁰ *The President’s 2018 Trade Policy Agenda and 2017 Annual Report* (USTR) (Feb. 2018). Available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017> (last accessed on March 1, 2018).

³¹ *Supra*. pages 1, 3, 14 and 19.