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Trump, Trade and National Security

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By Stuart Malawer



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The Trump administration's reliance on a national security provision (§232 of the Trade Expansion Act of 1962) in imposing restrictions on the import of steel and aluminum will lead to serious challenges by countries in the World Trade Organization (WTO).

The recent declaration by the administration authorizing tariffs on a broad range of Chinese imports, as retaliation under §301 of the Trade Act of 1974 for its technology policies, raises issues distinct from reliance upon §232. While focusing on technology policies is groundbreaking, the United States has often relied upon retaliation under §301.

The administration's reliance on the rarely used §232 of the Trade Expansion Act of 1962 is truly historical and damaging for its reliance on national security. It has never been litigated in the WTO.

This provision has been used only three times against foreign oil imports by prior American presidents and never since the establishment of the World Trade Organization in 1995.

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

Why?

If this U.S. approach succeeds, 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 its 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. Indeed, this defense has now been raised in the litigation between the Ukraine and the Russian Federation over restrictions on traffic in transit through Russia to third-party countries. As third parties the EU considers Article XXI as justiciable and the United States views it as non-justiciable.

If the United States loses its 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 United States 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 in time of war or other emergency in international relations. However, a global glut of steel and aluminum exists, and the United States 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 contemplation of declaring a national emergency under the International Emergency Economic Powers Act of 1977 (IEEPA) based on China's policies requiring the transfer of intellectual property rights. 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 and at the most an issue of market access restriction.

The IEEPA provides the president with broad powers when there is an unusual and extraordinary threat and the president declares a national emergency. No previous 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), *Youngstown Sheet & Tube v. Sawyer* (1952), and *Dames & Moore v. Regan* (1981), has made 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.

Modern trade legislation concerning the delegation of such authority dates back to the Roosevelt administration and its rejection of high tariffs and protectionist policies. The president can act only pursuant to a Congressional delegation of authority with regard to tariffs, and the subsequent actions are subject to judicial review. But such delegation has been historically broad. Some in Congress including Republicans have begun to regret this broad delegation and are suggesting reclaiming its authority. In any case, the president's determination of national security under §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 including 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.

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, belligerent, and dangerous embrace of protectionism will do great harm to U.S. foreign policy and national security and resurrect nasty and corrosive domestic fights over tariffs and trade relations. U.S. farmers are already petrified that retaliation will hurt them.

The signing of the revised Trans-Pacific Partnership by our closest trading partners, 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.

Congress is considering upgrading and drastically expanding the legislation concerning national security reviews by the Committee on Foreign Investment in the United States (CFIUS). Proposed legislation would expand the CFIUS's coverage to include 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.

The Trump administration recently blocked the Singapore firm Broadcom's takeover of the U.S. firm Qualcomm. The administration's real aim is most certainly to stop the Chinese firm Huawei's entrance into the 5G market. This type of action restricting a foreign company from buying U.S. assets has happened only

four times in the last thirty years. The next time the administration uses CFIUS this way to block foreign transactions, legal action might be filed in federal court contesting digital protectionism that relies upon dubious claims of national security.

The flipside of trade deficits is the flow of foreign direct investment into the United States. This is basic economics. Foreign investment is to be encouraged for economic development and job creation. The aggressive application of CFIUS legislation greatly hinders this investment and is an unnecessary disincentive.

The better action for the Trump administration would have been to question the proposed Broadcom merger on antitrust grounds through the U.S. Department of Justice or the Federal Trade Commission. Many U.S. firms oppose the dramatic expansion and aggressive application of CFIUS. However, defense and intelligence interests support this increased oversight.

Reliance on Alexander Hamilton's love affair with protectionist tariffs might have been justifiable in the early 1800s when the United States was a new country with a colonial and a plantation economy. Such reliance has no place in a world where the United States is now the greatest superpower with the largest advanced economy in the world. Failure to recognize global supply chains that interconnect the global economy will doom the Trump administration in promoting effective global engagement.

On a diplomatic and litigation note, the Trump administration should reconsider using the WTO dispute resolution system to address China's predatory pricing and intellectual property practices. There is no valid reason for the Trump administration not to follow-up and request a panel to hear the aluminum subsidies case filed by the Obama administration during its last few days in office. (The Trump administration has only recently filed its first case in the WTO, a case against India over export subsidies.)

Tariffs and protectionism are the wrong tools to encourage competition and job creation. In reauthorizing trade promotion authority Congress ought to include requirements to encourage multilateral cooperation. International and domestic policies that address the totality of U.S.-China relations are desperately needed as we move forward.

With the ascendancy of Peter Navarro and Robert Lighthizer the White House has clearly decided on more aggressive trade actions and reliance upon trade advisers who formerly represented steel clients. The chaos in the State Department and failure by the administration to include it in policy formulation has removed a traditional source of pushback advocating for broader strategic national interests.

The last major trade war was launched by two Republican lawmakers, Smoot and Hawley, in the 1930s, spurring the Great Depression and World War II. It also ended the reign of Republican presidents with the election of President Roosevelt and his new era of reciprocal trade agreements.

Let the fireworks begin.

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